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NOTE

From:	Presidency
To:	COREPER / Mixed Committee at the level of Senior Officials
No. prev. doc.:	9117/16 VISA 155 CODEC 691
No. Cion doc.:	8727/16 VISA 134 CODEC 618 COMIX 347
Subject:	Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (revision of the suspension mechanism) (First reading) – Presidency debriefing on the outcome of the trilogue

I. INTRODUCTION

On 10 May 2016 the Council received a proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (revision of the suspension mechanism)¹.

The aim of this Regulation is to reinforce the current suspension mechanism, which has never been triggered, making it more flexible, and lowering the threshold for action, by making it easier for Member States to notify circumstances leading to a possible suspension and by enabling the Commission to trigger the mechanism on its own initiative.

¹ See 8727/16.

Following the discussions at the Visa Working Party on 11 May 2016, at the JHA Counsellors on 17 May 2016¹, and at COREPER on 18 May 2016, the Council (JHA) reached, on 20 May 2016, a general approach on the text as set out in 9117/16, on the basis of which the Presidency was mandated to start negotiations with the European Parliament (EP).

The LIBE Committee voted its Report on 7 July 2016 and already on 11 July 2016 a first trilogue took place, preceded by a tripartite technical meeting. On 13 July 2016, the JHA Counsellors discussed the outcome of the trilogue, and a further technical meeting with the EP took place on the same day.

The Presidency now needs to prepare for further contacts with the EP with a view to a second trilogue in the beginning of September 2016.

II. OUTSTANDING ISSUES

Delegated acts and implementing acts

For all cases where an act must be adopted in order to trigger the suspension mechanism, the Council follows the Commission proposal, which foresees that implementing acts are to be adopted in accordance with Article 291 TFEU.

However, the EP in its report insists on having recourse to delegated acts as provided for in Article 290 TFEU. At the trilogue, the EP maintained that position very strongly. The EP saw this as a part of a horizontal approach of the EP with respect to delegated acts, and also referred to recent ECJ jurisprudence. The EP argued that only a delegated act would put the EP and the Council on an equal footing, and give the EP influence on the suspension of visa exemptions.

On the other hand, the Council insists on the use of implementing acts, which can only be adopted by the Commission when supported by a qualified majority of Member States (examination procedure). This also avoids the risk of a subsequent rejection by the EP or the Council of the adopted measure, which would be possible when using delegated acts. Furthermore, an implementing act allows for a swift reintroduction of the visa obligation.

¹ See 9025/16.

Possible compromise options that could be explored:

(a) the adoption of delegated acts in the cases triggered pursuant to:

- Article 1a(2) (notifications by one or more¹ Member State(s));
- Article 1a(2a) (information obtained directly by the Commission);
- Article 1a(2b) (in the context of the monitoring by the Commission),

and the adoption of an implementing act in the case of the so-called "emergency brake", i.e., following a notification by at least a simple majority of the Member States (Article 1a(4)).

Regarding the "emergency brake", the EP has suggested that the need to act swiftly could also be met by the adoption of a delegated act in accordance with the urgency procedure provided for in Chapter VI of the Annex to the Interinstitutional Agreement of 13 April 2016². However, this would not avoid the risk of objection to the act, by the EP or the Council, after it has been adopted and implemented.

(b) A two-step approach, consisting in the adoption, in all four cases, of implementing acts for a period of three months. In the event that the problems that originally triggered the suspension mechanism persist beyond this period of three months, the Commission should adopt a delegated act.

¹ But less than a simple majority of Member States. In this case, the procedure provided for in Article 1a(4) should apply.

² Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making of 13 April 2016, OJ L 123, 12.5.2016, p. 1.

Other issues

Fundamental freedoms and human rights

The EP proposed to make several references to the respect of human rights and fundamental freedoms in the text. For the sake of the quality of the legislation, the Council could instead propose a single general reference – to be inserted in Article 1a(2b) and in the corresponding recital –, to Article -1 (minus one) of the Regulation, which makes a specific reference to human rights and fundamental freedoms and covers all the Regulation.

As a last resort

Recalling that the current mechanism has never been applied, probably due its lack of flexibility, the Council supports the Commission proposal, which provides for the deletion of the expression "as a last resort" in Article 1a(1). It is not clear what "last" really means, and when the mechanism ultimately may be triggered. In fact, this would be in contradiction with the objectives of the revision of the suspension mechanism. Furthermore, in paragraph 2, *in fine*, of the same Article, it is foreseen that when the notifications are made, *detailed explanation of the preliminary measures that the Member State concerned has taken with a view to remedying the situation* shall be provided. So, triggering the suspension mechanism would never be a first step.

Nationals instead of countries and terrorist offences

Following the discussions at the JHA Counsellors on 13 July 2016, the Presidency informed EP that the Council could consider the insertion of the word "nationals" in Article 1a(2)(d), as proposed by the EP.

However, in the same paragraph, the EP insisted on not mentioning "terrorist offences". A possible way for a compromise could be maintaining the wording "serious crime", which anyhow would cover terrorism.

"Emergency brake"

The so-called "emergency brake", included in the general approach of the Council, to be activated by a simple majority of Member States, was accepted by the EP during the technical trilogue on 13 July 2016. However, the EP's acceptance is subject to the application of delegated acts, as referred to above.

Applying the "examination" phase only upon a notification by a Member State¹

The Council considered that when the Commission triggers the mechanism on the basis of information it has obtained and transmitted to the EP and the Council (Article 1a(2a)), or in the context of the monitoring exercise (Article 1a(2b)), the Commission will already have studied and processed the information, so that no additional examination phase is necessary. The same applies in case of a notification by a simple majority of Member States ("emergency brake").

The EP would support the Council in the context of the monitoring (Article 1a(2b)) and the "emergency brake" (Article 1a(4)), again subject to adoption of delegated acts, but would not support skipping the examination phase in the case of Article 1a(2a)).

Residence permits

The EP seemed reluctant to accept the residence permits, as an example mentioned in recital (3c). The background for this recital is that applications for residence permits have to be seen as an indicator of illegal stay. Applicants, following refusal of an unfounded asylum application, may apply for a residence permit, which may allow them to prolong their stay in the territory of the EU. This may need to be further clarified to the EP.

Refused entry

Following the debate at the JHA Counsellors on 13 July 2016, the Presidency informed the EP on 13 July 2016, during the technical meeting, that the wording suggested by the EP for Article 1a(2)(a) should be acceptable to the Council.

Whilst not included in the Report voted by the EP on 7 July 2016, during the trilogues, the EP, **based on suggestions made by the Commission**, proposed the following:

(a) Limiting the automaticity of the mechanism

In the cases referred to in Article 1a(2a), the EP considered that the Commission should inform the EP and the Council of its analysis of the situation, and should only proceed further where the Commission considers that the seriousness of the circumstances so justifies.

¹ or less than a simple majority of the Member States, as it would otherwise be covered by the "emergency brake".

b) **Limiting the duration of the monitoring**

The EP considered that the monitoring by the Commission should be limited to eight years following the entry into force of the Regulation.

III. CONCLUSION

In this context, COREPER is invited to take note of the above state of play and, if appropriate, consider certain of the outstanding issues, in particular that of the delegated and implementing acts, with a view to further contacts with the EP.
