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## NOTE

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From: Presidency

To: Visa Working Party/Mixed Committee (EU-Iceland/Norway and Switzerland/Liechtenstein)

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Subject: Future of visa policy: internal dimension

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### 1. Introduction

During the last Visa Working Party, the Belgian Presidency launched a discussion with the Member States on the future of visa policy, focusing on the issue of third country nationals **misusing the legal channels of entry** into the Schengen area to lodge an asylum application.

This initial exchange of views highlighted the broad consensus among Member States on the fact that **abuse of visa policy** – whether from nationals from visa-free or visa-required countries – should be **tackled**, including within the context of the **Pact on migration and asylum**. Indeed, reducing migratory pressure will be essential in the years to come for the sustainability of Member States' asylum systems.

The delegations also agreed on the relevance of further pursuing the discussion and identifying possible areas of action. In particular, Member States stressed the importance of making **optimal use of (or even strengthening) existing tools**, such as the visa suspension mechanism, the VIS or the Article 25a leverage. At the same time, it was also quite clear that the focus should be on both **preventing** abuse and developing the Union's capacity to **counter** it.

During the Visa Working Party on 24 April, we will address the **internal dimension** of this question, hence focusing on the Union's tools and legal framework. The informal SCIFA on 15-16 May will then be the opportunity to further reflect on the **external dimension** and how we should approach this issue strategically in our relations with third countries.

While the overall **objective** of this two-track exercise will be to provide the next Commission with concrete guidelines and ideas on how to address this matter in the years to come, the Belgian Presidency strongly believes that effective progress can only be achieved if the **Member States take full ownership of the issue** as well. Consequently, we should also take a close look at measures that could be implemented at the national level or at possible avenues of cooperation between Member States.

2. Make the most of existing tools

a. The Commission annual report on the visa suspension mechanism

While we should not prejudge the outcome of the trilogues, it is already quite clear that once adopted, the revised **visa suspension mechanism** will be one of the Union's most important tools for addressing potential problems with visa-free countries. However, it is also agreed that the mechanism should only be triggered as a last resort and that **prevention of abuse** will be key.

In this respect, the Belgian Presidency proposes to develop a **common approach regarding the Commission's annual report on the visa suspension mechanism** in the Visa Working Party, notably with a view to ensuring greater synergy between the Council and the Commission. While some of these proposals could already be implemented under the current regulation, others will unfold their full potential once the revised mechanism enters into force. The approach would be based on the following principles:

1. Currently, the Commission's report is discussed once a year in the Visa Working Party around the time of its publication. The Belgian Presidency believes this is highly insufficient and that **regular updates/follow-up** discussions should be organized, **at least** once per semester<sup>1</sup>. It would therefore be up to the upcoming Presidencies to ensure that this topic is regularly scheduled. Moreover, ad hoc discussions at the request of one or more Member States should also be possible, if need be.
2. These regular discussions within the Visa Working Party should be the opportunity for Member States to report **problematic or sensitive situations** with visa-free countries. Based on this exchange of information, a list of **priority countries** for which close monitoring is necessary could be established, eventually complemented by a formal request for reporting under article **8d paragraph 2** of the Visa Regulation<sup>2</sup>, as provided for in the Commission's proposal on the revision of the visa suspension mechanism<sup>3</sup>. This could be particularly useful given that the revised suspension mechanism should in all likelihood enshrine the fact that the report will now potentially cover all 61 visa-free countries.
3. Where a particular third country requires closer monitoring, the Member States should be able to provide **guidance** to the Commission for future outreach and awareness-raising actions. It could also be envisaged to involve Member States which have a privileged relationship with the third country concerned.
4. Prior to the report's publication, Member States should also be able to contribute/provide **input to the drafting of specific recommendations** to be drawn up in cases of shortcomings. As mentioned during the examination of the revised suspension mechanism, it is of the utmost importance to ensure that if a problem is identified, very concrete proposals on how to remedy the situation are systematically agreed upon and followed up.

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<sup>1</sup> As agreed under the Finnish Presidency in 2019.

<sup>2</sup> Regulation (EU) 2018/1806.

<sup>3</sup> And provided that the provision remains untouched after the trilogues with the European Parliament.

5. Finally, discussions within the Visa Working Party should also enable Member States to exchange views - **in full transparency and confidentiality** - on potential **notifications** under the suspension mechanism – including the opportunity to collectively notify the Commission in case problems persist after several months with a specific third country, as provided for in Article 8(6) of the current Visa Regulation.

b. The Visa Information System

As widely emphasized during the last Visa Working Party, the absence of statistics regarding the number of persons misusing a visa to enter the Schengen area and then lodge an asylum application is an important issue. Indeed, this prevents us not only from assessing the scale of the phenomenon but also from properly addressing it. However, it should also be stressed that progress in this regard will depend first and foremost on the willingness of Member States to improve VIS checks in the context of asylum applications.

