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2014/0094 (COD)

Proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on the Union Code on Visas (Visa Code)

(recast)
{SWD(2014) 67 final}
{SWD(2014) 68 final}

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

Grounds for and objectives of the proposal

This proposal recasts and amends Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code).

This proposal takes into account the increased political emphasis given to the economic impact of visa policy on the wider European Union economy, and in particular on tourism, to ensure greater consistency with the growth objectives of the Europe 2020 strategy, in line with the Commission's communication *Implementation and development of the common visa policy to spur growth in the European Union*.[1]

The proposal also builds on the conclusions drawn in the Report from the Commission to the European Parliament and the Council on the evaluation of the implementation of the Visa Code[2]. The report is accompanied by a Commission staff working paper[3] containing the detailed evaluation.

This proposal also contains two measures to facilitate family contacts: It introduces certain procedural facilitations for close relatives coming to visit Union citizens residing in the territory of the Member State of which the latter are nationals and for close relatives of Union citizens living in a third country and wishing to visit together with the Union citizen the Member State of which the latter is a national.

Furthermore, it clarifies that the same procedural facilitations should as a minimum be granted to family members of EU citizens who benefit from article 5(2), second subparagraph of Directive 2004/38/EC on the rights of Union citizens and their family members to move and reside freely within the territory of the Member States.

General context

Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visa (Visa Code) became applicable on 5 April 2010. The provisions regarding notification and the requirements on providing the grounds of refusal, revocation and annulment of visas and the right to appeal against such decisions, became applicable on 5 April 2011.

Article 57(1) of the Visa Code requires the Commission to send the European Parliament and the Council an evaluation of its application two years after all the provisions of the Visa Code have become applicable (i.e. 5 April 2013). The evaluation and accompanying staff working document have been submitted. Article 57(2) provides that the evaluation may be accompanied by a proposal for an amendment of the Regulation.

In the light of the evaluation report's conclusions, the Commission decided to submit this proposal for amendments to the legislation together with the report.

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1 COM(2012) 649 final.
2 COM (2014) 165.
3 SWD (2014) 101 .

The proposed amendments while maintaining security at the external borders and ensuring the good functioning of the Schengen area, make travel easier for legitimate travellers and simplify the legal framework in the interest of Member States, e.g. by allowing more flexible rules on consular cooperation. The common visa policy should contribute to generating growth and be coherent with other EU policies on external relations, trade, education, culture and tourism.

Existing provisions

Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code).

2. RESULTS OF CONSULTATIONS WITH THE INTERESTED PARTIES AND IMPACT ASSESSMENT

Consultation of interested parties

The consultation of interested parties is covered in the impact assessment[4] accompanying this proposal.

Impact assessment (IA)

Based on the evaluation report referred to in section 1, two principal problem areas were identified:

(1) The overall length and costs (direct and indirect) and the cumbersome nature of the procedures;

The complex nature of this problem area is explained in detail in the IA. As far as regulatory options are concerned, the issuing of multiple-entry visas (MEVs) with a long validity accompanied by certain procedural facilitations was considered the only win-win solution for both sides. It has the potential to lessen the administrative burden on consulates and, at the same time, it is considered a very important facilitation for certain groups of travellers. In practice it would be equivalent to a visa waiver for the period of validity of the MEV, resulting in significant savings and efficiency gains both for visa applicants (in terms of time and cost) and consulates (time). The policy options envisaged in response to this problem area are therefore fairly similar. Only the beneficiaries to be covered and the length of validity of the MEVs to be issued differ, as follows:

Minimum regulatory option: introduction of mandatory procedural facilitations and mandatory issuing of MEVs valid for at least one year and subsequently for three years for frequent travellers (defined as applicants who have previously lawfully used at least three visas (within the previous 12 months prior to the date of the application) that are registered in the Visa Information System (VIS).

Intermediate option: introduction of mandatory procedural facilitations and mandatory issuing of MEVs valid for at least three years and subsequently for five years for regular travellers (defined as applicants who have previously lawfully used at least two visas that are registered in the VIS).

[4] SWD (2014) 67 and SWD 68.

The maximum option identified would extend mandatory procedural facilitations and mandatory issuing of MEVs immediately for five years to the majority of applicants ('VIS registered applicants') by requiring only one lawfully used visa (within the previous twelve months prior to the date of the application) that is registered in the VIS.

