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**COMMISSION STAFF WORKING DOCUMENT**

**Evaluation of the implementation of Regulation (EC) No 810/2009 of the European Parliament and Council establishing a Community Code on Visas (Visa Code)**

*Accompanying the document*

**Report from the Commission to the European Parliament and the Council**

**A Smarter Visa Policy for Economic Growth**

{COM(2014) 165 final}

## TABLE OF CONTENTS

|          |                                                                                                                                    |    |
|----------|------------------------------------------------------------------------------------------------------------------------------------|----|
| 1.       | INTRODUCTION.....                                                                                                                  | 3  |
| 2.       | THEMATIC EVALUATION .....                                                                                                          | 4  |
| 2.1.     | Detailed evaluation.....                                                                                                           | 4  |
| 2.1.1.   | The visa application procedure .....                                                                                               | 4  |
| 2.1.1.1. | Lodging the visa application .....                                                                                                 | 5  |
| 2.1.1.2. | Documentary requirements when lodging an application.....                                                                          | 11 |
| 2.1.1.3. | Fees to be paid.....                                                                                                               | 16 |
| 2.1.1.4. | Examination of the application .....                                                                                               | 18 |
| 2.1.1.5. | Consultation of and sharing information with other Member States .....                                                             | 20 |
| 2.1.1.6. | Decision making and issuing or refusal of a visa.....                                                                              | 21 |
| 2.1.1.7. | Management of visa sections .....                                                                                                  | 27 |
| 2.1.1.8. | Visas applied for and issued at the external borders .....                                                                         | 27 |
| 2.1.2.   | Information to the general public .....                                                                                            | 28 |
| 2.1.3.   | Common operational instructions .....                                                                                              | 29 |
| 2.1.4.   | Consular cooperation and consular coverage.....                                                                                    | 30 |
| 2.1.5.   | Interaction between the Visa Code and Directive 2004/38 on the free movement of EU citizens and their family members .....         | 35 |
| 2.1.6.   | Modification of issued visas.....                                                                                                  | 37 |
| 2.1.7.   | Airport Transit Visa .....                                                                                                         | 40 |
| 2.1.8.   | Institutional aspects.....                                                                                                         | 41 |
| 2.1.9.   | Lack of visa or other authorisation allowing travellers to stay more than 90 days in any 180-day period in the Schengen area ..... | 42 |

## 1. INTRODUCTION

This staff working document accompanies the Commission's evaluation report<sup>1</sup> on the implementation of the Visa Code. It has been informed by extensive discussions with various stakeholders and inputs through different channels. These include exchanges on practical issues arising from the implementation of the Code's legal provisions with specific professional stakeholders, e.g. seafarers' associations, the tourism industry, artists' organisations, and discussions with Member States (including ad hoc enquiries).

This document is also based on the Commission's regular monitoring of the correct implementation of EU legislation, petitions addressed to the European Parliament, questions raised by Members of the European Parliament, complaints and questions from private persons, and Schengen evaluations. Additionally, representatives of third countries' authorities have raised issues and concerns in bilateral meetings with the European Union/the Commission. Views been exchanged on the implementation of the Visa Code particularly in the framework of the Joint Committees set up under the various Visa Facilitation Agreements<sup>2</sup> between the EU and a number of third countries.

An on-line public consultation on the implementation of the Visa Code seen from the applicants' point of view was launched in March 2013 and ran for 12 weeks. This yielded a total of 1084 responses to a detailed questionnaire and written contributions from a wide range of stakeholders. They included individuals, performing artists' representatives and organisations, business associations, the tourism industry, and academics. The results of the consultation and the list of respondents have been published<sup>3</sup>. This working document is also based on a study of Member States' 'Schengen Visa Information' carried out for the Commission<sup>4</sup>.

Finally, this document is informed by data collected in an external study commissioned by DG Enterprise, focusing on the economic impact of visa facilitation on the tourism industry and on the economies of Schengen States (hereinafter: Economic Impact Study)<sup>5</sup>. This study particularly focused on travellers from six target countries (China, India, the Russian Federation, Saudi Arabia, South Africa and Ukraine), covering in total more than 60 % of all short-stay visa applications (2012).

A distinction should be made between the overall evaluation of the implementation of the Visa Code, covered in this document, and the evaluation referred to in Article 57(3) of the Visa Code.

The latter concerns the evaluation of the implementation of seven Articles of the Visa Code (of which two are specifically related to the collection of biometric data and five others to forms of cooperation for the collection of visa applications), and specific Articles of the VIS Regulation. The latter (periodic) evaluation is to be made for the first time 'three years after the VIS is brought into operation and every four years thereafter', i.e. for the first time in October 2014.

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<sup>1</sup> COM(2013) xxx.

<sup>2</sup> Visa Facilitation Agreements have been concluded with: the Russian Federation, Ukraine, Moldova, Georgia, [Cape Verde], Armenia, FYROM, Serbia, Montenegro, Bosnia and Herzegovina and Albania.

<sup>3</sup> [http://ec.europa.eu/dgs/home-affairs/what-is-new/public-consultation/2013/docs/consultation\\_025/report\\_on\\_the\\_results\\_of\\_the\\_consultation\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-is-new/public-consultation/2013/docs/consultation_025/report_on_the_results_of_the_consultation_en.pdf).

<sup>4</sup> Carried out by Tracys/Stratipo.

<sup>5</sup> [http://ec.europa.eu/enterprise/sectors/tourism/international/index\\_en.htm](http://ec.europa.eu/enterprise/sectors/tourism/international/index_en.htm).

However, this document also addresses the implementation of the five articles related to consular cooperation, as significant problems with their implementation have been identified, not related to the progressive rollout of the Visa Information System.

## 2. THEMATIC EVALUATION

### 2.1. Detailed evaluation

The structure of the Visa Code basically follows the logic of the visa application process and is divided into six Titles, of which the core Title III ('procedures and conditions for issuing visas') is subdivided into six Chapters. The Annexes cover measures implementing the general rules on the procedures and conditions for issuing visas and administrative management, laid down in Titles III and IV.

This chapter comprises a detailed assessment of the implementation of the provisions of the Visa Code grouped under thematic headings, except for the following:

Article 13 ('*Biometric identifiers*') and Article 44 ('*Encryption and secure transfer of data*') that are to be covered in the October 2014 evaluation report;

Article 49 ('*Arrangements in relation to the Olympic Games and Paralympic Games*') as it has not yet been applied; and

legal acts that were not subject to interpretation and/or implementation issues, such as Articles 2, 4, 28 and 29.

#### 2.1.1. The visa application procedure

This chapter covers provisions on procedural aspects and different steps of the procedure.

With the Visa Code, the separate '**transit visa**' was abolished. It was acknowledged that the distinction between transit and stay was artificial (e.g. during a 'transit' by car between Ukraine and the United Kingdom, the person concerned may decide to 'stay' for a few days in Belgium).

Article 1(1) and several others<sup>6</sup> were amended by the recent amendment of the Schengen Border Code<sup>7</sup>. The amendment concerns the **definition and calculation of 'short stay'**. Pursuant to *Case C-241/05 Nicolae Bot v Préfet du Val-de-Marne*<sup>8</sup>, there was a need to amend the rules dealing with the definition and calculation of the authorised length of short stays in the Union. The reference to 'first entry' has been deleted and the period of allowed stay is now counted in days (90/180days) only, whereas previously it had been counted in months. The clear, simple and harmonised rules benefit travellers as well as border and visa authorities.

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<sup>6</sup> Article 2(2), point (a), Article 25(1), point (b), Article 32(1)(a), point (iv), and Annexes VI, VII and IX.

<sup>7</sup> Regulation (EU) no 610/2013 of the European Parliament and of the Council of 26 June 2013 amending Regulation (EC) No 562/2006 of the European Parliament and of the Council establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), the Convention implementing the Schengen Agreement, Council Regulations (EC) No 1683/95 and (EC) No 539/2001 and Regulations (EC) No 767/2008 and (EC) No 810/2009 of the European Parliament and of the Council, OJ L 182, 29.6.2013, p. 1.

<sup>8</sup> [2006] ECR I-9627.

#### 2.1.1.1. Lodging the visa application

So-called Schengen visas are issued in the interests of the Union as a whole, on the basis of one set of legal provisions, and are mutually recognised by the Member States (cf. Article 19 of the Schengen Convention). However, they remain ‘national’ in the formal sense that they are issued by consulates which are public services of the Member States. A ‘common European issuing mechanism for short-term visas’, as mentioned in the Stockholm Programme, has not been created (yet).

The purpose of the rules in Article 5 is to clarify for applicants what consulate they should apply to and to ensure that the best/better placed Member State consulate examines their application, e.g. the Member State of sole or main destination. Visa applicants can not choose freely where to apply.

(1)<sup>9</sup> The rules on **the competent Member State for examining applications for short stays**<sup>10</sup> are challenging for both applicants and Member States’ consulates, unless the applicant only intends to travel to one Member State. In other cases, even if Article 5 sets out criteria intended to be objective, such as ‘main destination’, ‘length or purpose of the stay’ and ‘first entry’ (in the case of itinerant travellers), these seem too rigid to match reality.

The most important aspect cannot always be determined easily; nor can the difference in length of stay clearly justify that one Member State is competent, rather than another. Cases have been reported where a difference in length of stay of a few hours meant that applicants were sent from one consulate to another.

The ‘length of stay’ criteria is also one that can easily be changed (a technique frequently used by travel agencies) by adapting itineraries to make the longest stay in the Member State whose consulate is considered the most ‘accessible’. About 30 % of respondents in the public consultation found it difficult to determine where to apply for a visa when staying in several Member States during the same trip. The cruise industry, shipping and manning companies point to the specific working conditions of seafarers (maritime and hospitality crew) and the culture sector points to touring/performing artists. These require flexibility of practices regarding, among others, the determination of the ‘competent’ Member State.

The Visa Code Handbook contains a specific chapter on the determination of the competent Member State with numerous examples and best practices to illustrate how to apply the rules on competence. Even if the notion of ‘competent’ Member State could seem to contradict the fact that Member States issue a visa valid for a territory covering 26 Member States, discussions on this specific point were just as difficult and lengthy as the examination of these legal provisions preceding the adoption of the Visa Code.

An additional complication occurs when a person has to travel to several Member States in consecutive trips and does not have time to apply for several visas. Although Member States’ central authorities advocate a flexible approach, the Commission has received numerous complaints about consulates refusing to take responsibility for issuing multiple entry visas covering all subsequent trips. This forces an applicant to apply for a visa for each trip, which is often impossible time-wise, and can be costly, as each application incurs a visa fee.

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<sup>9</sup> *The consecutive numbering of paragraphs are intended to facilitate reading of cross-references in the text.*

<sup>10</sup> The competence issue for applications for airport transit visas is clearly defined and easily applicable, because the airport transit rarely covers more than one airport in the Schengen area.

Judging by the number of questions raised by Member States and complaints from individual applicants, the problems created by the strict application of this provision (cf. also the public consultation), the criteria appear to need clarifying. This could help applicants to know where to apply without necessarily having an impact in terms of facilitation if the competent Member State is located far away. Clarifying these criteria would not have an impact on the workload of Member States' consulates.

Finally, some applicants may have to travel far to apply at the consulate of the competent Member State because of the combination of rules on competence, rules on 'lodging in person', further tightened by the mandatory collection of fingerprints from first-time applicants linked to the roll out of the VIS, and the fact that some Member States' consular network is limited. This is costly and time-consuming and sometimes even prohibitive for potential visa applicants (this issue is further developed below).

The current 'soft law' provisions (Article 5(4)) encouraging Member States to cooperate to ensure that a visa applicant can always apply in his/her place of residence are inefficient and difficult to enforce, or used on an ad hoc basis.

(2) Article 6 establishes clear rules on **consular territorial competence** to remedy diverging practices due to the absence of legal provisions. The basic rule is that a person should apply in his/her country of residence as the consulate there would be better placed to assess his/her application and will to return than a consulate in a location where he/she might just be passing through.

This provision would not allow for the spontaneous application for a visa by, e.g. a Chinese national visiting the United Kingdom as a tourist and wishing to spend time in a Schengen State. The consulate in the United Kingdom of the intended Schengen destination would not be in a position to properly verify that the person concerned fulfilled the entry conditions.

However, an exemption to the general rule is possible in justified cases (Article 6(2)). Therefore, this provision seems to fulfil the criteria of both relevance and consistency and should therefore be maintained.

(3) Article 18 on the **verification of consular competence** is linked to Articles 5, 6, 42 and 43. Honorary consuls (Article 42) and external service providers (Article 43) who collect visa applications, visa fees and biometric data are not involved in assessing the content of an application. Often, a consulate can only establish whether it is competent to handle an application once it has started to examine a file. This is also the case where electronic services are introduced in the visa handling process. However, if a consulate realises that it is not competent to handle an application, all documents and collected fees must be returned and biometric data, if collected, must be destroyed (under Article 18(2)) and no data can be registered in the VIS.

(4) Article 7 establishes clear rules to apply in rare cases where a third country national is **legally present in the territory of a Schengen State** without holding a document allowing him/her to circulate freely, e.g. a person whose application for asylum is under examination. The Commission is not aware of any problems regarding the implementation of these provisions.

However, situations may arise where a person present in the Schengen area on the basis of a visa loses his/her passport (including the visa sticker) and is no longer able to prove that he/she is legally present or — upon exit — that the stay was legal and that the length of

authorised stay was not exceeded. The Visa Code does not contain provisions regarding this situation and discussions in the Visa Committee revealed diverging practices among Member States. These ranged from no legal national provisions at all to relatively cumbersome rules covering only situations where the lost visa had been issued by the Member State in which the passport was declared lost or stolen.

The various Visa Facilitation Agreements (VFAs) that apply to nationals of specific third countries (and cover about 50 % of all visa holders) stipulate that a person who has lost his/her passport and visa is entitled to leave the Schengen area on the basis of valid identity documents, issued by his/her country of origin, without a visa or any other authorisation.

Providing a general rule on practices to follow in the case of loss of a passport with a valid visa may be useful.

Difficulties regarding the loss of a visa issued by another Member State will be overcome once the VIS has become fully operational, as Member States would have access to information on visas issued by others.

The Visa Code contains provisions designed to facilitate the visa application procedure for both visa applicants and consular staff. But the increasing number of visa applications (overall increase of 48 % between 2009 and 2012)<sup>11</sup> and the often decreasing capacity of Member States' consulates to handle applications due to budget cuts have led to bottleneck problems.