While the interoperability framework combined with the new Eurodac Regulation should allow for a significant improvement in this regard, it does not provide for a (much-needed) short-term solution. Consequently, the Belgian Presidency would like to propose to set up a **collaborative approach between the Member States to work on this issue** in the months to come. Indeed, several delegations mentioned having put in place the necessary statistical tools as well as smooth cooperation between visa and asylum authorities which, combined with the **systematic check of the VIS in the context of asylum**, allow them to have a very complete picture of the situation and to ensure the adequate follow-up.

The Belgian Presidency believes it could be useful to organize either dedicated **workshops** or **joint discussions** within the Visa Working Party that would **bring together asylum and visa authorities** and where these Member States could showcase what they have set up at national level to produce and compile statistics linking visa and asylum. This exchange of “best practices” would provide an insight into the information that can be obtained, its added value in terms of detection of potential abuse and what is required at technical level to achieve these results. Moreover, this would be a great opportunity to anticipate the entry into operation of the future Eurodac to determine already at this stage **what data will be most relevant to compile**.

The collaborative approach should also be extended to the **local Schengen cooperation's**. Member States should ensure to transmit the necessary information to their consulates in order for particular trends to be discussed. This in turn will allow the LSC's to be further strengthened and put to a more strategic use in assessing the migratory and security risks in the respective jurisdiction, as mandated by the Visa Code.

### 3. Innovative solutions: visa fraud and the EU legal framework

As gathered by Europol within the framework of an enquiry on “visa fraud in the EU” back in 2020<sup>4</sup>, **20 Member States/Schengen Associated Countries** reported **visa fraud** as being a **criminal offense** in their legislation. In the Europol survey, “visa fraud” refers to persons giving false statements and/or providing false documents to an authority to obtain an official, genuine document for the purpose of travelling to the European Union/Schengen area. Consequently, visa fraud includes situations where a visa has been obtained for reasons that did not match the actual purpose of the entry into the Schengen area, for example to lodge an asylum application.

For the time being, the **EU legal framework on visas does not provide for provisions regarding prosecution of visa fraud**. As mentioned in the judgment of the European Court of Justice of 10 April 2012 in case C-83/12 PPU, “*the Visa Code governs the conditions for issuing, annulling and revoking visas, but it does not contain any rules laying down criminal penalties for infringement of those conditions*”. The only reference to this notion can be found in the visa application form set out in Annex I to the Visa Code which contains a section informing applicants that any false statements will lead, inter alia, to the annulment of the visa and may render them liable to prosecution.

Consequently, the options available to Member States for sanctioning visa fraud as well as “overstay” (i.e. the person fails to exit in accordance with the issued visa) on the basis of EU law remain limited to **administrative measures** – mainly the *possibility* to issue an “**entry ban**” (together with a return decision), as provided for in Article 11 of the Return Directive. Indeed, persons who are subject to an entry ban may no longer enter or stay in the territory of the Member States and, in principle, **may no longer obtain a Schengen visa for the duration of the entry ban**.

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<sup>4</sup> See Annex to document 12589/20.

As indicated by a number of delegations during the last Visa Working Party, it might be opportune to consider whether **additional measures** should be envisaged within the framework of the Visa Code, drawing in particular on those already provided for in **Article 25a**. The following measures could be considered for visa applicants who previously committed visa fraud or “overstayed”<sup>5</sup>:

- They could be subject to an increased visa fee;
- A mandatory in-person interview could be imposed to assess their intention to leave after the intended stay;
- The deadline to decide on the application could be automatically extended without further justification needed;
- The possibility to issue a multiple-entry visa could be suspended for a certain period; In cases of (serious) visa fraud<sup>6</sup>, provide for the obligation for Member States to issue an entry ban, of which the period would be harmonized.

Even though a revision of the Visa Code may not be foreseen in the short term, the Belgian Presidency believes this issue deserves proper attention and that **no avenue should be overlooked, including the strengthening of the legal framework**.

During the Visa Working Party on 24 April, the Presidency would like to ask the following questions to the delegations:

- *What are the views of the delegations on the proposed common approach regarding the Commission's annual report on the visa suspension mechanism?*
- *Do Member States agree that short-term measures are needed to improve statistical analysis and information sharing with a view to effectively tackling the phenomenon of persons misusing a visa to enter the Schengen area and then lodge an asylum application? In order to strengthen ownership by the Member States, would you consider it useful to exchange best practices in dedicated workshops or joint discussions within the Visa Working party as proposed by the Presidency?*

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<sup>5</sup> Bearing in mind that these measures are listed here by way of example and will have to be further examined with regard to their practical and legal implications.

<sup>6</sup> To be defined

- *Do delegations think it would be opportune for the Commission to consider amending the Visa Code to provide for the possibility to apply individual restrictive measures against third-country nationals who have committed visa fraud or have “overstayed”?*
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