The IA showed that these options would all further harmonise the current legal framework and would lead towards a genuinely common visa policy. The potential economic impacts on the Member States of these options occur because the travellers in possession of long(er) validity MEVs with are likely to make more trips to the Schengen area than they otherwise would. The IA estimates that some 500 000 additional trips to the Schengen area with the minimum policy option, some 2 million with the intermediate and some 3 million with the maximum policy option. The additional trips to the Schengen area obviously generate additional income: some. EUR 300 million (some 7 600 supported full time equivalent /FTE/ jobs) in case of the minimum option; more than EUR 1 billion (ca. 30 000 supported FTE job) with the intermediate option and some EUR 2 billion (50 000 supported FTE jobs) with the maximum option. The IA also showed that the very high potential economic impact of the maximum option is associated with a higher security risk.

None of these options would involve considerable additional costs. In fact, one of the driving forces behind the policy options is to produce savings for both the Member States/consulates and visa applicants. These options progressively lead to cost savings on the applicants' side, mainly resulting from the increasing number of long-validity MEVs issued. From the applicants' point of view, the maximum option is obviously the most efficient, and the minimum option is the least efficient. The declining number of visa applications under the MEV-system, is expected to reduce Member States' visa revenues. However, the issuing of MEVs also reduces costs, as fewer visa applications need to be processed: the economic benefits considerably exceed the estimated costs in all options.

While it was clear that the maximum option had a very high potential economic impact, it is associated with a potentially higher security risk, too. To mitigate this risk, the approach proposed is to issue longer-validity MEVs gradually to 'VIS registered regular travellers' (first for three years, then on the basis of lawful use of that visa, for five years). The impacts of this approach fall between the intermediate and the maximum option identified in the IA, probably closer to the impacts of the maximum option as far as the economic impacts are concerned.

(2) insufficient geographical coverage in visa processing.

The minimum policy option assessed for this problem area was to repeal Article 41 of the Visa Code (co-location, Common Application Centres (CAC*)*) and to introduce a general notion/concept of 'Schengen Visa Centre' which would provide a more realistic, more flexible definition with regard to certain forms of consular cooperation. The intermediate option in addition to the 'Schengen Visa Centres' was introducing the concept of 'mandatory representation' according to which, if the Member State competent to process the visa application is neither present nor represented (under such an arrangement) in a given third country any other Member State present in that country would be obliged to process visa applications on their behalf. Finally, as a maximum option, in order to ensure adequate visa collecting/processing coverage, Commission implementing decisions could lay down what the Schengen visa collecting network in third countries should look like in terms of representation arrangements, cooperation with external service providers and pooling of resources by other means.

The IA noted that the maximum policy option could have the most positive impacts in terms of rationalising the visa collecting/processing presence and could offer important advantages for visa applicants and significant efficiency gains for consulates. However its feasibility appears low. Based on the impact assessment, the intermediate option was preferred. The IA points out that 'mandatory representation' would secure consular coverage in any third country where there is at least one consulate present to process visa applications. This could have a positive impact on some 100 000 applicants who would be able to lodge the application in their country of residence instead of travelling to a country where the competent Member State is present or represented.

The economic impacts of all the policy options were considered fairly modest. In fact due to the very nature of the problem, the policy options were not aimed at generating economic growth in the first place, but providing a better service for visa applicants and providing a good legal framework for Member States to rationalise their resources. The financial impacts of 'mandatory representation' were considered not to be significant because, in principle, if a high number of visa applications is addressed to a Member State in a given third country that state will, in principle, already have ensured consular presence by being present or represented. Moreover the visa fee, in principle, covers the average cost of processing.

The non-regulatory policy options were considered to have very little positive impact on addressing the problems or achieving the policy objectives, so they were not considered very effective.

The evaluation report suggests, and this proposal deals with a number of other (mostly quite technical) issues. The IA did not cover those issues because the changes envisaged were not considered to have substantial and/or measurable budgetary, social, or economic implications; most of the proposed changes are intended to clarify or adjust/complement certain provisions of the Visa Code without altering their substance.

3. LEGAL ELEMENTS OF THE PROPOSAL

Summary

The proposed amendments concern the following issues:

The provisions on individual Member States' introduction of airport transit visa requirement for nationals of specific third countries have been revised to ensure transparency and proportionality (Article 3).

