Warsaw, 6 May 2014

Visa-free Europe Coalition

Assessment on the envisaged reform of EU visa rules

Reporter: Dr Marek Porzycki

Documents analysed:

- Proposal for a regulation of the European Parliament and of the Council on the Union Code on Visas (Visa Code) (recast) (COM(2014) 164 final, 1.4.2014), hereinafter "recast Visa Code"

- Proposal for a regulation of the European Parliament and of the Council establishing a touring visa and amending the Convention implementing the Schengen Agreement and Regulations (EC) No 562/2006 and (EC) No 767/2008 (COM(2014) 163 final, 1.4.2014), hereinafter "Touring Visa Regulation"

1. General observations

1.1. The general direction of the proposed changes is positive. If adopted, both proposed regulations will contribute to a greater freedom of movement by bringing much needed changes facilitating bona fide visits to the European Union. It is particularly welcome that the package of documents accompanying the proposed regulations brings a more balanced approach to the justification and functions of visa rules. The previously prevailing one-sided security perspective has been changed by taking the economic aspects of visas into account. In this respect, the European

Commission is correct to highlight the economic cost of restrictive visa rules suffered by the economies of EU Member States in lost GDP and jobs.

1.2. As the single most important measure in the envisaged visa reform, the intention to increase the availability of long-term multiple-entry visas (MEVs), including mandatory MEVs, should be noted with approval. However, due to the excessively restrictive criteria, the positive effect of this measure may be much more limited in practice than envisaged by the Commission. See in detail in paragraph 2.1 below. Extending the maximum validity of MEVs to 10 years, e.g. for applicants that have already had a 5 year visa, should also be considered. Granting visas of such length to visitors with no immigration risk has been successfully tested by the United States of America. This measure could be equally beneficial to the economies of EU Member States.

1.3. The proposal to introduce a touring visa is a very positive development, as it will cover some narrow but significant categories of visitors to the EU who are not included by the current visa rules. These applicants include e.g. visitors taking a career break, freelancers, artists and academics on sabbatical leave. Visitors from those categories are frequently affluent enough to spend large amounts of money on their extended trips to Europe, making a disproportionately large contribution to the economies of EU Member States. The Touring Visa Regulation would facilitate extended trips of this kind, which are currently only possible by bending existing rules.

2. Specific observations

2.1. Restrictive criteria for mandatory MEVs

The mandatory issue of long-term multiple-entry visas under Article 21(3) and (4) of the recast Visa Code, could be the single most beneficial measure of the proposed visa reforms, by creating a large group of frequent visitors to the EU that are people of proven integrity and reliability. However, the actual benefits of the proposed changes could be considerably reduced by excessively restrictive criteria for granting mandatory MEVs. The proposal runs the risk of taking a step back in relation to one important category of applicants, namely those who have already benefited from MEVs under current Article 24(2) of the Regulation(EC) No 810/2009 of 13 July

2009 establishing a Community Code on Visas (Visa Code), as well as those that will be granted MEVs under Article 21(5) of the recast Visa Code.

The weak point is that **the definition of "VIS registered regular traveller" in Article 2(9) of the recast Visa Code does not take into account applicants who have previously been issued MEVs.** The requirement to have obtained two visas within 12 months prior to the application logically implies that the second visa must have already expired. As a result the definition of a "VIS registered regular traveller" includes only those applicants who have previously obtained two visas of a short validity, in relatively short succession. This requirement will automatically disqualify any applicant holding a previous visa which is valid for one year or more. Most applicants holding a previous visa valid for six months would also not qualify.

The definition also excludes previous holders of national visas for long-term stays ("D" type) and residence permits issued by Member States. Applicants who have previously resided lawfully in the EU e.g. for purposes of work or study, are usually interested in frequent short visits to the EU after they have returned to their countries of origin. Such applicants should not be forced to re-apply for short term single entry visas in order to gain "VIS registered regular traveller" status, as their integrity and reliability can already be considered proven.

In view of the above, the definition of a "VIS registered regular traveller" excludes most of the applicants that the proposed visa facilitation measures are intended to attract – applicants with experience of previous travel to the EU, considered reliable enough to qualify for MEVs or residence permits even under current provisions.

As a consequence, the proposed facilitation runs the danger of actually benefitting only a very small number of applicants due to the excessively restrictive criteria.