(5) Article 9 sets out **deadlines for lodging an application and for obtaining an appointment** for lodging and the possibility of (accredited) commercial intermediaries to lodge an application on behalf of applicants. The objective of introducing such deadlines was to ensure procedural certainty and equal treatment of applicants.

Applicants may lodge their applications **no earlier than three months** before their intended trip. The reasoning behind this time period is that it should be possible for the consulate to assess the applicant's situation (e.g. financial status and employment situation) relatively close to the intended trip, under the assumption that it would not change in such a short period of time. A minimum deadline for lodging an application is not set explicitly, but given that the

<sup>11</sup> Number of visas applied for in the top-10 countries where most visas were applied for, 2009-2012

|                | 2009      | 2010      | 2011       | 2012       | Increase<br>2009-2012(%) |
|----------------|-----------|-----------|------------|------------|--------------------------|
| Russia         | 3 241 940 | 4 222 551 | 5 265 866  | 6 069 001  | 87.2                     |
| Ukraine        | 854 209   | 972 580   | 1 142 732  | 1 313 727  | 53.8                     |
| China          | 597 430   | 824 860   | 1 079 516  | 1 242 507  | 108.0                    |
| Belarus        | 369 842   | 433 102   | 583 871    | 698 404    | 88.8                     |
| Turkey         | 484 209   | 559 946   | 624 361    | 668 835    | 38.1                     |
| India          | 364 408   | 444 562   | 499 954    | 506 162    | 38.9                     |
| Algeria        | 267 460   | 263 794   | 311 167    | 387 942    | 45.0                     |
| Morocco        | 269 875   | 330 218   | 359 657    | 373 823    | 38.5                     |
| Saudi Arabia   | 137 548   | 170 029   | 196 327    | 255 083    | 85.5                     |
| United Kingdom | 191 178   | 198 046   | 212 564    | 210 610    | 10.2                     |
| TOTAL          | 6 778 099 | 8 419 688 | 10 276 015 | 11 726 094 | 73.0.                    |

normal maximum processing time is 15 calendar days, that would also be the minimum deadline for submitting an application.

These deadlines create problems for some applicants, e.g. seafarers who might be on the high seas for more than three months before arriving at a port in the Schengen area, and persons who wish to avoid peak periods with potentially long waiting times. The lack of explicit minimum deadlines for lodging an application creates problems for consulates when applications are lodged at the last minute without there being a justified case of urgency.

It could therefore be considered whether it would be in the interest if both visa applicants and Member States' consulates to allow for the lodging of applications up to 6 months ahead of the intended trip.

In the public consultation, respondents said the total time spent on their last visa application ranged from 1 day (10 %) to 5 days (59%), including time to obtain relevant information from the consulate, time to obtain supporting documents, travelling time to lodge the application, collection of the passport etc.. The total 'application period' exceeded one month in the case of 18 % of respondents.

(6) **Appointment systems** were generally introduced as a crowd control measure, to avoid queues and informal 'appointment systems' outside consulates. According to Article 9(2), the appointment for lodging a visa application should, as a rule, take place within two weeks of the date on which the appointment was requested. This provision was part of the final compromise in the negotiations of the proposal, and the ambiguous formulation 'as a rule' makes it difficult to enforce this provision. The Visa Code Handbook, which does not create legally binding rules, states: *'the capacity of Member States' consulates to handle should be adapted so that the [two week] deadline is complied with even during peak seasons.'*

The Commission has received numerous complaints about violations of these rules and has therefore conducted an investigation of Member States' practices. It found that the waiting time for an appointment to lodge a visa application in several consular posts of certain Member States was always longer than two weeks. In some cases, there was no 'direct access' to the Member State consulate, only to an external service provider. Respondents in the public consultation also said the deadline for obtaining an appointment was not met<sup>12</sup>.

The Commission took up this issue with 13 Member States through the EU pilot platform in December 2012. The majority provided concrete information about the problems faced in certain jurisdictions and mentioned measures taken or planned to reduce delays in their appointment system. Some Member States denied that waiting times were always longer than two weeks and argued that they had experienced isolated problems during peak periods, special events or problems with their online appointment systems due to fraudulent practices by individuals or intermediaries.

The problems with meeting deadlines for obtaining an appointment have also been cited by the European tourism industry as one of the obstacles to running the visa application process

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<sup>12</sup> Result of the Public Consultation: 30 % of respondents signalled that they did not get an appointment within two weeks. In the opinion of 49.3 % this timeframe is not acceptable, as consulates do not allow urgent applications to be made directly without an appointment, while 18 % of respondents find this deadline acceptable, but not kept by the consulates. According to another 33 % of respondents a two-week timeframe for appointments is acceptable, considering that in urgent cases, the requirement to make an appointment is waived. .

smoothly (cf. the November 2012 Communication). The same applies to the culture sector, especially for touring/performing artists.

At the same time, travellers complain that they cannot benefit from cheap last minute reservations, and the business community points to loss of business opportunities because of the deadlines for lodging an application (in such cases, processing time would also be an issue).

The Visa Code provides that *'in justified cases of urgency, the consulate may allow applicants to lodge their applications either without appointment, or an appointment shall be given immediately'* (Article 9(3)). On this basis, the Visa Code Handbook (cf. paragraph (38)) states that *'a consulate may decide to establish a 'fast track' procedure for the submission of applications in order to receive certain categories of applicants'*. Some Member States have indeed formally established such fast track procedures in some consulates for certain categories of applicants such as businesspeople or seafarers. Other Member States have informal fast track procedures in their consulates in justified cases of urgency.

(7) Article 10 establishes the **basic principle of 'lodging the application in person'** while allowing exceptions for known applicants. The maintenance of this principle was the final issue to be solved before the adoption of the Visa Code.

In the public consultation, 70 % of respondents considered lodging in person an unnecessary burden because it is costly (travel expenses) and time consuming. In the Economic Impact Study, roughly 50 % of respondents among travellers consider lodging in person problematic. According to the same study, 25 %, of respondents among consulates said this requirement could be 'modified or simplified'.

The traditional opinion is that the added value of having applicants lodge in person is that consular staff can already get a 'first impression', and ask additional questions/request documents at the counter. For the applicant, it is an opportunity to explain the purpose of travel.

However, the reality in 2013 is that consular staff processing and deciding on visa applications have very little or even no direct contact with applicants. A very high number of applications are lodged via external service providers (ESPs), via commercial intermediaries (e.g. travel agencies), in 'front offices' that are remote from decision-making staff, or sent by post.

Under these circumstances there is little to no added value in obliging applicants, especially frequent or regular travellers, to lodge their applications in person at the premises of an ESP or the consulate, other than when biometric data is to be collected.

In locations where the VIS has been rolled out, the fingerprints of first-time applicants must be collected. This can obviously only happen if the person comes to the consulate or the ESP in person. For the following 59 months, fingerprints are not taken at each subsequent application; the first set is copied to the new application.

The Visa Code states the one-stop principle for lodging the application: according to Article 40(4) *'...the selection of a form of organisation shall not lead to the applicant being required to appear in person at more than one location in order to lodge the application.'* This fundamental principle rules out obliging an applicant to go first to an ESP to hand in the application form, supporting documents, etc., then to a consulate to have fingerprints taken. A Member State that had put in place such a two-stop procedure has been addressed via the EU PILOT platform.

(8) Article 45 covers the rules on Member States' **cooperation with commercial intermediaries**. The 'cooperation' refers to Member States that have accredited a travel agency, tour operator etc. to lodge applications on behalf of (groups of) visa applicants, meaning that applicants do not have to go to an ESP or consulate 'in person'. This article clarifies and structures provisions covered in the previous legislation. Rather than defining the various types of commercial intermediaries, as was previously the case, the article defines the tasks that commercial intermediaries may carry out, lists various aspects to be verified before accreditation is granted, sets out provisions on monitoring such intermediaries and establishes rules on exchange of information on fraudulent behaviour within local Schengen cooperation (LSC).

The Commission does not compile information on Member States' accreditation of commercial intermediaries (mainly travel agencies and transport companies). However, based on ad hoc inquiries (among others in local Schengen cooperation) and Schengen evaluations, it can be established that such accreditation is widely used, accreditation procedures are sound and information on malpractice is exchanged locally.

Member States often fail to inform the public about commercial intermediaries that have been accredited as provided by Article 45(5). Such clear information could contribute to combating the phenomenon of self-acclaimed intermediaries that charge exorbitant fees and lure applicants into having them lodge applications on their behalf. According to the Economic Impact Study, 60% of the Member States interviewed in the six target countries accept applications from travel agents. It should be noted that Member States often allow (known) commercial intermediaries to lodge applications on behalf of individuals or group travellers without there being a formal accreditation procedure in place.

It goes without saying that the start of the roll out of the VIS, requiring first-time applicants to have their fingerprints collected, will have an impact on cooperation with commercial intermediaries (cf. Article 45(1)), as they are not entitled to collect fingerprints.

The 'Approved Destination Status (ADS)' scheme<sup>13</sup> with China has been in place since September 2004. The aim of this is to facilitate organised group travel from China to the Member States with a view to strengthening the tourism sectors in both China and the EU. It is based on a Memorandum of Understanding (MoU) signed by the European Community and the National Tourism Administration of the People's Republic of China. The Chinese authorities establish the list of travel agencies that may operate under the ADS scheme and Member States decide which of these they accredit. It should be noted that the MoU includes measures to be taken in case of illegal overstay of any ADS tourist and his/her readmission that have not hitherto been applied.

(9) According to Article 10(2), the requirement on 'lodging in person' may be waived for persons 'known ... for [their] integrity and reliability'. This is another example of a legal provision that is difficult to enforce. Article 24(2) links 'integrity and reliability' of the applicant to the 'lawful use' of previous visas (without specifying how many), the applicant's economic situation and the 'genuine will to return'.

Given that there are no objective criteria for waiving the 'lodging in person', applicants will in reality never know whether they qualify for a waiver. Generally, Member States do not inform applicants about the criteria for being exempted from 'lodging in person'. This, combined with the widespread use of outsourcing to ESPs that cannot be given any

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<sup>13</sup> OJ L 296, 21.9.2004, page 23.

responsibilities regarding the assessment of the application or the status of the applicant (e.g. lawful use of previous visas), hinders the implementation of this facilitation.

Article 21(8) of the Visa Code offers the possibility ‘in justified cases’ of carrying out an **interview** during the examination process to provide additional information, but experience shows this possibility is rarely used, meaning that in reality, decision-making is almost exclusively a ‘paper procedure’.

It should therefore be considered whether it would be more appropriate to drop the ‘basic principle’ of lodging in person (without prejudice to requirements to collect fingerprints of first-time applicants), while maintaining the provisions regarding the interview, and to adapt the rules to what seems to be general practice and allow for full ‘online application’: filling in the application form online, transmit documents electronically, or send them by surface mail.

Individual Member States are currently testing different ways of making use of modern technology in the visa application process to ease the burden on both sides. However, as long as the ‘physical’ passport and visa sticker are still key elements in processing visa applications, the process cannot become fully electronic. Moreover, in the public consultation, certain ‘youth exchange’ and ‘artist/cultural worker’ stakeholders said that the quasi-mandatory requirement of having access to the internet to apply for a visa may be problematic in certain (rural) parts of the world.

#### 2.1.1.2. Documentary requirements when lodging an application

(10) The basic ‘document’ in the visa application process is the **application form** (Article 11). The harmonised form was introduced in 2001, It was amended and streamlined and a number of fields were abolished by the Visa Code. Irrespective of the format (hard copy or electronic) in which the application form is made available to visa applicants, Member States generally do not inform visa applicants precisely enough about how to fill in the form. This means that applicants leave fields open, so Member States do not get the entries indispensable for them to enter data into the VIS or to carry out consultations electronically. A means of overcoming such problems would be to revise the format, to make the titles of boxes more explicit or to add a comprehensive explanation of how to fill in the application form as an annex.

It should be noted that in the public consultation, 51 % of respondents found the application form ‘easy’ or ‘very easy’ and 37 % had a neutral opinion. Compared to the visa application forms used by certain other countries<sup>14</sup>, the ‘Schengen application form’ is relatively simple and user-friendly. In view of the VIS becoming fully operational, the fields regarding information on previously-issued visas could be simplified or abolished.

(11) To lodge an application, an applicant must hold a **travel document**. Article 12 specifies the requirements regarding validity, issuing date and minimum number of available blank pages. The formulation ‘valid’ travel document was imposed by the formulation in the Schengen Borders Code, regarding entry conditions (Article 5(1)(a) — formulation maintained in the recent amendment of the Borders Code). Although the following paragraph refers to ‘validity’ in terms of temporal validity, e.g. three months beyond the date of intended

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<sup>14</sup> UK visa application form: 12 pages covering approximately 80 questions/fields, Australia: approx. 45 questions/fields .

departure, the term ‘valid’ has given rise to varying interpretations, and some Member States understand ‘valid’ as meaning ‘recognised’ for the purpose of affixing a visa<sup>15</sup>.

Clarifying the distinction between the two notions could be considered.

Provisions on the validity of the travel document mean that, in principle, the visa issued could at maximum be valid until three months before the expiry of the travel document. This rule could mean frequent and regular travellers, who are eligible for a multiple entry visa (MEV) with a long validity, may not be able to take full advantage of that facilitation. An MEV issued to the holder of a travel document valid for another two years could have a maximum length of validity of two years minus three months.

Allowing the issuing of a MEV with a validity beyond the validity of the travel document could be considered, providing the visa holder presents a (new) valid travel document and the valid visa in the expired travel document to be allowed to enter the Schengen area.

The reason why a passport must have two blank pages is that the visa sticker is affixed to one of the pages and the ‘matching’ entry-exit stamps are affixed on the opposite page to facilitate border controls on compliance with the length of authorised stay, as printed on the visa sticker. As the text does not specify that the blank pages must be a ‘double page’, the text can be interpreted as meaning two blank pages anywhere in the travel document, thus undermining the intention of the requirement. For holders of MEVs, one additional blank page is obviously not sufficient. The travel document of frequent travellers will quickly fill up with entry-exit stamps before the expiry of both the visa and the travel document.

To cover such situations without penalising the visa holder, a recommended best practice has been added in the Visa Code Handbook. This allows frequent travellers to travel bearing both their old and new passports, with the valid visa in the old, ‘full’ passport and a new passport where entry-exit stamps can be affixed. The requirement on blank pages necessary for affixing entry-exit stamps will become obsolete when the ‘Entry-Exit System’ (EES)<sup>16</sup> becomes applicable.