To distinguish clearly between different categories of visa applicants while taking into account the full roll out of the VIS, definitions of 'VIS registered applicants' and 'VIS registered regular travellers' have been added (Article 2). This distinction is reflected in all steps of the procedure (Articles 5, 10, 12, 13, 18 and 21). An overview of the various procedural facilitations is set out below:

	Lodging in person	Collection of fingerprints	Supporting documents	Visa to be issued
First time applicant – not VIS registered	YES	YES	Full list corresponding to all entry conditions	Single entry corresponding to travel purpose. However, a MEV may be issued, if the consulate

				considers the applicant reliable.
VIS registered applicant (but not a regular traveller)	NO	NO, unless the fingerprints have not been collected within the last 59 months	Full list corresponding to all entry conditions	Single entry or MEV
VIS registered regular traveller	NO	NO	Only proof of travel purpose Presumption (because of 'visa history' of fulfilment of entry conditions regarding migratory and security risk and sufficient means of subsistence.	First application: three year MEV Following applications: five-year MEV

The provisions regarding "competent Member State" (Article 5) have been simplified to make it easier for applicants to know where to lodge the application and to ensure that they can, in principle, always lodge the application in their country of residence. This implies that in case the competent Member State is neither present nor represented in a given location, the applicant is entitled to apply at one of the consulates present according to criteria set out in the article.

The provisions provide certain procedural facilitations for close relatives of Union citizens so as to contribute to improving their mobility, in particular by facilitating family visits (Articles 8, 13, 14 and 20).

First, the provisions provide for facilitations for family members intending to visit Union citizens residing in the territory of the Member State of which they are nationals and for family members of Union citizens living in a third country and wishing to visit together the Member State of which the EU citizens are nationals. Both categories of situations are outside the scope of Directive 2004/38/EC. The Visa Facilitation Agreements concluded and implemented by the EU with a number of third countries demonstrate the importance of facilitating such visits: the amended Visa Facilitation Agreements with Ukraine and Moldova, as well as the recent Visa Facilitation Agreements with Armenia and Azerbaijan, provide facilitations (e.g. visa fee waiver and the issuing of multiple entry visas (MEVs) with a long validity) for the citizens of the third country concerned visiting close relatives who have the nationality of the Member State of residence. This practice of the Union should be made general in the Visa Code.

Secondly, according to the provisions the same facilitations are granted as a minimum in situations covered by Directive 2004/38/EC. As provided in Article 5(2) of the Directive, Member States may, where the EU citizen exercises the right to move and reside freely in their territory, require the family member who is a non-EU national to have an entry visa. As confirmed by the Court of Justice[5], such family members have not only the right to enter the territory of the Member State but also the right to obtain an entry visa for that purpose. According to Article 5(2), second subparagraph of the Directive, Member States must grant

[5] See, inter alia, judgment of the Court of 31 January 2006 in case C-503/03 Commission v Spain

such persons *every facility*[6] to obtain the necessary visas, which must be issued free of charge as soon as possible and on the basis of an accelerated procedure.

It should be noted that Article 5(2) cited above essentially contains the same provision as Article 3(2) of Directive 68/360/EEC[7] which was repealed by Directive 2004/38/EC. Article 3(2) of Directive 68/360/EEC was adopted at a time when the then Community had no competence to legislate on visas. Since the entry into force of the Amsterdam Treaty on 1 May 1999, the Community has had a competence to legislate on visas. This competence, currently enshrined in Article 77 of the TFEU, was used for the adoption of the Visa Code. It is desirable to render more precise the facilitations which Directive 2004/38/EC refers to, and the appropriate place to do so is the Visa Code, where detailed rules on conditions and procedures for the issuing of visas are established. While respecting the freedom of Member States to grant further facilitations, the facilitations proposed for certain close relatives of Union citizens who have not made use of their right to move and reside freely within the Union should apply, as a minimum, in situations which fall within the scope of Directive 2004/38/EC. Those facilitations are then a common implementation in the Visa Code and for the Member States bound by it, of the obligation contained in Article 5(2), second subparagraph of Directive 2004/38/EC.

The provisions on visa fee waivers have become mandatory rather than optional to ensure equal treatment of applicants (Article 14). Certain categories eligible to visa fee waivers have been enlarged, e.g. minors up to 18 years, or added (close relatives of Union citizens not exercising their right to free movement).

General procedural facilitations:

– The principle of all applicants having to lodge the application in person has been abolished (cf. Commission staff working paper, point 2.1.1.1 (paragraph (7)).Generally, applicants will only be required to appear in person at the consulate or the external service provider for the collection of fingerprints to be stored in the Visa Information System (Article 9).

– The maximum deadline for lodging an application has been increased to allow travellers to plan ahead and avoid peak seasons; likewise a minimum deadline for lodging an application has been set to allow Member States time to proper assessment of applications and organisation of work (Article 8).

– The general visa application form (Annex I) has been simplified and a reference has been made to the use of electronic filling in of the application form (Article 10).

