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NOTE

From:	Presidency
To:	Visa Working Party/Mixed Committee (EU-Iceland/Norway and Switzerland/Liechtenstein)
Subject:	Digitalisation of the visa procedure: follow-up on outstanding issues

During the previous meeting of the Visa Working Party, the Swedish Presidency initiated a discussion focusing on three outstanding issues regarding the digitalisation proposal. Based on the discussion and the written comments received, the Presidency suggests the approach in points 1, 2 and 3 below regarding these issues.

In this paper the Presidency has included an additional point 4 to address the issue of the implementation of the digital visa by BG, CY and RO.

These four points have been integrated in the compromise text (6011/23, *to be issued*) that will be discussed during the meeting on 22 February.

1. Continued use of paper visa stickers

The Presidency suggests that the possibility to use a paper visa sticker should be removed altogether, in line with the COM proposal.

The rationale behind this choice is that the current Visa Code and the VIS Regulation only allow for issuing a handwritten paper sticker in the case of *technical force majeure*. This relates to the actual *printing* of the sticker, not the visa issuing process prior to that step, where a functional VIS is required.

Once the digital visa has been introduced and implemented, printing of a paper visa sticker will no longer be an issue and a safeguard for the current handwritten sticker will no longer be necessary. Regarding the need for a safeguard procedure in urgent cases at the consular posts in case of the unavailability of the VIS, these situations could be handled by ad hoc representation as provided for in the Visa Code or by the central authorities issuing a visa.

Urgent cases at the border may be handled by the central authorities in case the national VIS and central VIS are still available. If this is not the case, Article 6(5)(c) of the Schengen Border Code can be applied¹.

2. Article 5 of the Visa Code; Member State competent for examining and deciding on an application

Taking into account the comments from the Member States, the Presidency suggests a modified version of alternative 2. This would entail that the applicant enters requested data in the application in the EU-VAP. If more than one destination is entered, with different purposes of stay, the EU-VAP selects the competent Member State based on the number of days. According to the compromise text of the Presidency, the applicant will have the possibility to override the selection automatically made by the EU-VAP by ticking a box corresponding to the other Member State stated as destination, establishing it as competent based on the purpose of stay. The application will then be accessible for the Member State selected by the applicant. That Member State will be able to assess and determine the competence on the basis of Article 5, as is the case in the current regulation.

¹ Article 6(5)(c) of the SBC: “(c) third-country nationals who do not fulfil one or more of the conditions laid down in paragraph 1 may be authorised by a Member State to enter its territory on humanitarian grounds, on grounds of national interest or because of international obligations. Where the third-country national concerned is the subject of an alert as referred to in paragraph 1(d), the Member State authorising him or her to enter its territory shall inform the other Member States accordingly.”.

Articles 5(1)(b) of the Visa Code and 7c of the VIS regulation are modified accordingly, as follows:

In Article 1 - Amendments to Regulation (EC) No 810/2009

(4) in Article 5(1), point (b) is replaced by the following:

- “(b) if the visit includes more than one destination, or if several separate visits are to be carried out within a period of two months, the Member State whose territory constitutes the main destination of the visit(s) in terms of the length of stay, counted in days, **or purpose of stay;** or”

In Article 2 - Amendments to Regulation (EC) No 767/2008

(3) the following Chapter Ia is inserted:

[...]

Article 7c
Application process using the EU application platform

1. Upon submission of the application form pursuant to Article 7b, the EU application platform shall determine the type of visa applied for, and conduct an automated competence pre-check to ~~automatically~~ pre-determine the competent Member State ~~on the basis of the data provided by the applicant~~ **on the basis of the number of days and Member State of first entry provided by the applicant. The applicant may override this pre-check taking into account the purpose of stay.** This shall not preclude the manual verification of the competence by the Member States in accordance with Article 18(3) of Regulation (EC) No 810/2009.

[...]

The approach described above reflects how Article 5 is currently applied by Member States. Should Member States not accept this approach, the Presidency will proceed by keeping option 1 in line with the COM proposal (i.e. only taking into account the number of days).

3. Article 3(5)(b) and (c) and Annex V of the Visa Code

The Presidency proposes to delete the reference to visas in Article 3(5)(c), but to keep residence permits issued by the UK in letter (b) of the same Article. This would include both temporary and permanent residence permits as requested by several delegations.

