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NOTE

From: Presidency
To: Working Party on Integration, Migration and Expulsion (IMEX Expulsion)
Subject: Presidency discussion paper on effectiveness of the visa leverage (Visa Code Article 25a mechanism)

Delegations will find in annex a discussion paper on the above-mentioned topic for the Integration, Migration and Expulsion (IMEX Expulsion) working party meeting on 16 January 2024.

PRESIDENCY DISCUSSION PAPER ON EFFECTIVENESS OF THE VISA CODE

ARTICLE 25A MECHANISM

Given the increase in irregular border crossings and the pressure on the Member States asylum systems, it is essential and urgent that countries of origin and transit cooperate on the readmission of their nationals. However, good cooperation on readmission with many third countries is a challenge common to all Member States that requires a European solution. To achieve this good cooperation, the European Council has regularly highlighted the need to use the leverages available towards the third countries that do not cooperate sufficiently on readmission. An important step has been taken in this direction with the creation of a link between visa policy and cooperation on readmission, thanks to the new Article 25a in the revised Visa Code, which became applicable from 2 February 2020.

Four years later, and given the repeated calls for optimum use of this tool, it is a good time to take stock of how the Article 25a mechanism has been applied and its actual consequences on readmission cooperation with third countries. Furthermore, on the basis of these observations, it is appropriate to identify the possible improvements to further reinforce the mechanism and its most effective use.

A greater effectiveness of the Article 25a mechanism should lead to a more credible tool and in return, this should increase the numbers of returns of illegally staying third country nationals to the countries of origin and transit. Since this objective will guide the work of the Council during this semester, the Presidency will hold a strategic discussion on the effectiveness of the Article 25a mechanism at the forthcoming Integration, Migration and Expulsion (IMEX Expulsion) Working Party meeting on 16 January 2024.

The effectiveness of the Article 25a mechanism follows from three elements: credibility, strategy and solidarity. Credibility is ensured by various factors that build trust in the Article 25a mechanism among Member States but also as regards third countries. A strategic use of the tool is about timing and opportunity so that the appropriate action is taken at the appropriate moment. It is a search for the right and delicate balance between incentivizing cooperation by giving enough time and space for dialogue and taking restrictive visa measures when no real progress is observed. There is no “one size fits all” solution here. Lastly, resorting to Article 25a mechanism requires Member States to act jointly at different stages of the procedure, in a true spirit of solidarity, which sometimes might mean prioritizing a wider European interest over the national interests.

In the preparation for the forthcoming IMEX Expulsion working party meetings we would like to share several observations stemming from four years of practice on the credibility, strategy and solidarity of Article 25a mechanism that are described below. Some observations may be relevant for more than one of these three elements, but for the easiness of reading, they appear under the most prominent one.

Credibility

Procedure (Data collection and timing)

Given the extensiveness of the information contained in the Commission Article 25a reports (assessments of the level of third country cooperation on readmission), Member States have to provide a large amount of data besides the information already gathered by the Commission with the agencies. To lighten the administrative burden, the questionnaire could adapt the amount of information requested according to the size of the caseload. The key is to find the right balance between the quantity and quality of the information on the one hand, and the administrative burden for the Member States on the other hand. This objective has led the Commission to adapt the data collection method for the fifth Article 25a report, which has recently been launched.

At the JHA Council of December 2022, Member States adopted a timeline in order to streamline the process under Visa Code Article 25a.¹ The goal was to reduce the time gap between the data collection and the Commission's report and to ensure that visa measures would be proposed within a reasonable timeframe. While the Member States should stick to the deadline to provide data, the Commission should do its utmost to issue the report and the proposals as soon as possible. Good progress has already been achieved in this respect.

Opportunity to submit proposals for visa measures

As regards restrictive visa measures, it is commonly accepted that the purpose of the Article 25a mechanism is not to adopt restrictive visa measures *per se* but rather to foster progress in third countries' cooperation on readmission. The power of the mechanism lies in the political message conveyed by the proposals, rather than the measures themselves. The proposals also strengthen the credibility of the steps undertaken by the Commission during the outreach phase. As experience shows, the tabling of proposals increases the probability of the third countries' readiness to engage on readmission and improve their cooperation. Consequently, the Presidency believes that the Commission should issue more proposals with regard to other relevant third countries not yet concerned by the proposals currently on the table.

The Article 25a mechanism allows both to take positive and restrictive visa measures. So far no proposals for positive visa measures have been put forward, given that the third countries identified as possible recipients of such measures already had a more generous visa regime proposed by visa facilitation agreements or were in progress of negotiating visa liberalization.

¹ 15568/22

Selection of third countries targeted by restrictive visa measures proposals

When the Commission selects the third countries with regard to whom proposals should be submitted, it must take into account, notably, the Union's overall relations with those third countries, including in the field of migration. Taking into account the overall relations should be used as a safeguard rather than a blocking element. For this, the right balance between overall relations and cooperation on readmission needs to be found so that the Article 25a mechanism does not become inoperative towards some priority countries.

Follow-up of the evolution of readmission cooperation

Once a report is published, it is now an established practice that Member States identify, among the third countries whose cooperation on readmission is evaluated as unsatisfactory, those that they deem as priority. Practice has also brought out the use of quantitative and qualitative criteria, notably, by the Presidency to help identify those third countries.