(12) The Visa Code applies universally to all categories of persons, irrespective of travel purpose, as the entry conditions are unvarying. Yet local circumstances vary greatly. It is therefore not possible to draw up exhaustive rules on documentary evidence to be submitted by all visa applicants all over the world, hence the need for harmonisation at local level.

Provisions on **supporting documents** have been established in Article 14, and a non-exhaustive, more ‘operational’ list is set out in Annex II. In both the article and the annex, there is a clear distinction between supporting documents to be submitted for a short stay on the one hand and for airport transit on the other. This distinction is important, as persons in airport transit do not enter the ‘Schengen’ area and should not need to prove they have sufficient means of subsistence for the transit.

<sup>15</sup> Commission Decision No 1105/2011/EU of the European Parliament and of the Council of 25 October 2011 on the list of travel documents which entitle the holder to cross the external borders and which may be endorsed with a visa and on setting up a mechanism for establishing this list. OJ L 278, 4.11.12, p. 9.

<sup>16</sup> Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 562/2006 as regards the use of the Entry/Exit System (EES) and the Registered Traveller Programme (RTP) (COM(2013) 96 final.

The Visa Code Handbook contains very detailed guidelines as to generic types of supporting documents that may be requested. The purpose of harmonisation within local Schengen cooperation (Article 48(1)(a)) was to ‘translate’ the generic lists and guidelines into harmonised lists corresponding to local circumstances, e.g. what precise document should prove a person’s employment situation in, say, Ecuador or Ukraine. Unfortunately, the Commission has noted a tendency to go for either ‘maximalist’ or ‘minimalist’ lists, as Member States could not agree on relevant documents. So ‘harmonisation’ would in the first case mean more severe requirements, and in the latter case, would leave it to Member States’ discretion as to whether they systematically require more than what appears on the harmonised list.

Three years after the implementation of the Visa Code, work on establishing harmonised lists of supporting documents has resulted in the adoption of only six Commission Implementing Decisions<sup>17</sup> covering 16 LSCs, and work has progressed in another 30 LSCs around the world. There are various reasons for the lack of progress: reluctance on the part of Member States at local level, seemingly unaware of the legal obligation to carry out this assessment; lack of awareness by consulates of certain Member States regarding application of a common visa policy; presence of only one or two Member States, obviously rendering harmonisation less relevant; nationals of the host state not subject to the visa requirement, in which case harmonisation is considered unnecessary.

Some requirements such as ‘reservation of either a return or a round ticket’ and proof of accommodation appear to be incompatible with current travel and booking habits and unjustly burdensome for (refused) visa applicants, though such reservations can serve to prove the purpose of journey and Member State of destination/competent Member State.

Article 14(6) allows flexibility in the implementation of requirements on supporting documents, but the criteria for doing so are vague and difficult to enforce in an objective manner. Certain documents may be waived for ‘*applicants known [to the consulate] for his integrity and reliability, in particular the lawful use of previous visas, if there is no doubt that he will fulfil [the entry conditions].*’ The widespread use of outsourcing and commercial intermediaries means that these provisions allowing facilitation in individual cases are in many cases practically impossible to implement. For instance, a service provider does not have information that may determine whether a given person is ‘known to the consulate’ or ‘that there is no doubt that he will fulfil the entry conditions’. External service providers are in any case not entitled to assess the content of applications, only to collect them on the basis of Member States’ instructions.

The vague formulations regarding flexibilities and facilitations to be offered to certain categories of persons also lead to diverging practices among Member State consulates, a source of frustration among visa applicants.

In the Economic Impact Study, respondents (travellers) rank the requirements on supporting documents as problematic. In the public consultation, only 9.4 % of respondents who consider themselves as frequent travellers have experienced facilitations regarding documentary evidence. In contrast, 22 % of the consulates covered in the Economic Impact Study said the rules on supporting documents could be simplified.

Clarification of the rules on the supporting documents to be submitted by applicants should be

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<sup>17</sup> C(2011) 5500 final, C(2011) 7192 final, C(2012) 1152 final, C(2012) 4726 final, C(2012) 5310 final, C(2013) 1725 final.

considered, particularly for the general facilitations and flexibilities to be offered to ensure equal treatment of applicants on the basis of objective criteria.

The Visa Code does not cover rules on original vs copies/scans or certified translations of supporting documents. Applicants and stakeholders consider these requirements problematic both because of the costs they incur for collecting the supporting documents (including translation) but also because of Member States' differing practices. In the public consultation, 33% of the respondents spent EUR 11-50 on fulfilling these requirements, while 13% said they had spent more than EUR 50. In 4.3% of cases, translation costs alone exceeded EUR 50.

(13) Under Article 14, Member States may require applicants to present **proof of sponsorship and/or private accommodation** by completing a form drawn up by each Member State. The Visa Code lists a number of minimum requirements for the content of such forms. A recent evaluation of the 24 national forms in use showed that the forms do not fulfil the minimum requirements, and that it is not always clear whether the form is proof of 'invitation' and/or proof of sponsorship and/or of accommodation. Additionally, many forms cover more than sponsorship and/or proof of accommodation during the visitor's intended stay. Some forms explicitly impose the financial risks of an extended stay on the signee of the form. Some limit the signee's responsibility to the period of validity of the visa or three months, while others commit the signee to cover costs of a possible overstay (up to a maximum of five years). Some forms seem to be less interested in the visa applicant proving sufficient means of subsistence than in attempting to eliminate any financial risk to the public authorities that might occur if the visa applicant overstays.

Most forms do not contain a reference to data protection under Article 37 of the VIS Regulation, which is important, because inviting persons' personal data are stored in the VIS for as long as the data of the visa application.

(14) The requirements on **travel medical insurance (TMI)** were introduced in 2004<sup>18</sup> at the initiative of a Member State (now Article 15). The purpose of TMI is to cover repatriation and emergency treatment for unforeseen health problems due to accidents etc. during the visa holder's stay (to be distinguished from cases where the purpose of the trip is medical treatment). The previous legislation was largely taken over in the Visa Code, though certain provisions were clarified on the basis of past experience. General exemptions from the TMI requirement were introduced for holders of diplomatic passports and seafarers. Third country nationals applying for a visa at the border — which should be an exceptional occurrence, for reasons of emergency — may also be exempted, as it would seem disproportionate and often impossible for such persons to contract an insurance. As regards implementation of the provisions on travel medical insurance, guidelines drawn up under the previous legislation have been revised and included in the Handbooks (see point 2.1.3).

Whereas acquiring a TMI seems unproblematic<sup>19</sup>, frequent discussions in the Visa Committee and in local Schengen cooperation have shown that the requirement poses problems in several

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<sup>18</sup> Council Decision No 2004/17/EC of 22 December 2003 amending Part V, point 1.4, of the Common Consular Instructions and Part I, point 4.1.2 of the Common Manual as regards inclusion of the requirement to be in possession of travel medical insurance as one of the supporting documents for the grant of a uniform entry visa. OJ L 5, 9.1.2004, page 79.

<sup>19</sup> In the Economic Impact Study, respondents generally did not consider the travel medical requirement to be a problem and 90% of the respondents in the Public Consultation have declared that acquiring a TMI is unproblematic.

other respects. For the applicant, having to show proof of TMI when lodging an application can mean losing money spent on insurance if a visa is refused, or if a stay shorter than requested is authorised.

According to the rules, the TMI must cover the period of stay, but most Member State consulates appear to require the TMI to cover the entire period of validity<sup>20</sup> of the visa. This means the applicant pays for insurance that covers a period longer than the effective stay. The LSC has in certain locations been in contact with local insurance associations to explain the rules of the Visa Code to try to adapt insurance policies to match the Code, but these attempts have so far been in vain.

The simple solution would be to require the visa holder to present a TMI when collecting their passport, as the TMI would then cover precisely the period of authorised stay. Member States discarded this possibility during negotiations on the Visa Code proposal as it would be a challenge from a practical and logistic point of view to verify the TMI after issuing the visa. It would also rule out the possibility of returning the passport by post/courier service.

These problems only concern single-entry visas, as persons applying for a multiple entry visa are only obliged to present proof of TMI for their first intended visit and, by signing the application form, promise to carry a TMI for each trip carried out on the basis of the visa, though this is not verified at the border.

From the consulates' perspective, it is difficult to verify whether the detailed and highly technical insurance policies are adequate. Member States have in a number of locations drawn up a list of 'recommended insurance companies' in an attempt to limit the number of different products that have to be assessed, though WTO rules on competition do not allow the refusal of any insurance policy that fulfils the criteria set out in the Visa Code.

Very limited evidence is available as to the enforcement of insurance policies if a visa holder needs emergency treatment during his/her stay in a Member State. Some Member States have recently carried out surveys that show that the level of recovery of medical expenses is extremely low. Others do not have any data. This is partly because of the fact that in most Member States, public hospitals are obliged to treat all emergency cases.

The TMI requirement poses other fundamental problems. First, it only covers nationals of third countries subject to the short-stay visa requirement, not third country nationals in general. There is no evidence that persons under the visa requirement would be more likely to need emergency treatment than others. Some Member States have indicated that nationals of visa-free countries without medical insurance are more likely to be a burden for public budgets

Secondly, it is not an entry condition. The TMI is not verified at external borders, yet not having insurance is listed among grounds for refusal on the standard form for refusal of a visa (Annex VI). Since the TMI requirement is not verified at the external borders, a visa holder could cancel the insurance once the visa has been issued. And even if those applying for a multiple entry visa promise to have TMI for each trip made with the visa, there is no check at the border to confirm that the traveller actually has insurance.

Finally, travellers nowadays, especially tourists, generally take out TMI at their own initiative; business travellers are covered by their company's insurance; and an increasing number of travellers hold such insurance on the basis of their credit card.

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<sup>20</sup> Period of authorised stay (XX days) + 'period of grace' (15 days) = period of validity of the visa (XX+15days).

Based on the above, the added value of maintaining the provisions regarding TMI could be considered.

#### 2.1.1.3. Fees to be paid

(15) Article 16 sets the rules for the **visa fee** to be paid by applicants and should cover the administrative costs of processing a visa application (Article 16(3)). The fee, EUR 60 (irrespective of the type of visa or number of entries applied for), was taken over from the legislation adopted in 2006. At that time, it was argued that the administrative costs of processing an application, including the collection of biometric data (to be stored in the VIS), was EUR 60<sup>21</sup>. It should be noted that under VFAs, accounting in 2012 for almost 50 % of all visa applications, the visa fee is fixed at EUR 35.

Respondents in the public consultation were concerned mainly about the overall cost of the visa application procedure (70 % consider that to be a burden) rather than about the level of the fee and 27 % would be willing to pay a higher visa fee for faster processing (max. three days).

The Visa Code provides for regular revision of the visa fee ‘in order to reflect the administrative costs’, but no such revision has taken place. Experience has shown that calculating the costs of processing a visa application has proved to be impossible. The cost of the ‘visa handling procedure’ cannot be isolated from the overall costs of activities at Member States’ diplomatic missions and consular posts. Most consular staff have duties other than processing visa applications. Different cost components (premises, personnel, operational and security related equipment) differ from one location to another and depend on whether visa applications are lodged via external service providers.

The Visa Code introduced **mandatory**<sup>22</sup> and **optional**<sup>23</sup> **visa fee waivers** for certain applicants. Some waivers are easily applicable, because they cover clearly defined categories of persons, e.g. children under six, children between six and 12, holders of diplomatic and service passports. Others cover large, less clearly defined categories of persons, e.g. *‘representatives of non-profit organisation, aged 25 years or less participating [in certain events] organised by non-profit organisations’* and *‘participants aged 25 years or less [in certain events] organised by non-profit organisations’*. The VFAs provide for additional waivers for some specific categories of applicants.

While the provisions on mandatory visa fee waivers create a clear legal obligation for Member States, those on optional waivers depend on individual Member States who, in most cases, determine all consular fees to be applied at central level. This in reality prevents the implementation of the provision in Article 16(5), last paragraph, according to which ‘within local Schengen cooperation Member States shall aim to harmonise the application’ of optional

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<sup>21</sup> ‘Short stay visa’ fees applied by other countries: United Kingdom: 93, 55 EUR; Australia: 93.67 EUR; Canada: 56.36 EUR (single entry) and 112.69 EUR (multiple entry); Japan 24.45 EUR (single entry) and 49.12 EUR (multiple entry); United States: 125.35 EUR.

<sup>22</sup> Children under six years; school pupils, students, post-graduate students and accompanying teachers who undertake stays for the purpose of study or educational training; researchers from third countries travelling for the purpose of carrying out scientific research as defined in Recommendation No 2005/761/EC of the European Parliament and of the Council; representatives of non-profit organisations aged 25 years or less participating in seminars, conferences, sports, cultural or educational events organised by non-profit organisations.

<sup>23</sup> Children 6 – 12 years; holders of diplomatic and service passports; participants aged 25 years or less in seminars, conferences, sports, cultural or educational events, organised by non-profit organisations.

visa fee waivers. Given that the Visa Code does not lay down a clear obligation ('shall aim to'), local harmonisation is *de facto* not possible.

Additionally, some of the categories to benefit from fee waivers or reductions are not defined precisely enough, which leaves room for interpretation and diverging practices. For instance, what is a 'non-profit organisation'? what is the difference between 'participants' and 'representatives'? In the public consultation, stakeholders said the visa fee waiver for participants in seminars, conferences, cultural etc. events was rarely applied.

Given the lack of harmonisation in this field, introducing more mandatory visa fee waivers for clearly defined categories could be considered.

Member States may also in **individual cases** waive or reduce the visa fee in view of promoting cultural or sporting interests, interests in the field of foreign policy, development policy and other areas of vital public interest or for humanitarian reasons. No evidence is available of the extent to which this possibility is applied.

Article 16(7) establishes that the **visa fee** may be **charged in EUR or in the 'local' currency**. When the visa fee is charged in local currency, Member States' differing methods and frequency in calculating exchange rates often leads to substantial differences in fees applied by different Member States in the same location. In some countries — mainly those neighbouring the EU — the problem is 'solved' by simply charging the fee in EUR because acquisition of foreign currency is easy. This 'solution' would be excessively burdensome in most other parts of the world.

