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NOTE

From:	Presidency
To:	Permanent Representatives Committee/Council/Mixed Committee (EU-Iceland/Norway and Switzerland/Liechtenstein)
Subject:	Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 810/2009 establishing a Community Code on Visas (Visa Code)

Introduction

1. On 14 March 2018 the Commission submitted a legislative proposal amending Regulation (EC) No 810/2009 establishing a Community Code on Visa (Visa Code) (7173/18).
2. The Bulgarian Presidency started the examination of the text in the Council preparatory bodies soon thereafter. Five meetings of the Visa Working Party were devoted almost entirely to discussing the proposal, as well as a number of compromise proposals put forward by the Presidency¹, reflecting the oral and written comments made by delegations.
3. Policy debates were held at political level, both in Coreper (28 March 2018) and in SCIFA (16 May 2018) to give guidance to the aforementioned Working Party on certain politically sensitive issues.

¹ 7981/18, 8475/18 and 8800/18.

4. Considerable progress has been made under the current Presidency on many technical aspects of the proposal, such as the level of visa fees, some aspects of the representation arrangements, the procedures and conditions for issuing visas, the determination of the Member States competent for examining and deciding on an application, the issuing of multiple-entry visas and the cooperation with external service providers.
5. One of the core elements of the Commission proposal, i.e. the link between visa policy and readmission, remains outstanding at this stage and further political guidance should be provided in order to find a solution on which agreement can be reached.
6. The Commission proposes the creation of a new mechanism to trigger stricter conditions for processing visas when a third country does not cooperate sufficiently on the readmission of irregular migrants. The proposal of codifying such a link in the Visa Code reflects a debate on this issue dating back to 2015 (in the context of the Visa Code recast) and was specifically mentioned by the JHA Council in its conclusions of 8 June 2017.
7. Currently, the possibility of adopting specific measures in the framework of visa policy, in full compliance with the provisions of the Visa Code, in case of non-cooperation in the field of return, exists on the basis of the so-called 'toolbox' endorsed in May 2017 by the Representatives of the Governments of the Member States and the Representatives of the Governments of the Associated States (9880/17 RESTREINT UE/EU RESTRICTED). The first test case for launching this process, Bangladesh (where eventually the application of visa measures was considered unnecessary), proved that the mechanism had a positive preventive effect.
8. In Coreper, on 28 March 2018, delegations broadly supported the principle of codifying the link in a legal instrument (i.e. the Visa Code) as a way to ensure legal certainty and transparency. At the same time, many delegations expressed some concerns regarding two issues in the Commission's proposal: 1) the indicators to be used to assess the level of cooperation on readmission with third countries were not sufficiently elaborated, and 2) the decision-making process did not appropriately reflect the political nature of the decision to activate visa policy as leverage.

9. During the examination of the proposal at technical level, the French and German delegations presented a contribution (8526/1/18 REV 1) which suggested an alternative approach (i.e. adding positive incentives), in terms both of how to use the visa leverage to get better results in the area of return of irregular migrants and of the functioning of the new mechanism to be inserted in the Visa Code.
10. While the principle of the codification is not disputed, four elements need to be further discussed with a view to reaching an acceptable compromise on this core provision of the proposal: (1) the approach to be followed (namely whether only negative incentives or a mix of positive and negative incentives should be envisaged), (2) the indicators to assess the degree of cooperation of a third country, (3) the triggering mechanism and (4) the decision-making process.

The approach

11. While the Commission's proposal consists of a 'negative' leverage, whereby stricter conditions for processing visas would apply to nationals from third countries which do not cooperate satisfactorily on readmission, France and Germany prefer a mix of a positive and negative approach, whereby further visa incentives would be granted to third-country nationals from cooperative countries, while nationals from non-cooperative countries would not be able to benefit from some of the facilitations included in the Visa Code and would be targeted by stricter conditions in visa processing. The main principle underpinning the Franco-German proposal is that visa policy should be used also as a positive tool to push third countries to cooperate better in the area of return and not just as a punitive one to penalise them in case of lack of cooperation.

12. During the discussion held in the Visa Working Party (8 May 2018) and in SCIFA (16 May 2018), some delegations acknowledged that a mixed approach had some added value and that, provided the right balance could be found between positive and negative incentives, it could indeed enrich the toolbox offered by visa policy. However, a number of delegations mentioned a series of misgivings, emphasising that the facilitations included in the Visa Code already provide for positive incentives and noting the risk of undermining the added value of Visa Facilitation Agreements (which are often signed 'in exchange' for readmission agreements), the discriminating effect towards third countries with which return problems are irrelevant or which have always offered a good level of cooperation and which would not get any facilitation, as no improvement in the degree of cooperation could be registered, the difficulty of withdrawing 'rewards' once granted, the complexity of the operational management of different lists and the risk of an increased administrative burden for Member States and their consulates, as well as the impact on the Member States' finances should the reduction of visa fees be granted to a large number of third countries.

In light of the above, Coreper/Council are invited to indicate which approach would be preferable:

- *the approach of negative incentives, proposed by the Commission or*
- *the mix of positive and negative incentives, as proposed by France and Germany.*

The indicators (Article 25a(2))

13. The Commission's proposal includes three indicators on the basis of which the assessment of the degree of cooperation by a third country should be assessed:
- a) the number of return decisions;
 - b) the number of actual returns as a percentage of the number of return decisions issued to citizens of the third country in question;
 - c) the number of readmission requests accepted by the third country as a percentage of the number of such applications submitted to it.