– The list of supporting documents in Annex II is no longer a "non-exhaustive list" and a distinction has been made between unknown applicants and VIS registered regular travellers as regards the supporting documents to be submitted (Article 13). The

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6 The notion of facilitation has been interpreted by the Court of Justice in relation to the entry and residence of family members falling under Article 3(2) of the Directive as imposing an obligation on the Member States *to confer a certain advantage*, compared with applications for entry and residence of other nationals of third States, on applications submitted by persons who have a relationship of particular dependence with a Union citizen"; judgment of 5 September 2012 in case C-83/11, Rahman.

7 Council Directive of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families (68/360/EEC), OJ L 257, 19.10.1968, p. 13.

provisions regarding the preparatory work on drawing up lists adapted to local circumstances in local Schengen cooperation have been reinforced in Article 13.

– The unknown visa applicant (i.e. someone who has not applied for a visa before) should prove that he fulfils the visa issuing conditions.

– In this context, attention is drawn to the recent 'Koushkaki judgement'[8] according to which Articles 23(4), 32(1) and 35(6) (Articles 20(4), 29(1) and 32(5) of the recast Visa Code) "must be interpreted as meaning that the competent authorities of a Member State cannot refuse, following the examination of an application for a uniform visa, to issue such a visa to an applicant unless one of the grounds for refusal of a visa listed in those provisions can be applied to that applicant. Those authorities have a wide discretion in the examination of that application so far as concerns the conditions for the application of those provisions and the assessment of the relevant facts, with a view to ascertaining whether one of those grounds for refusal can be applied to the applicant."

– The European Court of Justice also ruled that the provisions of Article 32(1) (now Article 29(1)) of the Visa Code, read in conjunction with Article 21(1) (now Article 18(1)), "must be interpreted as meaning that the obligation on the competent authorities of a Member State to issue a uniform visa is subject to the condition that there is no reasonable doubt that the applicant intends to leave the territory of the Member States before the expiry of the visa applied for, in the light of the general situation in the applicant's country of residence and his individual characteristics, determined in the light of information provided by the applicant."

– It should be presumed that 'VIS registered regular travellers' fulfil the entry conditions regarding the risk of irregular immigration and need to possess sufficient means of subsistence. However, this presumption should be reversible in individual cases.

– The proposal establishes that the authorities of the Member States can rebut the presumption of fulfilment of entry conditions in an individual case and it establishes on which basis this can occur (Article 18(9)).

– General reduction of the deadlines for taking a decision on a visa application (Article 20) in the light of the shortening of the response time in the prior consultation procedure (Article 19). Short deadlines are introduced for the examination of applications from family members of Union citizens exercising their right to free movement and from close relatives of Union citizens not exercising their right to free movement.

– A MEV may be issued with a validity going beyond the validity of the travel document (Article 11(a)).

– The provisions on travel medical insurance (TMI) should be deleted because the actual added value of the TMI measure has never been established (cf. Commission staff working paper, point 2.1.1.2 (14)).

[8] Judgment of 19 December 2013 in case C-84/12 Koushkaki not yet published in the E.C.R.

– The standard form for notifying and motivating refusal, annulment or revocation of a visa has been be revised to include a specific ground for refusal of an airport transit visa and to ensure that the person concerned is properly informed about appeal procedures.

– Provisions derogating from the general provisions on the exceptional issuing of visas at the external border have been introduced: Member States will in view of promoting short term tourism be allowed to issue visas at the external borders under a temporary scheme and upon notification and publication of the organisational modalities of the scheme (Article 33).

– Flexible rules allowing Member States to optimise use of resources, increase consular coverage and develop cooperation among Member States have been added (Article 38).

– Member States' use of external service provider is no longer to be the last resort solution.

– Member States are not obliged to maintain the possibility of "direct access" for lodging applications at the consulate in places where an external service provider has been mandated to collect visa applications (deletion of previous Article 17(5)). However, family members of Union citizens exercising their right to free movement and close relatives of Union citizens not exercising their right to free movement as well as applicants who can justify a case of emergency should be given an immediate appointment.

– Member States should annually report to the Commission on the cooperation with external service providers, including the monitoring of the service providers.

– Streamlining of the provisions regarding representation arrangements (Article 39) (cf. Commission staff working paper, points 2.1.1.5 (paragraph (20)) and 2.1.4 (paragraph 41)).

– As explained in the evaluation report (point 3.2) the lack of sufficiently detailed statistical data hinders the assessment of the implementation of certain provisions. Therefore, Annex VII is amended to provide for the collection of all relevant data in a sufficiently disaggregated form allow for proper assessment. All data concerned can be retrieved (by Member States) from the VIS, except for information on the number of visas issued free of charge, but given that that is linked to the general treasury of the Member State, such data should be easily accessible.