To overcome the problems linked to differences in fees charged in local currency, the Visa Code envisages that the reference exchange rate set by the European Central Bank should be used as a basis for regular revisions to ensure that 'similar' fees are charged. Member States have argued that it is not possible for individual consulates to adapt the level of fees charged. Contrary to the vague formulation in Article 16(5), Article 16(7) imposes a clear legal obligation that is directly applicable Union legislation, to effectively ensure that fees are similar. However, the formulation 'similar' leaves room for interpretation as to how big the difference has to be for fees to be considered not to be similar in the sense of Article 16(7).

Ad hoc surveys of Member States' implementation of optional visa fee waivers and reductions and of the possibility for individual consulates to adapt their practices or the level of fees charged locally have been carried out at central level and in a number of third country locations. Although far from exhaustive, these surveys show that the application of visa fees is far from harmonised and the legal provisions have not been and cannot be implemented effectively. However, the surveys also show that differences in visa fees, due to charging in local currency, are not a source of 'visa shopping'.

(16) An ESP charges a **service fee** to cover the service offered (Article 17). The fee is to be set in the legal instrument (contract) between the Member State and the company, but it can never be higher than 50% of the basic visa fee of EUR 60. This means that total maximum fees for lodging an application could be EUR 90 (and EUR 65 in VFA countries, accounting for more than 50% of all visa applications), which is still relatively low.

According to the Visa Code, Member States should at local level 'ensure that the service fee reflects the services offered by the company and is adapted to local circumstances' and even 'aim to harmonise' the fee. Though there appear to be no cases of the maximum being exceeded, the latter provisions are *de facto* impossible to implement because contracts with

service providers are concluded at central level. There is often a global contract setting the service fee as a result of a public call for tender, e.g. at EUR 20 globally. Therefore, the fee is neither adapted to local circumstances, nor can consulates influence the level of the fee.

#### 2.1.1.4. Examination of the application

(17) Article 19 on ‘admissibility’ is directly linked to Article 10 (‘general rules for lodging an application’). It establishes the basic elements (which do not cover ‘supporting documents’) for an application to be ‘admitted’ for examination. This notion was introduced to distinguish between ‘rejection of incomplete applications’ (e.g. where the applicant has failed to submit all supporting documents) and formal refusals based on an examination of the application. Previously ‘incomplete’ applications rejected at the counter were either unrecorded, leaving no trace of an attempt to lodge an application, thus facilitating ‘visa shopping’, or counted as ‘refusals’ and distorted statistics. ‘Incomplete’ applications were not legally defined, but depended on the practices of the individual consulate.

With the rollout of the VIS, it became necessary to regulate precisely when an application is to be recorded in the system to ensure that all Member States applied the provisions on entry of data in the same manner to ensure full exploitation of the advantages of the system.

Evaluations of individual Member States’ consulates and countless questions raised within local Schengen cooperation and in various Council and Commission bodies show that the rules on admissibility are not understood and therefore not applied correctly. So the practices regarding ‘(in)complete’ applications continue to apply, including in locations where the VIS has become operational.

ESPs and honorary consuls, who cannot be given responsibility regarding the assessment of applications, are instructed by Member States on what applicants have to produce for an application to be ‘complete’ so as to avoid requests for additional documents/information later in the procedure. If the collection of applications is outsourced, the (basic) criteria for an application to be admissible are only verified once the file is examined at the consulate.

To ensure correct and effective implementation of the provisions on admissibility, including supporting documents in the admissibility criteria could be considered, but that would presuppose that the requirements on supporting documents that applicants have to produce in a given location had been fully harmonised under the legal framework set out in the Visa Code.

A declaration of ‘non-admissibility’ is not a formal refusal, but linked to the basic criteria for an application to be considered formally lodged and formally registered (with the legal implications that this entails, i.e. examination and decision-making). So applicants are not formally notified of grounds for non-admissibility, nor do they have a right of appeal.

There would be no added value in offering applicants the possibility of appeal against ‘non-admissibility’, as such a decision has no legal effects or impacts on future applications for a visa since the case is not registered in the VIS. Nevertheless, making it mandatory to notify applicants and to explain the reasons for ‘non-admissibility’ could be considered for reasons of transparency.

(18) Article 20 provides that when an application is admissible, the competent consulate should **stamp the applicant’s travel document**. The purpose of this is to ‘inform’ other Member States that if such a stamp is found in a travel document, it means that the person has

applied for a visa at the consulate of another Member State and that a visa has not (yet) issued. Member States fairly systematically omit to inform the public (cf. Article 47(1)(e)) that the stamp has no legal implications and that it simply means the holder has applied for a visa and that the application was admissible.

Once Member States start transmitting data to the VIS, the stamp will become redundant as Member States will have access to information on the applicant's 'visa history'. But this stamp is not serving its purpose even now, in locations where the VIS has not yet become operational. Rather than presenting a travel document with an 'admissibility stamp' from a previous application, some applicants prefer to acquire a new travel document (which is often fairly easy and not very costly) with no reference to a previous unsuccessful application (if the application was 'admissible' but not successful).

(19) Article 21 sets out provisions on the **verification of entry conditions** with particular focus on the criteria of 'migratory risk' and 'security risks'. These legal provisions take the form of operational guidelines<sup>24</sup>. Basically the article (paragraphs 3 and 4) repeats the entry conditions and grounds for refusal (Article 32 of the Visa Code and Annex V, Part A, of the Schengen Borders Code). Additionally, a reference is also made to the applicant's possession of adequate travel medical insurance (also repeated as grounds for refusal of a visa). However, possession of travel medical insurance is not an entry condition.

Article 21(8) establishes that an applicant may in 'justified cases' be called for an interview during the examination process or asked to bring additional information/documents.

Article 21(9) establishes the basic principle that a refusal should not lead to future applications being refused and that each application must be assessed on its own merit. Although this is an important principle, it is difficult to enforce.

This article does not contribute to legal certainty because of the combination of repetition of the entry conditions/grounds for refusal, operational instructions enabling subjective assessment ('justified cases'), reference to issues governed by the Schengen Borders Code ('reference amounts'), clarification of the link between 'long stay' and 'short stay' and inconsistency with other legal provisions (e.g. adding possession of travel medical insurance as an entry condition).

Based on the above, clarifying the provisions regarding the verification of fulfilment of entry conditions could be considered.

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<sup>24</sup> This legal implications of this provision have been raised in a preliminary ruling (Case C-84/12):

- '1) *In order for the court to direct the defendant to issue a Schengen visa to the applicant, must the court be satisfied that, pursuant to Article 21(1) of the Visa Code, the applicant intends to leave the territory of the Member States before the expiry of the visa applied for, or is it sufficient if the court, after examining Article 32(1)(b) of the Visa Code, has no doubts based on special circumstances as to the applicant's stated intention to leave the territory of the Member States before the expiry of the visa applied for?*
- 2) *Does the Visa Code establish a non-discretionary right to the issue of a Schengen visa if the entry conditions, in particular those of Article 21(1) of the Visa Code, are satisfied and there are no grounds for refusing the visa pursuant to Article 32(1) of the Visa Code?*
- 3) *Does the Visa Code preclude a national provision whereby a foreigner may, in accordance with Regulation (EC) No 810/2009, be issued with a visa for transit through or an intended stay in the territory of the Schengen States of no more than three months within a six-month period from the date of first entry (Schengen visa)?*

#### 2.1.1.5. Consultation of and sharing information with other Member States

(20) **‘Prior consultation’** means a Member State can require to be consulted during the examination of applications from all nationals of one or more third countries or specific categories of such nationals<sup>25</sup> to give them the possibility of objecting to the issuing of a visa. This mechanism is intended to ensure that other Member States’ interests are taken into account when examining visa applications.

The provisions on ‘prior consultation’ (Article 22) were largely carried over from the previous legislation, but with two major changes. The maximum response time was reduced from 14 days to seven calendar days and the list of third countries for which there has to be such prior consultation on all or some persons must be published. Information on Member States requiring such prior consultation is not published.

Prior consultation continues to give rise to discontent on the part of visa applicants and third countries’ authorities because of prolonged processing times, despite efforts to ensure processing does not exceed the maximum of 15 calendar days,. However, it appears that certain Member States can now carry out the procedures within 72 hours, thanks to better IT systems.

Currently (July 2013) prior consultation concerns nationals of 30 third countries. In some cases, Member States do not require prior consultation for holders of certain official passports. In others, it only applies to holders of certain official passports. In some cases, the requirement is limited to specific categories regarding age and gender: e.g. ‘male persons’ — ‘18-60 years of age’. Some Member States link the request for prior consultation to the travel itinerary, i.e. persons entering/transiting through their territory. More than five Member States require prior consultation from the same 15 third countries. For the remaining 15 third countries, between one and three Member States require prior consultation. In 2012, prior consultation was required for about 1 548 000 visa applications (i.e. about 10 % of all visa applications).

A recent survey on the implementation of prior consultation in the Visa Committee showed that the ‘hit rate’ of such consultation is extremely low and that visas are rarely refused because of an objection from a consulted Member State. It also emerged that the number of visas with limited territorial validity (see below) issued because of an objection from a

<sup>25</sup> Overview of third countries according to number of Member States requiring prior consultation for all or some categories of persons:

| Third country                                                                                                                                                   | No of MS |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------|----------|
| Afghanistan, Iraq, Pakistan                                                                                                                                     | 14       |
| Iran                                                                                                                                                            | 13       |
| Libya, Syria, Yemen                                                                                                                                             | 10       |
| Sudan                                                                                                                                                           | 9        |
| Lebanon, Somalia                                                                                                                                                | 8        |
| Jordan, N-Korea                                                                                                                                                 | 7        |
| Belarus, Nigeria, South-Sudan                                                                                                                                   | 5        |
| Egypt                                                                                                                                                           | 3        |
| Bangladesh                                                                                                                                                      | 2        |
| , DR Congo, Mali, Mauritania, Morocco, Niger, Russian Federation (only service passport holders), Rwanda, Saudi Arabia, Sri Lanka, Tunisia, Uzbekistan, Vietnam | 1        |

consulted Member State is low. However, there have been situations where the introduction of prior consultation requirements by one Member State has led to the systematic issuing of visas with limited territorial validity because there has been no time to carry out the prior consultation. Statistics are not collected on the specific reasons for issuing a visa with limited territorial validity.

Member States have argued that the low number of ‘hits’ or objections under the consultation mechanism is not evidence that the mechanism has no added value, because prior consultation is among the measures to prevent entry of persons presenting a security risk.

The list of third countries for whose nationals prior consultation is required has remained fairly stable over recent years. Contrary to the situation for the airport transit requirement, there is no regular review mechanism. Introducing a regular review could be considered, and account should be taken of technological developments to shorten response times.

(21) Given the negative ‘practical’ and political impact of prior consultation and given that several Member States have indicated they would rather be informed about visas issued than consulted on visa applications, the option of **ex-post information** was introduced (Article 31). However, this has not had the expected result. Only one Member State moved a relatively high number of third countries from ‘prior consultation’ to ‘ex-post information’.

Currently (July 2013) ex-post information concerns all nationals of 65 third countries. In one case, this does not apply to holders of certain official passports. In another, it only applies to holders of certain official passports. Consequently, practically all nationals of 64 third countries are concerned. This corresponded in 2012 to about 13 123 000 visa holders (in total about 14.5 million visas were issued), meaning that some Member States require ex-post information on practically all visas issued.

The purpose of prior consultation is obvious: verification against national databases of visa applicants before a final decision is taken on a given application. The legal consequences are clearly established by the Visa Code: refusal of a visa because of a Member State’s opposition to the issue of a uniform visa (valid for the entire Schengen area) or the issue of an LTV valid only for the issuing Member State. Any consequences of ex-post information are not settled by the Visa Code. A recent ad hoc (but incomplete) survey among Member States showed that practices vary from storage of data in national databases to mainly using the data for statistical purposes. On the basis of information received in ex-post information, some Member States annul or revoke visas issued by another Member State.

#### 2.1.1.6. Decision making and issuing or refusal of a visa

(22) Before the Visa Code, there were no **deadlines set for examining a visa application**. Article 23 introduced a fixed maximum deadline, i.e. 15 calendar days<sup>26</sup>, to ensure equal treatment of visa applicants. Generally, this deadline is met,, including in cases where ‘prior consultation’ applies. The actual average decision-making time is much shorter, often less than five days (cf. also the Economic Impact Study).

The waiting time for lodging an application may be up to 15 days, and an application can only be lodged three months before the intended date of travel. So the prolonged deadlines for examining an application for a short-stay visa seem excessive and could in extreme cases result in the person concerned not being able to travel at all, given that Article 23(2) and (3)

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<sup>26</sup> The Commission had proposed 10 days. In the VFAs the maximum deadline is 10 calendar days. .

provide for up to 30 days (in ‘individual cases’, e.g. where the represented Member State must be consulted) and of up to 60 days (in ‘exceptional cases’).

The reference to the deadline starting on the date of lodging an admissible application could create legal uncertainty. This is because the application may be lodged with an external service provider, but only Member State consular authorities are entitled to consider an application admissible (cf. Article 19). However, this issue does not have any significant practical impact, since, as a general rule, applications lodged at an external service provider are transferred to the responsible consulate the following day.

The period of validity of the uniform visa, the number of allowed entries, and the duration of the stay to be granted are based on the travel purpose, the examination of the application and the applicant’s ‘visa history’. A visa may be issued for one, two or multiple entries with a period of validity of up to a maximum of five years.

Article 24(1), third sub-paragraph, states that *‘in case of transit, the length of the authorised stay shall correspond to the time necessary for the purpose of the transit’*, and Annex VII, point 4, provides that *‘when a visa is valid for more than six months, the duration of stays is 90 days in any 180 days period’*.

The first provision is clear in the case of a single or two-entry visa, but the combination of the two raises doubt about how to interpret the rules if an MEV with a validity of two years is issued for the purpose of ‘transit’. However, the Commission agreed that among the underlying principles of the common visa policy is that a visa is not purpose bound, so this implies that point 4 of Annex VII also applies when the MEV is issued in view of transiting regularly through the Schengen area.

Given the ‘merging’ of transit and short stay and the acknowledgement of the artificial distinction between the two, clarifying the provisions in Article 24(1), third subparagraph, accordingly could be considered.