The Commission considered that the indicators should be as objective as possible and should concern areas for which sufficient data are available.

14. At its meeting on 26 April 2018, the Integration, Migration and Expulsion (Expulsion) Working Party (to which visa experts were invited) examined the issue. Several delegations considered that additional indicators should be included, notably regarding the practical cooperation offered by third countries in return and readmission. On this basis, the Presidency presented a possible compromise to the Visa Working Party of 7 and 8 May 2018 (WK 5343/2018). This compromise adds a fourth indicator, for which a number of elements are indicated (non-exhaustively):
- d) the level of practical cooperation in the area of return cooperation in the different stages of the return procedure, such as:
 - i. assistance provided in the identification of persons illegally staying on the territory of the Member States and in the timely issuance of travel documents;
 - ii. acceptance of the EU travel document;
 - iii. acceptance of charter flights;
 - iv. acceptance of joint return operations.
15. It should be noted that these indicators concern forced returns, as the existing available data at EU level only cover this category. It is difficult to determine what kind of cooperation a third country is expected to provide in case of voluntary return.
16. Also taking into account that the Presidency compromise suggestion is largely inspired by the list of indicators already included in the so-called 'Coreper toolbox', it received a good degree of support at the abovementioned meeting of the Visa Working Party.

In light of the above, Coreper/Council are invited to confirm whether the Presidency compromise suggestion (WK 5343/2018) is acceptable.

The triggering mechanism (Article 25a (2)(3)(4))

17. The triggering of the mechanism leading to the use of visa leverage is an important element of the proposal. In the view of the Presidency, it should, at the same time, (1) allow for a rapid reaction in case of a sudden worsening (or improvement, depending on the answer given to the first question of this note) of the level of cooperation, (2) be operational, meaning that it should allow for the actual use of the mechanism, avoiding any unwanted blockage, and, at the same time, (3) reflect the political nature of the (sensitive) decision to be taken, avoiding any automaticity.
18. In the Commission's proposal, a possible decision - by the Commission - on the lack of cooperation from a given third country and the adoption of visa measures (paragraph 5) can be triggered by two factors: the Commission's (regular) assessment of that country's level of cooperation (paragraph 2) or a notification from a Member State (paragraph 3), which the Commission is obliged to examine within a period of one month (paragraph 4). It is understood that, within this architecture, the Commission remains free to propose or not an implementing act in the framework of the comitology procedure, depending on its own assessment of the notification from the Member State(s) and its regular assessment of third countries' cooperation on readmission on the basis of the relevant indicators.
19. The French and German contribution suggests a more elaborate triggering mechanism - largely inspired by the so-called 'suspension mechanism'² - where the role of Member States is enhanced so that it is Member States giving political guidance to the Commission on the appropriateness of adopting visa measures and on their design. In this structure, in addition to the two triggering options (the Commission's own assessment or notification by a Member State) a third is suggested: if a simple majority of Member States notifies a persisting problem (or a substantial improvement) to the Commission over a period of one year, then the Commission would be obliged to adopt an implementing act within three months, taking into account the discussion held at high level in the Council.

² Regulation (EU) N) 2017/371 of 1 March 2017 amending Council Regulation (EC) No 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (revision of the suspension mechanism), OJ L 061, 08 March 2017, p. 1.

20. The threshold of a simple majority of Member States to trigger the mechanism - the same as in the suspension mechanism under Regulation (EC) 539/2001 - represents a sufficient 'critical mass' to oblige the Commission to start the process, taking into account that the classical voting rule will then be applied to adopt any measure that may be decided upon at the following stage.

Taking into account the two options above, Coreper/Council are invited to indicate whether they are in favour of adding to the triggering mechanism proposed by the Commission the French and German proposal, whereby a simple majority of Member States can oblige the Commission to adopt the implementing act.

The decision-making process (Article 25a(5))

21. Both the Commission proposal and the Franco-German paper establish that any measure to target nationals (or categories of nationals) of a third country will be adopted via an implementing act of the Commission (but with an enhanced role for Member States in the Franco-German paper when a simple majority of Member States notify, via a preliminary discussion at Council level, which the Commission should take into account when tabling the implementing act). In this context, it is to be noted that the Presidency revised text submitted to the Visa Working Party (8800/18) added a no-opinion clause to Article 52(2) of the Visa Code, so that in the absence of a qualified majority in the Visa Committee, the Commission would not be in a position to adopt the implementing act.
22. However, both in the Franco-German paper and in the discussion in the Visa Working Party on 18 May 2018, the option of an implementing act by the Council, as envisaged by Article 291(2) TFEU, was echoed and further explained in a Presidency paper (9139/18).

In light of the above and having in mind the sensitivity of this issue in the upcoming interinstitutional negotiations on this file, as well as solutions provided in similar mechanisms included in other legal instruments, Coreper/Council are invited to confirm whether they prefer:

- *the option of an implementing act by the Council or*
- *the option of an implementing act by the Commission.*

Conclusion

23. Coreper/Council are invited to reply to the questions above and give political guidance for further work, with a view to adopting a negotiating mandate on the Visa Code proposal.
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