Third countries whose cooperation on readmission is evaluated as unsatisfactory based on Article 25a reports, can be categorized in three groups:

- those faced with proposals for restrictive visa measures,
- those not faced with such proposals but identified as priority countries by the Council,
- and those neither faced with such proposals nor identified as priority countries by the Council but whose cooperation on readmission is, however, not satisfactory.

As stressed during different meetings, the evolution of the readmission cooperation of all third countries who do not cooperate satisfactorily should be closely scrutinized. However, the intensity of the monitoring should be tailored to the category they belong to.

Strategy

Importance of the third country national context

As already noted, the “one size fits all” approach is not appropriate when using the Article 25a mechanism. The information given by the European External Action Service (EEAS) and the Commission offers valuable insights on the driving forces at stake, which should be capitalized on. In order for the actions to be relevant and for the decisions to be taken in an enlightened manner, the national context of the third countries in question should continue to be taken into account, *inter alia*, political situation, electoral agenda, upcoming high level meetings.

Preparation and follow-up of the outreach

In the same vein as the previous point, closely involving the Member States in the preparation of the Commission’s visits or meetings with the third countries’ authorities and debriefing them afterwards has proved to be a good practice and should therefore be continued. It also contributes to aligning exchanges at bilateral level with the third country. This enables an appropriate involvement of all relevant actors, proper sharing of information and thus ensures a strategic decision-making.

Working on the basis of deadlines

Lessons learned from the Iraqi case have shown that setting a deadline against which to evaluate whether satisfactory progress in the readmission cooperation has been made, can bear fruits. Following this approach, in case by the end of the set deadline – which has to be clearly communicated to the concerned third country – no significant and concrete progress is observed, the Council then proceeds to the adoption of the restrictive visa measures. This approach, which should be used on a case-by-case basis, enables the EU to put pressure on the third country in transparent and precise way. The choice of such deadlines should wisely be made on the basis of the national context of the concerned third country and of the outcomes of the outreach.

Diversión

Dilatory actions such as delays in the appointment of interlocutors or hindrances to meetings undertaken by third countries faced with a proposal for restrictive visa measures should not be considered as justification for the lack of progress in operational cooperation. The negotiation of a new readmission arrangement or agreement, or prolongation of an existing one, while being a positive step, should be considered as a development of its own taking place in parallel to the expected concrete progress on readmission cooperation on the ground and should not delay the moment where such concrete progress must be observed.

Management of the stock of proposals for restrictive visa measures

After four years of application of the Article 25a mechanism, the question arises of the management of the proposals in the long term, given that some of them might have been on the table for some years without any decision being taken. While withdrawal of the proposals remains a Commission prerogative, it would not be advisable to withdraw automatically a proposal that has not been adopted after a certain number of years. The number of years with no substantial improvement of the cooperation should rather be a decisive element to take into account when considering the possibility to adopt a decision.

Public order and national security

Member States unanimously prioritize the return of third country nationals who pose a security threat. It is therefore of utmost importance that third countries ensure smooth cooperation on identification, issuance of travel documents and readmission, especially of such individuals. The Presidency believes it would be worth exploring how the Article 25a mechanism, including Article 25a report, could contribute to the improvement of the cooperation in this specific area.

Solidarity

Acting as a Team Europe

The Iraqi case has shown that when the EU institutions and the Member States act as a Team Europe, the message brought collectively is more influential and bears concrete results. Joint local demarches are a powerful tool that should be used more frequently.

Member States notification

Article 25a, paragraph 5, of the Visa Code states that “ (...) where, within 12 months [of the yearly assessment], a simple majority of Member States have notified the Commission in accordance with paragraph 3, the Commission, while continuing its efforts to improve the cooperation with the third country concerned, *shall* submit a proposal to the Council (...).” This possibility has never been used so far. However, it offers a solution in cases where the Commission does not submit a proposal although Member States deem that the proposal is necessary in order to foster sufficient cooperation. The activation of this provision would show the solidarity that exists among Member States and would send a strong signal to third countries.

Evolution of readmission cooperation vis-à-vis all Member States

Ensuring that third countries cooperate sufficiently on the readmission of illegally staying third country nationals vis-à-vis all Member States, regardless the caseload they have, is an important element to assess the evolution of the cooperation and the opportunity for possible further action. This principle has already been taken into account in the Article 25a exercises conducted so far, and should be further respected. The third countries should continue to be recalled that improving cooperation towards certain Member States is not considered enough to avoid restrictive visa measures.

Adoption of restrictive visa measures

Lastly, in case outreach did not result in any substantial and sustainable progress on readmission cooperation, the Council should take a coherent and united position, and consequently adopt the restrictive visa measures. The EU interests should be prioritised here. The importance of solidarity between Member States at this stage of the mechanism is a key element to further put the third country under pressure and also to ensure the credibility of the Article 25a mechanism.

At the forthcoming IMEX Expulsion meeting the Presidency would like to invite delegations to reflect and share their views on the following questions:

1. Out of different elements mentioned on credibility, strategy and solidarity of Article 25a mechanism, which are the main areas for improvement? Do you identify other areas for improvement? Which ones should we focus on as a matter of priority? What possible solutions do you envisage?
 2. Do you collect statistics as regards persons ordered to leave who pose a security threat? Do you have any legal or practical limitations in collecting such data and/or sharing them with the third countries? Would it be useful to have such an indicator, which could also be used in the future data collection for Article 25a report? To what extent should this element weigh in the exercise?
 3. What could be done to ensure more solidarity between Member States within Article 25a processes?
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