(23) To allow for unexpected changes in timing of a planned journey for reasons beyond the visa holder’s control (e.g. flight cancellations, postponement of commercial or cultural events, business meetings), a reasonable number of additional days, i.e. a **‘period of grace’**, is to be added to the validity of the visa (for a single-entry visa). The ‘period of grace’ is to be added systematically, but given problems with the period to be covered by the TMI, the intended flexibility for the traveller has mainly led to excessive insurance requirements (see paragraph (14)). In the public consultation, some respondents also mentioned problems arising from the fact that the authorised stay generally corresponds precisely to the event which is the purpose of the trip. This means that in the case of unforeseen delays or sudden business or other professional opportunities, the visa holder cannot postpone departure for a few days..

(24) Article 24(2) contains crucial provisions both for visa applicants and consulates. It regulates the issuing of **multiple-entry visas with a period of validity between six months and five years**. The corresponding recital (8) reads as follows: *‘Provided that certain conditions are fulfilled, multiple-entry visas should be issued in order to lessen the administrative burden of Member States’ consulates and to facilitate smooth travel for frequent or regular travellers. Applicants known to the consulate for their integrity and reliability should as far as possible benefit from a simplified procedure.’* In fact, the most important facilitation travellers can get is a MEV with long(er) validity. This is in practice equivalent to a visa waiver within the period of validity of the MEV, resulting in significant

savings and efficiency gains both for visa applicants (time and costs) and consulates (time). Therefore the implementation of this provision is of crucial importance.

The provisions (paragraph (2)) on issuing multiple entry visas were carried over from the previous legislation, but rules on mandatory issuing of MEVs to certain categories of persons were added. Although Article 24(2) is a ‘shall’ clause (*‘multiple-entry visas shall be issued [...]’*), it is undermined by the subjective assessment of notions such as ‘integrity’, reliability’ and ‘genuine intention to leave’.

In practice, more and more MEVs are issued under the provisions of the Visa Code — but to a larger extent in third countries with which a Visa Facilitation Agreement is in place<sup>27</sup>. Judging by the overall statistics<sup>28</sup>, the number of MEVs issued is growing steadily, but precise data detailing the length of validity of the MEVs (e.g. one, two or three years) is not available.

However, Member States are reluctant to issue MEVs valid for more than one year and rarely grant MEVs valid for five years. In the public consultation, 84 % of respondents had been granted MEVs valid for less than a year and for 43 %, validity was under six months. Only 5 % of respondents had been granted visas valid for more than two years. (Some even claim that it is not in the interests of ESPs and Member States to issue MEVs, as this would reduce the number of applicants and economic gain from service and visa fees!). The cruise industry, manning and shipping companies emphasise that the lack of long-validity MEVs for seafarers is problematic and generates additional costs for their business.

The Visa Code Handbook provides clarifications for processing visa applications as regards the categories of persons that could be eligible for MEVs. But eligibility conditions such as ‘integrity’ and ‘reliability’ of the applicant set out in the Visa Code give Member States’ consulates too big a margin of discretion in implementing this provision.

On the basis of the above, the possibility of introducing objective criteria could be considered to ensure proper, harmonised implementation of the provisions on MEVs.

Additionally, there is a tendency among consulates to disregard a visa holder’s correct use of short-stay visas previously issued by other Member States when assessing whether a person is eligible to be granted a MEV with long validity.

(25) If a visa applicant does not fulfil the entry conditions, the visa should be refused (Article 32). Under specific circumstances, a **visa with limited territorial validity (LTV)** may nevertheless exceptionally be issued to such a person. These circumstances may be humanitarian grounds, for reasons of national interest, or because of international obligations. An LTV may be issued if a person has already stayed in the Schengen area for 90 days within a 180-day period, but there are justified reasons for allowing the person to stay longer (in the issuing Member State only). Finally, an LTV should be issued to persons who hold a travel document not recognised by all Member States. In principle, an LTV is only valid for a stay in the issuing Member State, but in the latter case, if issued by a Member State that recognises the travel document, the validity is limited to stays in Member States that recognise the travel document.

All provisions regarding LTVs that were previously scattered around in various, incoherent legal instruments are now covered by Article 25. Apart from clarifying the general provisions,

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<sup>27</sup> The overall MEV rate (2012) is 41.5 % worldwide (without the Russian Federation, Ukraine and Moldova: 36 %). MEV rate in the Russian Federation: 49 %; Ukraine: 38.5 %; Moldova: 26.7 %.

<sup>28</sup> Share of MEVs of total number of visas issued: 35.8 % (2010), 37.8 % (2011), 41.6 % (2012).

the Visa Code also introduced provisions to cover a situation in which an LTV is issued by a Member State that cannot be reached by a direct flight, obliging the visa holder to enter the Schengen area via another Member State to reach their destination. That other Member State must give its consent to such an extension of the validity of the LTV.

Given the absence of internal border controls, one could question the added value of LTVs, because it is very difficult to verify whether the holder of such a visa complies with the limits on the right to travel to other Member States. There is, however, no statistical evidence of abuse. .

The total number of LTVs issued remains low (about 2 % of all visas issued in 2012) and detailed data are not available about the specific reasons for issuing them. High numbers of LTVs are issued to nationals of countries involving prior consultation. This could indicate that in urgent cases, prior consultation is not carried out and a LTV is issued instead.

(26) When an LTV has been issued, the issuing Member State has to inform other Member States of this, except when the LTV has been issued because the person concerned holds a travel document not recognised by one or more other Member State(s) or when the LTV is issued to a person who has already stayed for 90 days in a 180-day period.

As the Visa Code does not specify what data are to be transmitted and how, ‘best practices’ and a form to be used have been drawn up in accordance with the provisions of Article 51 as an amendment of the Visa Code Handbook. Despite the fact that information on issued visas is stored in the VIS, it will always be necessary to actively inform the central authorities of other Member States about individual cases. Once VISMail becomes operational, it will be easier to share information (Article 16(3) of the VIS Regulation), i.e. only the application number will have to be transmitted.

As mentioned in paragraph (25), the issuing of an LTV can be the solution if a person has legitimate reasons for staying longer than 90 days in a 180-day period without wishing to reside in a Member State. The Commission is aware that some Member States have used this possibility to cover the particular needs of live performing artists, (see chapter 2.1.9), but such practices are not legally sound.

(27) Article 27 and Annex VII set out rules on **filling in the visa sticker**. These provisions were generally taken over from the previous legislation, but new provisions were added in the Annex, particularly regarding the ‘COMMENTS’ section of the visa sticker (Annex VI, point 9). One of the mandatory entries is ‘TRANSIT’ to be added when a visa is issued for the purpose of transit, but given that Schengen visas are not purpose-bound, this seems superfluous.

Whereas the entire Annex covers mandatory rules, point 9 b) allows Member States to enter ‘national comments’ which should not overlap with the mandatory ones. Many Member States have nevertheless notified overlapping ‘national’ comments. Some have notified an excessive number of comments, often in the form of codes, which refer to details on the purpose of stay, national legislation or intended border crossing point.

Some of the comments are incomprehensible for the visa holder and not explained to them, e.g. codes such as ‘BNL 12’ ‘BNL 13’ or ‘C/VB/99/--’<sup>29</sup>, and border control and law enforcement authorities do not necessarily have the translation (or explanation of codes) of the relevant annex to the Visa Code Handbook at hand. Moreover, codes/comments that may

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<sup>29</sup> BNL 12: visa issued for "professional purposes"; BNL 13: visa issued for "business purposes"; C/VB/99/--: " single-entry visa for up to 90 days – other".

signify a ‘limitation’ of purpose go against the fundamental principle that short-stay visas, particularly visas allowing multiple entries, are not purpose-bound.

Member States have claimed that such comments are necessary to facilitate border control, but the added value is questionable. Additionally, border control authorities now have access to information on the visa application that has been entered into the VIS, so such national comments seem obsolete and irrelevant.

(28) Member States generally omit to inform visa applicants about the difference between period of allowed stay and period of validity of the visa and the significance of the entries on the visa sticker. In the public consultation, 74 % of respondents said they had not received such information.

The entries on the visa sticker must always be printed, but in cases of ‘*technical force majeure*’, the visa sticker may be filled in manually. Judging by the notifications on manually filled in visa stickers, such ‘technical force majeure’ occurs regularly. Rather than filling in visa stickers manually in such cases, Member States should ensure that sufficient backup equipment is available to overcome technical problems immediately or to seek technical support from other Member States in the same location.

(29) The VIS is progressively rolled out, region by region, in the order defined by the Commission. This means that the collection of applicants’ fingerprints also becomes mandatory progressively. However, Member States may start storing (and consulting) data in the VIS ahead of the general planning in any location, with or without collecting fingerprints.

This means that until the VIS is rolled out worldwide, different situations regarding the storage of data on visa applications will co-exist. For some applications, all data, including fingerprints, are stored in the VIS; for others, only alphanumeric data and the digital photograph are stored in the VIS; for others still, no data are as yet stored in the VIS.

To facilitate controls at external borders until the full roll-out, Annex VII to the Visa Code was amended<sup>30</sup> to establish specific codes to be printed on the visa sticker to show whether the visa holder’s data had been registered in the VIS and whether his/her fingerprints had also been stored.

(30) A specific article has been dedicated (Article 30) to restating the basic and essential principle that possession of a visa does not confer any automatic right of entry. Possession merely allows the holder to present him/herself at the external borders so that they are aware that border control authorities can check that entry conditions are fulfilled at that time.

Although Member States are, under Article 47(1)(i) of the Visa Code, obliged to inform visa applicants of this, some Member States have reported that up to 30 % of all refusals of entry were caused by third country nationals’ lack of knowledge of entry conditions. To ensure that visa holders are aware of these, a harmonised ‘leaflet’ informing holders of the rights derived from an issued visa has been drawn up in accordance with the provisions of Article 51 and will be integrated into the Visa Code Handbook.

(31) The innovating provisions on **mandatory motivation (giving reasons) and notification of refusal/revocation and annulment of a visa and the right of appeal** of such decisions became applicable one year after the start of application of the Visa Code. By that date (5 April 2011), all Member States had established procedures for the appeals procedure. The reason for the staggered implementation was that several Member States needed a transitional

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<sup>30</sup> Commission Regulation (EU) No 977/2011 of 3 October 2011, OJ L 258, 4.10.11, p 3. .

period to prepare the legal set-up for such procedures. In reality, a number of Member States that already offered such a legal remedy under national legislation started implementing these provisions of the Visa Code immediately.

Articles 32(3), 34(7) and 35(7) establish the obligation for Member States to provide a **right of appeal** against a visa refusal/annulment/revocation. Following a horizontal analysis of Member States' legal implementation of this obligation, some Member States appeared not to provide access to a judicial body for an appeal against a visa refusal/annulment/revocation. The appeal was only possible at an administrative body, which in some occasions was the same authority (i.e. the consulate) that issued the decision to refuse/revoke/annul the visa. Some Member States had also established problematic short deadlines or very high fees to lodge these appeals. The Commission addressed eight Member States through the EU pilot platform in August 2012. Some of the Member States reacted positively and have amended their national legislation in accordance with the Commission's arguments. However, several Member States rejected the Commission's position, arguing that the Visa Code left the organisation of the appeals procedures against visa decisions to the national legislator. The first steps towards formal infringement procedures against these Member States started in 2013.

The Commission does not collect data on the number of appeals lodged against negative decisions on visa applications or on their outcome, but ad hoc surveys show that the numbers vary among Member States and the visa applicants' country of origin. Therefore, comprehensive data on the administrative burden that this provision has entailed for Member States is not available. However, based on the limited information collected by the European Agency for Fundamental Rights, the number of appeals against negative decisions is very low and the original decision is rarely reversed<sup>31</sup>.

From the figures that are available, it is clear that not all visa refusals lead to an appeal. A visa applicant may, indeed, consider that it is more appropriate to lodge a new visa application than to lodge an appeal. The grounds for refusal are probably an important factor in this regard. If the refusal is based e.g. on insufficient proof of means of subsistence, an applicant may consider lodging a new application accompanied by more convincing proof that he/she possesses sufficient means of subsistence (e.g. a new sponsorship). If the refusal is based on doubts about the 'will to return', the applicant may be motivated to appeal against the refusal to avoid any negative impact on subsequent visa applications even if, according Art. 21 (9) of the Visa Code, *'a previous visa refusal shall not lead to an automatic refusal of a new application. A new application shall be assessed on the basis of all available information.'*

Annex VI contains the standard form for notifying and motivating (explaining) refusal, revocation and annulment of visas. The form matches the standard form for refusing entry at the external border and is based on the entry conditions. Although the form allows Member States to add more explanation, rather than just ticking one of the boxes for standard grounds for refusal, that is rarely done. Generally, the form is seen as offering insufficient motivation (explanation) of the refusal (75% of the respondents in the public consultation whose

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<sup>31</sup>Examples:

Belgium: Total number of refusals 37 362 — appeals:300; decision reversed: 2

Hungary: Total number of refusals 7 157 — appeals:341; decision reversed: 58

The Netherlands: Total number of refusals 29 912 — appeals: 463; decision reversed: 39

Slovenia: Total number of refusals 1 769 — appeals:1; decision reversed: 0

<http://fra.europa.eu/en/publication/2013/fundamental-rights-challenges-and-achievements-2012>.

application had been refused stated that they had not received sufficient information about the possibility and time limits for appealing against refusal of a visa).

Data are not collected on the grounds for refusal, revocation or annulment (contrary to what is the case for refusals of entry, for which data are collected on the reasons for refusal of entry and the nationality of the persons refused entry (Schengen Borders Code, Article 13).

#### 2.1.1.7. Management of visa sections

(32) The content of Article 37 on the organisation of visa sections has mainly been taken over from the previous legislation. Given the initial ‘disclaimer’ that Member States shall be responsible for organising the visa sections of their consulates, it provides rather general guidelines instead of precise and enforceable legal requirements. Certain provisions regarding archiving appear outdated.

(33) Article 38 corresponds to Article 14 of the Schengen Borders Code and refers both to deployment and training of staff and functional and security standards of premises. Like the previous article, these provisions are rather general guidelines instead of enforceable legislation. Based on information gathered in local Schengen cooperation, it appears there is room for improvement on training. Judging by the Member States’ capacity referred to earlier, and given the steady rise in the number of visa applications combined with budget cuts, it would seem that in a number of locations, staff are not available in ‘sufficient numbers’. However, many Member States seek to solve that problem by temporary posting of staff during peak season and/or outsourcing the collection of visa applications to an ESP.

(34) The objective of Article 39 is to ensure that staff of Member States’ diplomatic missions and consular posts respect the European Charter of Fundamental Rights when dealing with visa applicants by treating them courteously, in respect of human dignity and without discrimination. Nevertheless, the Commission regularly receives complaints about treatment by consular staff. A third of respondents in the public consultation rated consular staff as ‘not friendly’.