Recommendation: all of the following categories of applicants registered in the VIS should be included in the definition of a "VIS registered regular traveller":

- Applicants who have obtained two visas within the 12 months prior to the application, or
- Applicants who have previously held a multiple entry uniform visa, a national visa ("D" type) or national residence permit issued by a Member State valid for one year or more, provided that the application is lodged no

later than 12 months from the expiry date of the uniform visa, national visa or national residence permit in question issued by a Member State, or

- Applicants who have made two legal trips to the EU within the 12 months prior to the application.

This extension of the scope of applicants eligible for mandatory MEVs would not involve any increase in the security risk as only applicants with a proven track record of recent lawful visits or stay in the EU would be entitled to the visa.

2.2. Imprecise wording on subsequent MEVs

There is small discrepancy between the proposed wording of Articles 21(3) and (4) of the recast Visa Code. Paragraph 3 refers to a visa valid for "at least three years" while paragraph 4 only mentions a "multiple-entry visa valid for three years". Article 21(4) should also cover applicants who have received a visa valid for more than 3 years. The continued issue of subsequent 5 year visas (or even 10 year visas – see paragraph 1.2) after the expiry of a previous visa with the same validity period should also be more clearly provided. As in the latter case applicants would already have a proven track record of their lawful use of long-term multiple-entry visas, extending the permitted gap between five year visas to 3 years could also be considered.

Recommended wording: "4. Applicants referred to in paragraph 3 who have lawfully used a multiple-entry visa valid for three years or more shall be issued with a multiple-entry visa valid for five years, provided that the application is lodged no later than one year after the expiry date of the three year multiple-entry visa. These applicants shall be issued another multiple-entry visa valid for five [*ten*] years provided that the application is lodged no later than three years after the expiry date of previous five [*or ten*] year multiple-entry visa."

2.3. Relation to VFAs

As some provisions of the recast Visa Code will be more advantageous for applicants than some of the visa facilitation agreements (VFAs) previously concluded, a clarification of the relation between the recast Visa Code and the VFAs may be considered. VFAs should be regarded as providing a minimum level of benefits to

nationals of the other party, not excluding the further benefits resulting directly from the provisions of Union law. Therefore, a provision of the recast Visa Code should clearly affirm that in the event that a provision of the recast Visa Code is more beneficial to the applicant than a corresponding provision of the relevant VFA, the benefits based on the relevant provision of the recast Visa Code should apply.

2.4. External service providers and 'right of choice'

The recast Visa Code removes the obligation of the Member States to maintain an option for all applicants to lodge their applications directly at their consulates (Article 17(5) of the current Visa Code). Correspondingly, recital 15 of the current Visa Code is removed. At the same time the recast Visa Code does not include any mechanisms which provide an incentive for Member States to continue accepting applications directly at the consulates. It is very likely that many or even most consulates of Member States will cease accepting direct visa applications altogether and only accept applications lodged via an external service provider (visa centre). This change will in fact result in the cost of the visa increasing by up to EUR 30 (service fee charged by external service providers). From the perspective of applicants, the distinction between a visa fee charged by the consulate and service fee charged by the external service provider is unclear and irrelevant. Therefore, this change can result in the visa reform being perceived by applicants as simply a way of increasing visa fees hidden behind language about visa facilitation. This result would be contrary to the intention of the envisaged reform to increase the attractiveness of the EU as a tourism and travel destination. Despite the overall presentation of the proposed regulations as facilitating travel and liberalising visa rules, this change is very clearly a move in the opposite direction, increasing the costs borne by applicants.

Recommendation: The requirement for Member States to maintain the option for all applicants to lodge their applications directly at their consulates should not be removed. Alternatively, the visa fees charged at consulates which do not accept applications directly should be reduced by the service fee charged by the external service provider. This reduction would create an incentive for the Member States to continue accepting applications directly, while on the other hand it would eliminate

the increase in costs borne by applicants, ruling out their negative perception of the changes introduced by the visa reform.