Family members of EU nationals and family members of UK nationals who themselves are beneficiaries of the EU-UK Withdrawal Agreement are already included in Article 3(5)(d), hence no changes have been made in this regard.

The issue is complex, and the Presidency understands concerns raised by some delegations especially regarding the condition of “unconditional return” set out in Article 3(5) and whether residence permits issued by UK meet this requirement. The wide range of residence permits, issued under different conditions, does not allow for an unequivocal assessment of the compliance with these conditions. It should however be noted that the fulfillment of the requirement of “unconditional return” is equally unclear for other residence permits that are already included in Annex V list, e.g. Canada and Japan.

Another issue that has been raised is that of reciprocity with the UK. While the suggested change would not be reciprocal, the Presidency considers that aim of making border management and operators activities more efficient justifies its inclusion. Moreover, the insertion could contribute to strengthening the attraction of the Schengen area.

According to the statistics provided by the Local Schengen Cooperation (LSC) in London, a total of 2123 applications for ATV were registered by Member States consulates during Q3 2022. Out of all applications processed, approximately 1% were refused. The Presidency therefore estimates the risk of introducing the suggested change as low. Member States are however invited to share their experiences on whether residence permits issued by UK has had negative consequences such as a rise in unfounded asylum applications.

If delegations cannot support the suggested approach, the Presidency, will proceed by removing the reference to the UK in its entirety from Article 3(5), in line with the COM proposal.

4. Implementation of the digital visa by BG, CY and RO in the context of the digitalisation proposal

In order to keep the format of the visa uniform and, at the same time, allow the three Member States not applying the Schengen acquis in full to take full advantage of the digitalisation process, the Presidency proposes that the digital visa is not defined as a record in VIS, as it currently stands in the digitalisation proposal, but is instead dematerialised into a digital format to be defined in the Regulation on uniform format for visas as a 2D barcode. The paper visa sticker will be abolished and visas will be issued in common digital format by all Member States.

Certain acts of the Schengen acquis were made applicable to BG, CY and RO upon their EU accession. This is notably the case for the Regulation on uniform format for visas (Regulation (EC) 1683/95), including all the developments via implementing acts stemming from the same Regulation, notably the introduction of a secure 2D barcode by Commission implementing decision C(2020)2672.

The digitalisation proposal envisaged the abolishment of the visa sticker and defined the digital visa as a record in VIS, with the 2D barcode, printable on paper, as a fall-back. Since BG, CY and RO do not operate VIS², according to the current digitalisation proposal they would need to continue to using the paper visa sticker.

BG in particular, followed by RO and CY, has expressed a wish to develop a digital visa and not to be obliged to continue to use visa stickers. Such wish is consistent with the legal requirement that the uniform format (previously in the form of a sticker, now as digital visa) should apply to all the Member States, as requested by Regulation (EC) 1683/95 which is applicable also to the Member States not applying the Schengen acquis in full.

² Council Decision (EU) 2017/1908 of 12 October 2017 granted read-only access to VIS for BG and RO (but not CY).

A possible solution to overcome the fact that these three Member States do not have full access to the VIS, would be to adapt the definition of the digital visa: it would no longer be a record in VIS, but would instead be a dematerialised visa, in the form of a digital format, to be defined in the Regulation on uniform format for visas as a 2D barcode. Consequently, all Member States will continue using the same format which will now be digital instead of a physical sticker.

In the compromise text, this proposal of the Presidency implies that all modifications (including the implementing acts) on the digital format and the 2D barcode should be removed from the VIS Regulation and included into the amendments to the Regulation on the uniform format for visas. Given that, on the basis of Article 6 of the Protocol N°22 on the position of Denmark, the latter takes part in the adoption of measures relating to a uniform format for visas, the solution above takes the form of a second amending regulation, containing amendments to the Regulation on uniform format for visas. Because the Regulation on the uniform format applies to all Member States, it cannot contain cross-references to the digitalisation regulation, the Visa Code or the VIS Regulation. Hence, self-standing provisions on the data fields contained in the digital visa need to be included (Annex 1 of the Regulation on the uniform format), as well as self-standing provisions on entry into force and deferred application of the digital visa.