#### 2.1.1.8. Visas applied for and issued at the external borders

(35) Generally, visas are to be applied for before the person concerned travels, at the consulate of the competent Member State (cf. Article 4(1) of the Visa Code) to ensure that applications are properly examined. There may, however, be situations where a person has to apply for a visa at the external borders and therefore a legal framework for this situation was drawn up in 2003. These provisions were largely carried over in the Visa Code. Article 35 covers the general provisions on the issuing of visas at the borders and Article 36 and Annex IX cover provisions concerning seafarers (in particular the ‘form for seafarers in transit’). The current rules were generally carried over from the previous legislation, but it has been emphasised that visas can only exceptionally be applied for at the external borders. This seems to have led to a restriction in offering this possibility only to specific categories of persons who, due to the nature of their profession, are often compelled to apply for visas at the external borders, e.g. seafarers.

As regards the specific category of seafarers, their particular work situation makes it virtually impossible for them to comply with certain provisions of the Visa Code, e.g. applying for a visa no earlier than three months before intended travel. Often, the seafarer will be at sea at this point and unable to apply for a visa before reaching the harbour of a Member State. Lodging an application in person at a consulate can be impossible if the person concerned comes from a remote location or if there is an urgent need to change vital crew. As for the

issue of ‘competent Member State’, for certain types of shipping, the port(s) of destination/call are not always known in advance. The shipping and cruise industries have reported major expenses linked to administration and staff travel (to match visa requirements), rerouting of vessels to countries either outside the Schengen area or to Schengen States considered the most ‘flexible’ in terms of issuing visas at the border.

Many of the specific problems facing seafarers could be solved by the systematic issuing of a two-entry visa valid for 12 months as a minimum. This would also reduce the number of applications lodged at the external borders. Guidelines to this effect were already drawn up in 2003 in the Visa Working Party and have now been added in the Visa Code Handbook.

Annex IX, Part I, covers ‘rules for issuing visas at the border to seafarers in transit subject to visa requirements’. Rather than legal provisions, this part of the annex contains guidelines regarding the exchange of information between Member States’ authorities under three different situations of transit: ‘signing on a vessel, leaving service from a vessel and transferring from a vessel to another vessel.’ Additionally, the ‘guidelines’ contain a general reference to the rules of stamping of travel documents, set out in the Schengen Borders Code.

Annex IX, Part 2, establishes a 1-page ‘form for seafarers in transit who are subject to visa requirements’ and contains a two-page explanation on how to fill in the form. The purpose of this form is to provide information on the seafarer, the vessel and the shipping agent. Additionally, the seafarer’s personal data are to be given (also covered by the mandatory visa application form) and information on the purpose of entry. Only one problem with the use of this form has been signalled by the industry: the reference to the ‘seaman’s book’. As a general rule, only maritime staff hold a seaman’s book, whereas hotel and hospitality staff (80% of staff in the cruise industry) do not.

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| It would seem appropriate to consider a revision of Annex XI. |
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Despite the legal requirement for Member States to submit data to the Commission on the issuing of visas in all ‘locations’ (including at border crossing points), some Member States claim that they are not obliged to provide such data. This is a matter of concern, not least as regards the secure handling of blank visa stickers. According to available data, approximately 107 000 visas were applied for at the external borders in 2011 and about 1 % were refused.

#### *2.1.2. Information to the general public*

(36) It is essential that applicants be well informed of the criteria and procedures for applying for a visa, given recent developments, where call centres, appointment systems and outsourcing have been introduced. It is in the interests of visa applicants to know precisely what is required for submitting an application. Member States too need to ensure that all relevant information and documentation is available to enable applications to be properly assessed.

Article 47 lists all the aspects to be covered (e.g. criteria, conditions and procedures for applying for a visa, accredited commercial intermediaries, deadlines for examining a visa application).

Within local Schengen cooperation, common information sheets have been drawn up in some locations, whereas in others, work is in progress on these. In some locations, the view is that, although mandatory under Article 48, work on such information sheets is superfluous as Member States already provide the appropriate information.

The assessment of websites showed that about 70 % of the sites offered ‘average’ or ‘poor’ information in comparison with the provisions of the Visa Code (Article 47)., This is mainly because information is not comprehensive and the ‘Schengen’ aspect of the visa is not always described. Applicants may get the impression that conditions and procedures for applying for a visa differ from Member State to Member State. Respondents (applicants and experts) said that it was not always obvious where to find the relevant website, because of the lack of overview on the consulates and their representations. Feedback also highlights the lack of consistency and completeness of information. Among those who looked for information on the Internet, 60 % of the respondents found that the procedure was explained clearly and 25 % found that the information was fairly helpful, but needed to be completed by details from the consulate or personal contacts that had already gone through the application procedure themselves.

In the public consultation, 35 % of respondents rated getting access to information as difficult or very difficult.

(37) According to Article 53, Member States are to notify a number of items to the Commission. The Commission publishes the compilation of this information on its website and also shares it with Member States on a common electronic platform.

Recital (23) of the Visa Code establishes that: ‘A common Schengen visa internet site is to be established to improve the visibility and a uniform image of the common visa policy. Such a site will serve as a means to provide the general public with all relevant information in relation to the application for a visa.’ In 2012-2013, a study was carried out on the availability, completeness and consistency of information on the Schengen visa on the Internet, primarily on Member States’ websites (at central level or at consulate level).

A second phase of the above study has been launched to identify best practices and recommendations for establishing a common Schengen visa Internet site, or for improving existing EU and national websites.

#### *2.1.3. Common operational instructions*

Article 51 of the Visa Code establishes that ‘operational instructions on the practical application of [the] Regulation’ are to be drawn up by means of implementing acts. These operational instructions have been gathered in two Handbooks. The objective of the Handbooks is to draw up one set of instructions to ensure consistent implementation of common legal provisions. The Handbooks neither create any legally binding obligations on Member States, nor do they establish any new rights and obligations for persons who might be concerned by them. Only the legal acts on which the Handbooks are based or refer to have legally binding effects and can be invoked before a national jurisdiction.

(38) The ‘Handbook for the processing of visa applications and the modification of issued visas’, addressed to Member States’ consular staff, was drawn up in close cooperation with Member States in the Visa Committee (established by the Visa Code) and became applicable simultaneously with the Visa Code. In the light of early experience in the application of the Visa Code, the Handbook was amended in 2011 to ensure that it remained a useful tool. A second amendment is under preparation and should be adopted in autumn 2013. To ensure that Member States’ operational staff have all relevant information at hand, there are 28 annexes to this Visa Code Handbook: the annexes to the Visa Code, compilations of various Member States’ notifications (cf. Article 53) and relevant annexes from the Schengen Borders Code Manual.

(39) A separate ‘Handbook for the organisation of visa sections and local Schengen cooperation’, mainly addressed to Member States’ central authorities, was adopted just after the start of implementation of the Visa Code. Unlike the handbook mentioned above, this set of operational instructions largely reproduces the legal provisions of the Visa Code, because given the relatively vague formulations of the legal provisions, e.g. ‘Member States shall deploy appropriate staff in sufficient numbers’ (Article 38(1)) and Member States’ competence regarding the organisation of visa sections, it was difficult to draw up common guidelines.

#### *2.1.4. Consular cooperation and consular coverage*

The progressive roll-out of the VIS will require visa applicants to present themselves in person, at least for their first application. To allow pooling of resources of Member States and to avoid excessive burden and costs for visa applicants, the Visa Code set up a legal framework of alternative ways of cooperation among Member States to ensure a consular presence for the lodging of visa applications in applicants’ places of residence.

(40) According to Article 40(1), ‘each Member State shall be responsible for organising procedures relating to applications’ and that ‘in principle, applications shall be lodged at a consulate of a Member State’. The common visa policy is applied by 26 Member States whose consular networks differ greatly, as do the numbers of visa applicants. To ensure that visa applicants can apply where they reside (as provided by Article 7), to ease the effects of some Member States’ limited consular network, and to allow Member States not to maintain visa processing consular posts in locations where the number of visa applications is low, the Visa Code contains a number of articles allowing for different types of representation, cooperation and organisation to enlarge ‘consular coverage’.

(41) **Representation** arrangements between Member States are the ‘classic’ means of cooperation and of enlarging consular coverage. Article 8 generally carried over the existing rules. However, efforts were made to restructure the provisions to make them clearer (e.g. basic requirements of bilateral representation arrangements) and specific rules have been added, ensuring that applicants and other Member States both locally and centrally are informed in good time about the entry into force or termination of agreements on representation.

Generally, and in line with the basic principle of mutual confidence on which the common visa policy is built, representation arrangements are to cover the entire visa handling process. But the Visa Code also allows for ‘**limited representation**’ for the sole purpose of collecting applications and biometric data. The reasoning behind this was that Member States could save costs in connection with the roll-out of the VIS, by having another Member State collect applications and biometric data from applicants on their behalf, while the examination itself would be carried out by the Member States with ‘limited representation’. To date, according to the information at the disposal of the Commission, this possibility has never been used because the practical and technical challenges outweigh the added value.

Previously, there were no clear rules on how to handle cases where a representing Member State envisaged taking a negative decision on an application. Often, the visa applicant was simply asked to resubmit the application to the nearest consular office of the represented Member State. The intention of Article 8(2) was to avoid putting the burden on the applicant in such cases by having the two Member States concerned exchange the application file. However, acknowledging that such transmission is costly, cumbersome and time consuming and, to be coherent with the mandatory provisions on refusal of a visa (including regarding

the legal responsibility for appeals), Article 8 provides that a representation arrangement may stipulate that representation also covers refusals.

In the 2005 proposal for the Visa Code, the Commission proposed clarifying (contrary to what was previously the case) that it would always be the representing Member State that would carry out ‘prior consultation’ under Article 22, and the previous rules on ‘prior consultation’ of a represented Member State were abolished. Article 8(4)(c), nevertheless, contains unclear rules mixing up the two issues. This has given rise to recurrent technical problems with the exchange of data for prior consultation, but also created obstacles for the conclusion of representation arrangements, to the detriment of visa applicants.

Article 8(5) allows a represented Member State to offer ‘*premises, staff and payment*’ to the representing Member State. No data on the application of this possibility are available, and it is assumed that it has never been applied, most likely because of technical and administrative obstacles.

Complete data on the number of visa applications lodged under representation arrangements are not available. Based on data collected ad hoc (in the exchanges of statistics in local Schengen cooperation and upon specific request), it seems that the number of visas applied for in representation is generally<sup>32</sup> low in a specific location. This contrasts with the considerable added value of facilitation for visa applicants, especially for the ‘image’ of the common visa policy when all Member States are represented in a given location. Member States have indicated that one of the main reasons for refusing to represent others is lack of resources. That said, some Member States already represent all or most others in a number of locations.

It could therefore be considered whether the availability of EU funding for representation arrangements could be a way to promote the effectiveness of these provisions.

Article 8(5) and (6) cover ‘soft law’ provisions encouraging Member States to conclude formal representation arrangements or to ensure ‘ad hoc’ arrangements to enable applicants to apply in their place of residence. However, the non-mandatory character of these provisions renders them ineffective and inconsistent with the requirements for applicants to apply in their place of residence.

However, 8.3% of respondents in the public consultation on the implementation of the Visa Code said they had not been able to apply for a visa where they live because the competent Member State was neither present nor represented there.

Overall, the system of (full) representation works well and the number of representation arrangements has been steadily growing. However, the requirements referred to in point (20), i.e. the represented Member State wanting to be consulted or to take negative decisions, preventing the representing Member States from taking sole responsibility for full processing, render the system inefficient and are inconsistent with a common visa policy. To date, there are about 900 ‘blank spots’ in the table of consular presence/representation, where Member States are neither present nor represented. Only in approximately 20 locations worldwide is full presence/representation ensured.

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<sup>32</sup> Example: France is the Member State that represents the most: by May 2013, France represented 23 other Member States in various locations which amounted to a total of 436 representations arrangements covering 81 consular posts. Number of visas issued under these representation arrangements was: 27 144 visas (2010), 32 795 (2011) and 44 991 (2012). In comparison, France issued in total 2 104 760 visas in 2012.

(42) Recital (13) reads as follows: ‘In order to facilitate the procedure, several forms of cooperation should be envisaged’. Article 40 provides a legal framework for various organisational options, which rather than being ‘forms of cooperation’, cover means of ensuring consular coverage, mainly for the purpose of collecting visa applications (and biometric data). This article is not a precise legal, enforceable provision, but is intended as a ‘scene setter’ for different forms of cooperation in order of priority. It also sets the criteria for the last resort option, i.e. outsourcing, to be used only when other possibilities ‘prove not to be appropriate.’ The following three articles set out the details of different types of organisation.

Article 40 defines **co-location** (consular staff of several Member States sharing the consular premises of one Member State). No information on co-location has been communicated to the Commission. It can be assumed that from a practical and technical point of view, setting up such cooperation is cumbersome and not worthwhile if the purpose is only to collect applications, while maintaining consular premises fully equipped to examine visa applications, which includes connection to central databases. The costs potentially saved by sharing facilities to receive applicants and equipment to collect biometric data are likely to be spent on additional costs linked to transferral of data, files and staff from the ‘co-location’ to the ‘back office’.

The article also defines Common Application Centres (CACs). These provisions are hardly used by Member States. To date a fully-fledged CAC has not materialised, though, for the same reasons as those mentioned regarding challenges of co-location, millions of euros have been made available for developing consular cooperation projects, in particular CACs, under the Community Actions of the External Borders Fund. Only two such projects have been funded: the ‘Schengen House’ in Kinshasa, Democratic Republic of Congo and the ‘Centro Comum de Vistos’ in Praia, Cape Verde. These operate on the basis of classical representation arrangements: not only are applications lodged at the centre, but examination and decisions also take place there, by the Belgian and the Portuguese consulates respectively.

One of the main reasons for the limited use of such options is the fact that Member States consider representation arrangements and outsourcing as the cheapest and easiest form of cooperation. In addition, Member States claim that co-location and CAC as defined in Article 41 of the Visa Code do not provide the necessary flexibility for establishing operational structures on the spot.

According to the definition, the CAC, for instance, is a form of cooperation where staff of the consulates of two or more Member States are pooled in one building (other than their own) to enable applicants to lodge visa applications there. As the name suggests, a Common Application Centre is ‘just’ an application centre. Decisions on applications should be made by the consulates of the respective Member States.