– Strengthening of the legal framework regarding information to the public (Article 45):

  - A common Schengen visa internet website is to be created by the Commission

  - A template for the information to be given to visa applicants is to be developed by the Commission

Technical amendments:

– Deletion of the reference to the specific travel purpose "transit" (Article 1(1) mainly) given that short stay visas are not purpose bound. The reference has only been maintained where it referred to as a specific travel purpose, e.g. in Annex II to the Visa Code, listing the supporting documents to be submitted according to purpose of travel

– Establishing harmonised rules on the handling of situations of loss of identity document and valid visa (Article 7).

– Precise deadlines for Member States' various notifications (15 days): on representation arrangements, introduction of prior consultation and ex-post information.

– In accordance with Article 290 of the TFEU, the power to amend non-essential elements of Regulation is delegated to the Commission in respect of the list of third countries whose nationals are required to hold an airport transit visa when passing through the international transit areas of airports situated on the territory of the Member States (Annex III) and the list of residence permits entitling the holder to transit through the airports of Member States without being required to hold an airport transit visa (Annex IV).

– In accordance with Article 291 of the TFEU, the Commission should be empowered to adopt implementing acts establishing the list of supporting documents to be to be used in each location to take account of local circumstances, details for filling in and affixing of the visa stickers and the rules for issuing visas to seafarers at the external borders. Therefore, the previous annexes VII, VIII and IX should be deleted.

Legal basis

Article 77(2)(a) of the Treaty of the Functioning of the European Union.

This proposal recasts Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code) which was based on the equivalent provisions of the Treaty establishing the European Community, i.e. Article 62(2)(a) and (b)(ii).

Subsidiarity principle

Article 77(2)(a) of the TFEU empowers the Union to develop measures concerning 'the common policy on visas and other short stay residence permits'.

The current proposal is within the limits set by this provision. The objective of this proposal is to further develop and improve the measures of the Visa Code concerning the conditions and procedures for issuing visas for intended stays in the territory of Member States not exceeding 90 days in any 180 days period. It cannot be sufficiently achieved by the Member States acting alone, because an amendment to an existing Union Act (the Visa Code) can only be achieved by the Union.

Proportionality principle

Article 5(4) of the TEU states that the content and form of Union action must not exceed what is necessary to achieve the objectives of the Treaties. The form chosen for this action must enable the proposal to achieve its objective and be implemented as effectively as possible.

The establishment of the Visa Code in 2009 took the form of a Regulation in order to ensure that it would be applied in the same way in all the Member States that apply the Schengen *acquis*. The proposed initiative constitutes an amendment to an existing regulation and must therefore take the form of a regulation. As to the content, this initiative is limited to improvements of the existing regulation and based on the policy objectives to which one new objective was added: economic growth. The proposal therefore complies with the proportionality principle.

Choice of instrument

This proposal recasts Regulation No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code). Therefore only a Regulation can be chosen as a legal instrument.

4. BUDGETARY IMPLICATIONS

The proposed amendment has no implications for the EU budget.

5. ADDITIONAL ELEMENTS

Consequences of the various protocols annexed to the Treaties and of the association agreements concluded with third countries

The legal basis for this proposal is to be found in Title V of Part Three of the Treaty on the Functioning of the European Union, with the result that the system of 'variable geometry', provided for in the protocols on the position of the United Kingdom, Ireland and Denmark and the Schengen protocol applies. The proposal builds on the Schengen *acquis*. The consequences for the various protocols therefore have to be considered with regard to Denmark, Ireland and the United Kingdom; Iceland and Norway; and Switzerland and Liechtenstein. Likewise, the consequences for the various Acts of Accessions must be considered. The detailed situation of each of these states concerned is described in recitals 49-57 of this proposal. The system of 'variable geometry' of this proposal is identical to the one that applies to the original Visa Code, with the addition of a reference to the 2011 Act of Accession regarding Croatia.

Link with the simultaneous proposal for a Regulation establishing a touring visa[9]

Possible amendments to this proposal during the legislative process will have an impact on the proposal for a Regulation establishing a touring visa, so particular attention should be paid to ensuring the necessary synergies between these two proposals during the negotiation process. If in the course of these negotiations an adoption within a similar timeframe appears within reach, the Commission intends to merge the two proposals into one single recast proposal. In case the legislators reach agreement on the present proposal before there is prospect of imminent agreement on the proposal for a Regulation establishing the touring visa, the provisions in this proposal relating to the envisaged touring visa (Articles 3(7), 12(3), 18(6)) should not be maintained for adoption but be inserted later by an amendment to the Visa Code when agreement on the touring visa proposal has eventually been reached.

[9] COM(2014) 163 final.