2.5. Rules on the competence of consulates

Changes to Article 5 of the Visa Code address the major inconveniences faced mostly by applicants travelling to smaller Member States which are not always represented in their respective countries. The introduction of the option – as a last resort – to apply at the consulate of any of the Member States present in the country concerned is a very positive step. However, this change will not reduce the inconvenience faced by some applicants in very large countries, such as China, India or Russia, who sometimes need to travel thousands of kilometres to lodge an application if the Member State in question is only represented in the capital. A similar facilitation measure can therefore be considered in cases where the Member State concerned has a presence in the applicant's country, but the nearest consulate or visa centre further than a certain distance (e.g. 500 or 1000 km) from the applicant's place of residence. In this case the applicant should be allowed to apply at a consulate of a Member State that is present closer to his or her place of residence.

2.6. Rules on appearance in person and the collection of fingerprints

One the most significant inconveniences of visa procedures for applicants results from the need to appear in person at the consulate or visa centre to apply for visa. Reducing these requirements by allowing on-line or postal applications could therefore considerably reduce the harmful consequences of the visa regime. In this regard the proposed changes related to VIS-registered applicants (in particular as per Article 9(2) of the recast Visa Code) are very welcome, as they would allow many applicants to avoid unnecessary repeated visits at a consulate or visa centre.

Further facilitations could be considered due to the existing technical possibilities. As shown by practices of some countries (e.g. Australia), the visa process for at least some groups of travellers, such as VIS registered applicants with biometric data stored in the VIS, can be moved entirely on-line, with the actual visa being granted at the border on basis of an electronic travel authorisation. A scheme of this kind would allow the workload of consulates of Member States to be reduced further.

2.7. Revocation and annulment of visas

It is noted that the proposal does not introduce any changes to provisions on annulment and revocation of visas (Article 31 of the recast Visa Code, current Article 34). The Commission is certainly aware of frequent cases of the excessive application of provisions against visa holders travelling to a Member State different from the Member State that has issued the visa, in particular in the case of Ukrainian nationals holding visas issued by Poland's consulates travelling to other EU Member States. Furthermore, the right to appeal against a decision on revocation or annulment of a visa according to the procedures of national law of the Member State that issued the decision in question (Article 31(7) of the recast Visa Code) is impractical, as the annulment or revocation of a visa is immediately effective and the visa holder in question is deported or obliged to leave the territory of the Member States in a very short space of time. There is also no effective procedure for claiming damages for the costs incurred due to the wrongful revocation or annulment of a visa.

In order to uphold the uniform character of the Schengen visa, legal certainty and confidence in fairness and the predictability of EU visa rules, cases of revocation or annulment of validly issued visas should be an absolute exception. Without limiting the grounds for revocation or annulment to cases of evident fraud and cases where the visa holder in question poses an obvious immigration risk or a threat to public security, the incidents mentioned above are likely to continue.

2.8. Visa issue at the border

The possibility of introduction of temporary schemes allowing visas to be issued at external borders (Article 33 of the recast Visa Code) is a very welcome step, likely to bring significant economic benefits, as it will considerably improve the attractiveness of the EU as a tourism destination. In order to maximise the benefits of this change, two further amendments may however be considered. Firstly, extending the maximum validity of visas granted under such schemes to one month, in view i.a. of the fact that some major sporting events like football tournaments or Olympic Games take more than 14 days, up to one month. Secondly, two Member States should be allowed to introduce joint schemes to issue visas valid for the territory of both Member States.

Alternatively, a neighbouring Member State should be able to conclude a representation arrangement with a Member State running a temporary scheme, allowing for visas issued under such a scheme to be valid also for the territory of that neighbouring Member State. Such change would be justified by the fact that many tourism areas in the EU straddle national borders in a way that areas situated in two Member States can be considered a single tourist destination. Some sporting or cultural events are also sometimes organised jointly by two Member States.

3. Conclusion

Both proposed regulations introduce a number of much needed changes and constitute a step in the right direction, which is likely to reduce the economic losses suffered by the economies of EU Member States due to restrictive visa regulations. However, the positive effect of proposed changes may be rather limited if mandatory MEVs are issued according to the restrictive criteria currently proposed (see paragraph 2.1). A liberalisation of these criteria by taking into account all applicants who have previously been issued MEVs is of utmost importance for the success of the envisaged reform of the EU visa policy.

Sapieżyńska 10a, 00-215 Warsaw, Poland
contact@visa-free-europe.eu www.visa-free-europe.eu