Practice shows that it is much easier to have another Member State carry out the entire procedure (full representation) than just a part of it. In the case of a CAC, the secure and speedy transfer of application files from that centre to the decision-making consulate should be ensured. This takes time and money, and requires personnel. Moreover, the definition implies that the building to be used should not be the consulate of one of the participating Member States (otherwise, in legal terms, the project should be considered as co-location).

Finally, the definition also requires that project partners should deploy their own consular staff to the CAC, something that Member States will not do unless there are enough of ‘their own’ visa applications to process.

It should also be borne in mind that setting up co-location or a CAC would not necessarily lead to increasing consular presence, as both (particularly co-location) presuppose that one Member State is already present in the location and the existing cooperation structures labelled as ‘CACs’ have all been established in the capitals of the countries concerned. They have, however, led to better reception facilities for applicants and provide good visibility for the EU and its common visa policy.

It could be considered whether a more flexible framework would enable the most appropriate cooperation structures to be established in the light of local circumstances.

(43) Under the Visa Code (Article 42), it became possible for Member States to authorise **honorary consuls** to collect visa applications and biometric data to enhance consular presence. To date only five Member States<sup>33</sup> have authorised some of their honorary consuls to collect visa applications, often in third countries whose nationals are not subject to the visa requirement. Some Member States have authorised honorary consuls to collect applications in locations where these Member States are also represented by another Member State (in one case, only for certain categories of visa applicants).

Based on information collected from Member States, honorary consuls will only exceptionally be authorised to collect fingerprints, which could put the ‘one-stop’ principle at stake, unless authorisation is withdrawn altogether, which would be detrimental to visa applicants.

(44) **Outsourcing** of parts of the visa handling process had started before the implementation of the Visa Code, but the Code sets out a clear legal framework on which such cooperation is to be based, also covering the content of the legal instrument (i.e. the contract). Member States should notify the start of such cooperation, as well as the legal instrument, to the Commission. Member States do not systematically do so. Often, information on new instances of outsourcing is discovered ‘by accident’ and contracts are only submitted upon request.

Outsourcing collection of visa applications to private companies, i.e. external service providers, is a relatively new phenomenon. It has been prompted by increasing numbers of visa applicants, inadequate reception facilities at consular premises, redeployment or lack of consular staff and, in some locations, for security reasons.

The use of outsourcing also considerably enlarges the ‘consular’ presence in large countries such as the Russian Federation, as ESPs can open ‘visa offices’/‘drop boxes’ in locations remote from the capital, which is generally the only location in which the competent Member State is present. Although lodging an application at an external service provider means the applicant has to pay a service fee, this is always less costly than travelling long distances to lodge the application. It should also be noted that there have been examples of third country authorities, e.g. in China, that have prevented external service providers from opening offices in locations where no Member State has a consular presence.

(45) According to Article 17(5), Member States using outsourcing must maintain the possibility for applicants to lodge their application directly at the consulate so that no one is forced to pay an extra service fee. The original Commission proposal referred to ‘direct access’ only as an option, but the text eventually adopted was part of the final compromise in negotiations. Its ambiguous formulations (‘maintain the possibility of .... to lodge their

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<sup>33</sup> Italy (97), Austria (75), the Netherlands (27), the Czech Republic (4) and Portugal (2). The figures in (..) refer to number of locations and are based on data available in June 2013.

application directly') make it difficult to enforce this provision. Bearing in mind that the main reason for using outsourcing is a Member State's lack of resources and reception facilities to receive applicants in high numbers or for security reasons, the requirement on maintaining access to the consulate can be seen as an impossible burden for Member States. To ensure that emergency cases are treated promptly, priority access to the external service provider should be the general rule.

The 'direct access' is often — except for cases of extreme urgency — more a theoretical possibility than a real one, e.g. a service provider collects visa applications for a Member State in Belarus, the applications are transferred to the Member State's consulate in Moscow, where direct access for Belarus applicants is 'ensured', or access to the consulate is only possible during limited opening hours and requires an appointment.

The Commission has received numerous complaints about Member States' violation of this provision, and has therefore conducted an investigation of their practices. It turned out that in some cases, there was no 'direct access' to lodge applications directly at the Member State's consulate. The only option was to lodge them at the external service provider.

(46) As mentioned above, outsourcing should be used as the last resort, but in reality, it is the preferred option. Article 43 states that 'Member States shall endeavour to cooperate with an external service provider together with one or more Member States'. This has proved unrealistic in practice, because Member States have to launch individual calls for tender according to national public procurement rules. Although most Member States have signed contracts with the same (few) service providers operating in this field, all have drawn up individual — and in some cases — global contracts.

This situation could be a source of concern. Though the major companies tend to standardise information given to the public, which could be seen as an asset in terms of the image of the common visa policy (and 'common application centres'), it can also lead to the lack of precise, up-to-date information.

The Commission has received complaints about the lack of access to information or of direct access to consular staff when outsourcing is used. In the public consultation, respondents complained that the employees of visa application centres were poorly informed and that they refused to accept applications for multiple entry visas. Some respondents complained that the services provided at the centres did not justify their high charges as, for instance, staff did not take responsibility for the safety of the passports with which they were entrusted.

Article 43 sets out the tasks that can be carried out by an external service provider and Annex X sets out the requirements of the contracts to be drawn up. Member States are supposed to submit copies of such contracts to the Commission. Generally, the contracts submitted comply with the provisions of Annex X. However, some Member States have systematically omitted to forward contracts. Some Member States also systematically fail to notify the use of outsourcing.

To date, no examples of fraudulent behaviour nor problems regarding the secure transmission of data on the part of ESPs have been reported to the Commission. The Commission does not have the means to verify the nature and frequency of Member States' monitoring of ESPs to ascertain any possible problems that may have occurred.

2.1.5. *Interaction between the Visa Code and Directive 2004/38 on the free movement of EU citizens<sup>34</sup> and their family members*

(47) Both before and after the entry into force of the Visa Code, the Commission has received numerous complaints and requests for clarification and information on the procedural visa facilitations that apply to family members of EU citizens.

According to Article 5(2) of Directive 2004/38 of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States<sup>35</sup>, *'family members who are not nationals of a Member State shall only be required to have an entry visa in accordance with Regulation (EC) No 539/2001 or, where appropriate, with national law. ... Member States shall grant such persons every facility to obtain the necessary visas. Such visas shall be issued free of charge as soon as possible and on the basis of an accelerated procedure.'*

The provisions of the Visa Code apply to all third-country nationals who require a visa pursuant to Regulation 539/2001 *without prejudice* to the right of free movement enjoyed by third-country nationals who are family members of EU citizens (Article 1(2)(a) of the Visa Code) and of EEA and Swiss citizens (Article 1(2)(b)).

Thus, as a rule, the Visa Code applies to visa applications (to be) lodged by family members of EU citizens, but without affecting the visa facilitations provided by the Directive which apply as a *lex specialis*.

The Visa Code does not contain many other specific provisions taking account of the Directive and settling explicitly the relationship between the general Visa Code rules and the regime applicable to family members of EU citizens.

One of the exceptions is Annex I on the harmonised visa application form. This gives family members of EU, EEA or CH citizens an exemption from having to fill in specified fields while exercising their right to free movement, as requiring that data — e.g. on the purpose of travel and the means of subsistence — would be incompatible with the Directive. Nevertheless, certain Member States seem to ask family members to fill in these fields in view of entering the data in the VIS.

(48) A specific chapter (Part III) has been added to the Visa Code Handbook to clarify the relationship between the Visa Code and the Directive, and to explain the particular rules applying to visa applicants who are family members of EU citizens covered by the Directive and family members of Swiss citizens covered by the EC-Switzerland Agreement on Free Movement of Persons.

The first part deals with the fundamental question as to whether the Directive applies to a visa applicant. The applicability of the Directive depends on the reply to three questions:

(1) is there an EU citizen from whom the visa applicant can derive any rights? In other words, is the EU citizen exercising or has he/she exercised his/her right to free movement?

(2) does the visa applicant fall under the definition of 'family member' in the Directive?

(3) does the visa applicant accompany or will they join the EU citizen?

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<sup>34</sup> By virtue of the EEA Agreement, Directive 2004/38/EC applies also in relation to the EEA Member States (*Norway, Iceland and Liechtenstein*). The derogations to the Directive, foreseen in the EEA Agreement, are not relevant for the visa procedure. Consequently, where this part refers to the EU citizen, it must be understood as referring to EEA citizens as well, unless specified otherwise.

<sup>35</sup> OJ L 158 of 30 April 2004, p. 35.

A separate part contains an overview of the specific derogations from the general rules of the Visa Code flowing from the Directive (e.g. with regard to grounds for refusing a visa grounds and the notification and motivation (explanation) for this).

The question of whether the Directive applies to a given family member of an EU citizen is a horizontal issue on which the Commission has already adopted Guidelines<sup>36</sup>. The reply to this question is also of fundamental importance in the area of visa policy:

- if the Directive applies to a family member, the latter has the right to obtain an entry visa; if the Directive does not apply, there is no such right<sup>37</sup>;
- if the Directive applies, the facilitations imposed by the Directive apply. The visa should be issued free of charge, every facility to obtain the visa should be granted, it should be granted promptly on the basis of an accelerated procedure, no supporting documents should be required with regard to the purpose of travel, accommodation, and so forth.
- If the Directive does not apply, the general rules under the Visa Code apply: visa fee, normal procedures and deadlines, submission of supporting documents on the purpose of travel, accommodation, etc..

(49) The Directive only applies to EU citizens who exercise the right of free movement and their family members. Thus it should be stressed that a family member may benefit from this Directive for certain trips (e.g. when joining his/her EU spouse who is spending holidays in a Member State other than that of which they hold the nationality) but not for certain other trips (e.g. when visiting his/her EU spouse residing in the Member State of which that spouse holds the nationality).

The fact that different visa application regimes apply in these two cases leads to great confusion for family members and may lead to visa refusals (e.g. because of non-submission of supporting documents on the purpose of travel and accommodation). In Local Schengen Cooperation in certain jurisdictions (e.g. London), Member States' consulates state that 'Brussels must clarify the rules'.

As can be seen from the above, it is of utmost importance that clear information be made available on this issue to both family members of EU citizens and consular staff.

(50) The facilitations for family members of EU citizens are established in the Directive and must therefore be transposed by each Member State into national law and practices. Whereas the visa fee waiver for family members imposed by the Directive does not leave room for manoeuvre for Member States when transposing into national law, they have flexibility when transposing the other 'facilities' and issuing the visa 'as soon as possible and on the basis of an accelerated procedure'.

It should be stressed that this provision of the Directive dates back to the 1960s<sup>38</sup>, when there was no common EU visa policy. Each Member State had to transpose this provision using its

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<sup>36</sup> See the Communication from the Commission to the EP and the Council on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM(2009) 313 final, of 2.7.2009.

<sup>37</sup> See the Communication in the previous footnote, p. 6 and Case C-503/03 Commission v. Spain (para 42).

<sup>38</sup> See e.g. Council Directive 68/360/EEC on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families (OJ No L 257 of 19.10.1968):

own national visa procedures as a reference point, and as a result, the facilitations still vary from one Member State to another.

However, now that the Schengen States have common visa procedures as defined in the Visa Code, it should be assessed whether it is politically acceptable that today, these facilitations to family members of EU citizens on the basis of the Directive remain un-harmonised for these Member States, compared with the Visa Code, which imposes harmonised procedures.

(51) In its Communication of November 2012<sup>39</sup>, the Commission stressed that ‘*Visa facilitation will not only bring economic benefits but it will also make it easier for EU citizens to be joined by their non-EU family members and travel within the EU.*’ EU citizens will indeed benefit from the overall improvements that the revised Visa Code will provide. Further to this, it should be considered whether harmonisation of facilitations for family members of EU citizens should also be pursued in the Visa Code, for the Member States applying the Visa Code, without, however re-opening and amending the provisions of Directive 2004/38/EC on visa facilitations for family members. The provisions of the Directive remain unchanged. Only the facilitations required under the Directive should now be made concrete with regard to the general provisions of the Visa Code.

(52) Finally, it should be noted that for reasons of legal basis (the Articles of the Treaty regarding the free movement of EU citizens within the territory of the Member States), the Free Movement Directive and its facilitations only apply to family members of EU citizens who are exercising or have exercised their right to free movement. Family members who come to visit or join EU citizens who reside and have always resided in the Member State of their nationality are not covered by the Directive.

Historically, this was considered to be a purely national situation not covered by EC competence. However, to date, the EU has the competence to adopt a common short stay visa policy. As mentioned in paragraph (47), the Visa Code applies to all applicants, including the family members of EU citizens residing in the Member State of their nationality.

Therefore, providing facilitations for the family members of all EU citizens irrespective of their place of residence<sup>40</sup> could be considered.

In this context, it should be noted that in the up-graded Visa Facilitation Agreements with Moldova and Ukraine and in recent Visa Facilitation Agreements with Armenia and Azerbaijan, facilitations are provided for citizens of these countries who come to visit their EU family members residing in the Member State of their nationality.

#### 2.1.6. *Modification of issued visas*

The provisions on annulment, revocation and extension of visas were previously covered in different texts, including the Schengen Borders Code, without a clear distinction between the different issues/purposes/circumstances. These provisions are now covered in two articles.

(53) Article 33 covers the rules on **extension** of the validity of a visa when the visa holder is still present in the ‘Schengen area’ which were clarified (e.g. an extension must always take

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Art. 3 (2): an entry visa may be demanded from non-EU family members but ‘Member States shall accord to such persons every facility for obtaining any necessary visas’; Art. 9 (2): this visa ‘shall be free of charge’.

<sup>39</sup> COM(2012) 649 final.

<sup>40</sup> It should be noted that Article 24 on the issuing of MEVs already refers to ‘family members of citizens of the Union’, in general.

the form of a visa sticker), and completed (e.g. harmonised fee) to ensure consistent practices. There have been no reports of specific problems with the implementation of these provisions, but when drawing up the operational guidelines covering this point, there was difficulty in distinguishing between cases in which the visa should be extended free of charge (*'force majeure or humanitarian reasons'*) and those in which a fee (of EUR 30) is to be charged (*'serious personal reasons'*).

Currently, no data is available as to the number of visas extended per year, nor on the reasons for extension. These items should therefore be added to the requirements on statistics to be notified by Member States to enable proper assessment of the implementation of this provision.

In principle, the territorial validity of an extended visa should remain the same as that for the original visa, e.g. a uniform visa will be extended as a uniform visa. Exceptions to this rule are possible, but given that a visa cannot be extended to go beyond the maximum period of authorised stay (90/180days), extension is not a solution if a person has legitimate reasons for needing to stay longer than 90 days in a 180-day period in the Schengen area, without wishing to reside in a Member State (see chapter 2.1.9).

(54) In Article 34, a clear distinction is made between the different circumstances in which **annulment and revocation** take place<sup>41</sup>. Revocation means that the remaining period of validity of a visa is cancelled when it becomes evident that the conditions for issuing it are no longer met, whereas a visa is annulled when it becomes evident that the conditions for issuing it were not met at the time when it was issued.

Misinterpretation on the part of consulates regarding the implementation of the provisions on revocation have been observed, mainly through numerous questions raised in local Schengen cooperation meetings around the world. Over-extensive use of the provisions on revocation is based on a mixture of lack of understanding of the basic principle of mutual recognition of short-stay visas issued by other Member States, lack of knowledge of the Visa Code Handbook, where guidelines on how to handle a visa application from a person who still holds a valid visa are set out, and finally, visa applicants being insufficiently informed. Member States have argued that visas are sometimes revoked 'because the applicant asked for it'. Such cases may occur, but based on the information collected, the applicant often asks for revocation because of misinformation by a consulate and not, as established in the Visa Code, in situations 'where it becomes evident that the conditions for issuing [the visa] are no longer met.'

The Commission has received numerous complaints, in particular in Joint Committees set up under Visa Facilitation Agreements, about alleged abusive annulments at the external borders of MEVs issued by other Member States, which indicates lack of compliance with the fundamental principle of mutual recognition.

The Schengen Convention (Article 19) establishes one of the fundamental principles on which the common visa policy (and the movement of third country nationals inside the area without internal borders, the 'Schengen area'), is based, namely the mutual recognition of short-stay visas.

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<sup>41</sup> To ensure that all matters pertaining to short stay visa be covered by the Visa Code, the Schengen Borders Code, Annex V, Part A ('Procedures for refusing entry') was amended by repealing the previous text and replacing it by a cross reference to the relevant provisions of the Visa Code. .

The harmonised rules governing the common visa policy (i.e. Regulation 539/2001 establishing the common 'visa lists', the Visa Code establishing the procedures and conditions for issuing short-stay visas and Regulation 1683/95 laying down a uniform format for the visa sticker) allow the Member States that apply the common visa policy in full to mutually recognise short-stay visas issued by other Member States.

The decision to issue a uniform visa is taken by national authorities, taking into account the interests not only of that Member State, but of all Member States which have abolished internal border controls. Therefore, the holder of the uniform visa issued by Member States' consulates is entitled to circulate in the entire Schengen area. As an exception to this rule, a person who does not fulfil the entry conditions may be issued a visa with limited territorial validity allowing for a stay in one or some Member States only.

The principle of mutual recognition is supported by several provisions in the Visa Code, the scope of which is to establish *'the procedures and conditions for issuing visas for transit through or intended stays in the territory of the Member States not exceeding 90 days in any 180 days period.'* (Article 1(1)).

The principle of mutual recognition as explained above also implies that Member States must, in principle, accept that the holder of a uniform visa issued by other Member States presents him/herself at their external border in view of entering in and staying on their territory. The entry conditions should of course be respected, and if a visa holder is unable to explain or prove his/her purpose of stay in a Member State other than which issued the visa, he/she may be refused entry, but Article 34(4) in the Visa Code provides that *'failure of the visa holder to produce, at the border, one or more of the supporting documents [to be submitted when the application is lodged], shall not automatically lead to a decision to annul or revoke the visa'*. Accordingly, the Schengen Borders Manual (point 6.6), states that such refusal of entry should not automatically lead to the annulment of the visa.

When a person holds an MEV, it means that the competent issuing Member State has assessed that he/she fulfils the criteria for being granted this type of visa and holds 'bona fide' status. That should be the prevailing element in the assessment of cases where such persons might wish to enter the Schengen area via a Member State other than which issued the visa. However, if a person holding an MEV issued by Member State (A) uses this visa to travel for the first time to Member State (B), this circumstance could indicate that he/she has obtained the visa on the basis of fraudulent declarations<sup>42</sup>.

If a Member State revokes or annuls a visa issued by another Member State, the latter should be informed of this. The Visa Code does not specify what data are to be transmitted nor how. Therefore, 'best practices' and a form to be used have been drawn up in accordance with the provisions of Article 51. These have been added to the Visa Code Handbook. When the VIS is fully rolled out and information on annulment/revocation is stored in the database, it will still be necessary actively to inform the central authorities of other Member States about individual cases of revocation/annulment. However, once VISMail becomes operational, this sharing of information will become easier (Article 16(3) of the VIS Regulation): only the application number will have to be transmitted.

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<sup>42</sup> Cf. Council doc 10139/13 FRONT 62 VISA 114 COMIX 336.

### 2.1.7. Airport Transit Visa (ATV)

The provisions on airport transit visas, previously covered by an ‘ex-third pillar’ Joint Action<sup>43</sup>, were integrated into the Union legal framework, and the ‘common list’ (now Annex IV) of third countries whose nationals are under the ATV requirement that has been in force since 1996 was maintained.

A number of mandatory exemptions from this requirement were inserted into the body of the legal text to ensure transparency and equal treatment. During the preparation of the Handbook, it was observed that the formulation of two paragraphs of Article 3(5) were unclear and did not correspond to the will of the co-legislators. According to the initial text, holders of visas and residence permits issued by EU Member States not fully applying the Schengen *acquis* (such as the United Kingdom and Ireland) would not be exempted from the ATV requirement. However, holders of visas and residence permits issued by certain third countries, such as the USA and Canada, were exempted from the ATV requirement. Additionally, during the preparation of the Visa Code Handbook, it was also observed that the formulation of Article 3(5)(c) was open to different interpretations.

While drawing up the Handbook, it was sought to remedy the above-mentioned problems via guidelines, but given that the operational instructions of the Handbook cannot create any legally-binding obligations on Member States, it was judged necessary to amend the Visa Code<sup>44</sup> to ensure legal certainty as to its application.

Individual Member States may also impose the ATV requirement on nationals from other third countries in ‘*urgent cases of massive influx of illegal immigrants*’. The Member State concerned is not required to substantiate or prove the ‘urgency’ or ‘massive influx’ and the requirement becomes applicable upon notification. This provision also existed before the Visa Code and the pre-existing requirements were maintained, but an annual ‘review’ mechanism was introduced to prevent national ATV requirements introduced under circumstances of ‘urgency’ remaining permanent without any re-consideration.

The wording of this criterion for adding a new country to national lists appears to be less appropriate for assessing existing ATV requirements, as there could not be such a ‘sudden massive influx’, precisely because of the ATV requirement.

Under the new mechanism (Article 3(3) and (4)), Member States are asked to review maintaining ATV requirements once a year, i.e. to justify a continuing situation of ‘urgency’, to withdraw the requirement for a specific country, or to suggest that a specific country be moved to the ‘common’ list (Annex IV).

The review mechanism has been effective in the sense that third countries have been removed from national lists when the circumstances that led to them being listed have changed<sup>45</sup>. In many cases, Member States have failed to substantiate the need to maintaining a third country on the national list and the Visa Code does not refer to substantiated justification when a new country is added to a national list. This, in combination with the unilateral competence to impose the airport transit visa requirement in the first place, means that the procedure is not transparent, particularly as regards proportionality. Statistical data on the number of ATVs

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<sup>43</sup> Joint Action 96/197/JHA, OJ L 63, 13.3.1996, p. 8.

<sup>44</sup> Regulation (EU) No 154/2012 of the European Parliament and of the Council of 15 February 2012), OJ L 58, 29.2.2012, p 3.

<sup>45</sup> 2011 review: ATV requirement removed in 20 cases, leading to the total removal of 2 third countries.  
2012 review: ATV requirement removed in 1 case.

2013 review: ATV requirement removed in 2 cases, leading to the removal of 1 third country.

applied for/issued<sup>46</sup> are not a means of verifying the relevance of ATV requirements, as it could be argued that low numbers of application for such a visa prove the measure is justified.

In the light of the above, providing for transparency and proportionality as regards the introduction of airport transit requirements by a single Member State could be considered.

The implementation of the option of suggesting that a given third country be added to the common list has not yet been applied. A number of Member States were in favour of adding Syria to the ‘common’ list, but the Commission has found that given the overall situation in Syria, it would not be appropriate to do so<sup>47</sup>. Finally, the review mechanism does not cover a situation in which removing a country from the common list is suggested, i.e. Annex IV. This aspect is covered by the general rules on the amendment of annexes (Article 50).

Under Regulation 539/2001 a Member State may waive the visa requirement for holders of service passports. Under the Visa Code, Article 3(5)(e), the ATV requirement is waived for holders of diplomatic passports. However, it remains unclear whether a Member State that exempts holders of service passports, for instance, from the ATV requirement would be obliged to submit them to the ATV requirement according to the list in Annex IV. As an example, 13 Member States waive the visa requirement for holders of service passports issued by Sri Lanka, but an analogue ATV waiver is not in place. Certain Member States that waive the visa requirement for this category of persons seem to enforce the ATV requirement on the same category.

Under Article 3(5)(b) and (c), the ATV requirement is waived for holders of visas or residence permits issued by five third countries (Andorra, Canada, Japan, San Marino and the United States of America) under the assumption that the right of entry/residence in these countries dispels the risk of irregular migration into the EU, cf. Annex V. There is no evidence indicating that these exemptions pose problems in terms of irregular migration.

#### *2.1.8. Institutional aspects*

In line with the Union legal framework, Article 50 sets out procedures for amending non-essential elements of the Regulation and nine of the 12 Annexes via the regulatory procedure with scrutiny. This procedure has been applied once.

Article 52 provides for the creation of the Committee to assist the Commission, i.e. the Visa Committee and the Committee’s essential mandate is established in Article 51, namely to draw up the ‘operational instructions’ for the application of the Visa Code, i.e. the Visa Code Handbooks (cf. chapter 2.1.3, paragraph (38)).

The Visa Committee has convened regularly over the last three years and has proved a useful forum for addressing issues related to the implementation of the Visa Code.

Additionally, this article establishes the procedures to be applied for the adoption of implementing acts. Originally, two different procedures applied: the ‘regulatory procedure’ and the ‘regulatory procedure with scrutiny’.

These provisions should be amended to take account of Regulation 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and principles

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<sup>46</sup> Total number of ATVs applied for: in 2011: 13 242; in 2012: 13 941.

<sup>47</sup> Joint Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Towards a comprehensive EU approach to the Syrian crisis, JOIN(2013) 22 final.

concerning mechanisms for control by Member States of the Commission's exercise of implementing powers.

As the Visa Code is not covered by the Commission's Proposal for a Regulation of the European Parliament and of the Council adapting a number of legal acts providing for the use of the regulatory procedure with scrutiny to Articles 290 and 291 of the TFEU, this should be dealt with in the proposal for a revision of the Visa Code.

*2.1.9. Lack of visa or other authorisation allowing travellers to stay more than 90 days in any 180-day period in the Schengen area*

The Visa Code covers the procedures and conditions for issuing short-stay visas, allowing the visa holder to stay in the Schengen area for up to 90 days in any 180-day period, in principle.. In the context of the implementation of the Visa Code, the Commission has been confronted with a specific problem related to this 90 day/180 day 'limitation' of stay in the Schengen area.

There are several categories of third-country nationals — both those who are subject to the visa requirements and those who are not — who have legitimate reasons for circulating in the Schengen area for more than 90 days in any 180-day period without being considered as 'immigrants' (i.e. they do not intend to reside in any of the Member States for a period beyond 90 days).

The main characteristic of these travellers is that they 'tour around' Europe/the Schengen area. They intend to stay longer than 90 days (in any 180-day period) in the Schengen area and could therefore in theory not apply for a short-stay uniform visa or travel under a short-stay visa waiver. At the same time, in most cases, these people do not intend to stay for more than 90 days in a single Member State and are thus not eligible for a 'national' long-stay (D) visa, or a residence permit.

In particular, associations and interest groups of live performing artists emphasise that they often experience difficulties in organising tours in Europe due to the 'limitation' of stay described above. In addition, travel agencies and several queries addressed to the Commission show that 'individual' travellers (students, researchers, trainees, young people participating in youth exchanges, artists and culture professionals, pensioners, business people) also often face problems with the limitation of the authorised stay to 90/180 days.

Neither the Visa Code nor any other part of the Union legal framework provide for an authorisation that would cater for these travellers' legitimate needs/itinerary. Until the entry into force of TFEU, it was not possible to envisage an authorisation for stays longer than three months in the overall Schengen area on a short-stay legal basis, since the Treaty itself had an explicit reference to the three-month 'limitation'. Article 62(3) of the Treaty Establishing the European Community referred to *'measures setting out the conditions under which nationals of third countries shall have the freedom to travel within the territory of the Member States during a period of no more than three months'*. In Article 77 of the TFEU, which confers the power on the EU to act on 'short-stay' there is no reference to the three-month limitation and it thus provides a more flexible legal basis on which to act.

The legislative gap between the rules on short stays in the Schengen area and the rules on admission of third-country nationals into individual Member States encourage the use of certain legal instruments not designed for extending an authorised stay in the Schengen area or to address the needs of this category of travellers: some Member States use Article 20 of

the Convention Implementing the Schengen Agreement<sup>48</sup> or issue LTV visas under Article 25(1)(b) of the Visa Code<sup>49</sup>.

Rather than tolerating these practices, introducing harmonised rules by creating a new authorisation for stays longer than 90 days in the Schengen area could be considered.

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<sup>48</sup> *'Aliens not subject to a visa requirement may move freely within the territories of the Contracting Parties for a maximum period of three months during the six months following the date of first entry, [...]. Paragraph 1 shall not affect each Contracting Party's right to extend beyond three months an alien's stay in its territory in exceptional circumstances or in accordance with a bilateral agreement concluded before the entry into force of this Convention.'* OJ L 239, 22.9.2000, p. 19-62.

<sup>49</sup> *'A visa with limited territorial validity shall be issued exceptionally, in the following cases: [...] (b) when for reasons deemed justified by the consulate, a new visa is issued for a stay during the same six-month period to an applicant who, over this six-month period, has already used a uniform visa or a visa with limited territorial validity allowing for a stay of three months.'*