



EUROPEAN COMMISSION

Brussels, 30.8.2011
COM(2011) 516 final

2011/0223 (COD)

Proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

**amending Regulation (EC) No 810/2009 of 13 July 2009 establishing a Community Code
on Visas (Visa Code)**

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas¹ became applicable on 5 April 2010. In accordance with Article 51 of the Visa Code operational instructions on the practical application of the provisions of the Regulation have been drawn up by the Commission Decision establishing the Handbook for the processing of visa applications and the modification of issued visas adopted on 19.3.2010².

During the preparation of the Handbook, it has been observed that the formulation of of Article 3 (5) (b) and (c) was unclear:

- (a) in Article 3 (5) (b) relating to the exemption from airport transit visa requirements of holders of residence permits issued by specific countries, the reference to Member States of the European Union which do not take part in the adoption of the present Regulation and to the Member States of the European Union which do not yet apply the provisions of the Schengen acquis in full (currently Bulgaria, Ireland, Cyprus, Romania and United Kingdom) has been omitted;
- (b) in Article 3 (5) (c) relating to the exemption from airport transit visa requirements of holders of visas issued by specific countries, the reference to the Member States of the European Union which do not take part in the adoption of the present Regulation and to the Member States of the European Union which do not yet apply the provisions of the Schengen acquis in full (currently Bulgaria, Ireland, Cyprus, Romania and United Kingdom) has been omitted.
- (c) Additionally, during the preparation of the Handbook, it has been observed that the formulation of the current wording of Article 3 (5) (c) allows for two interpretations, and it should be clarified that holders of visas issued by the Member States of the European Union which do not take part in the adoption of the present Regulation and by the Member States of the European Union which do not yet apply the provisions of the Schengen acquis in full and by specific third countries are exempt from the airport transit requirements when they travel to the visa issuing country or to any other third country and, after having used the visa, when they return from the issuing state (but not when they return from any other third country).
- (d) The reference to states party to the Agreement on the European Economic Area is redundant as the latter are either Member States covered by Article 3 (5) (a) or associated countries to whom Article 3(5)(a) applies via the respective association agreement or protocol..

Before April 2010, the Common Consular Instructions (CCI) and Joint Action 96/197/JHA³, set out the provisions on the third countries whose nationals were subject to the ATV requirement. Those provisions applied to all persons of a given nationality except if they held a residence permit issued by Ireland, the United Kingdom or by certain third states (Canada, USA, Japan etc) as it was assumed that such persons would not present a risk of illegal immigration for the Schengen States.

¹ OJ L 243 of 15.9.09

² C(2010)1620 final

³ OJ L 63 of 13.3.1996, p. 8.

In 2008, certain Member States took the initiative to amend the CCI, Annex 3, to provide that for the same reason also holders of visas issued by certain third states should be exempt from the ATV requirement when the visa holder travelled to the third state (or Ireland or the United Kingdom) that issued the visa or to any other third state. Similarly, the person concerned would be exempt from the ATV requirement when he returned from the visa issuing third state after having used the visa. He would not be exempt when returning from any other third country than the issuing country because given that he no longer holds a visa valid for one of the countries referred to in Article 3 (5) (c), it can no longer be assumed that he does not present a risk of illegal immigration for the Schengen States.

These provisions were to be adopted in the Visa Code, but essential words were omitted in Article 3 (5) (b) and (c) with the effect that the legal situation is unclear.

During the drafting of the Handbook, it was considered to remedy the problem via guidelines that express this intention. As the Handbook cannot create legally binding obligations on Member States, it is necessary to amend the Visa Code to establish legal certainty and a harmonised application of the rules. Such clarification is of practical importance for individual travellers and for airline companies.

The proposal is limited to the technical amendment consisting in clarifying the existing text.

2. RESULTS OF CONSULTATIONS WITH THE INTERESTED PARTIES AND IMPACT ASSESSMENTS

The two aspects covered by the proposal have been discussed in the Visa Committee and in the Visa Working Party and Member States have supported the Commission taking the initiative for a limited amendment of the Visa Code.

3. LEGAL ELEMENTS OF THE PROPOSAL

Article 3 (5) (b) and (c) of the Visa Code should be amended to clarify that:

- third country nationals holding a valid visa or residence permit issued by a Member State not applying the common visa policy in full are to be covered by the ATV exemption;
- the ATV exemption covers the persons holding a valid visa when they travel to the third country that issued the visa, to any other third country, and when having used the visa they return from the third country that issued the visa.

Proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

amending Regulation (EC) No 810/2009 of 13 July 2009 establishing a Community Code on Visas (Visa Code)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 77(2)(a) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national Parliaments,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) It is necessary to clarify the rules on transit through international areas of airports to ensure legal certainty and transparency.
- (2) Third country nationals subject to the airport transit visa requirement under Article 3(1) and (2) of Regulation (EC) No 810/2009 who hold a valid visa issued by a Member State, Canada, Japan or the United States of America or who hold a valid residence permit issued by a Member State, Andorra, Canada, Japan, San Marino or the United States of America are exempted from the airport transit visa requirement. It should be clarified that this exemption also applies to holders of valid visas or residence permits issued by the Member States of the European Union which do not take part in the adoption of the present Regulation and by the Member States of the European Union which do not yet apply the provisions of the Schengen *acquis* in full.
- (3) As regards persons holding a valid visa the exemption should apply when they travel to the issuing country or any other third country and when they return from the issuing country after having used the visa.
- (4) As regards Iceland and Norway, this Regulation constitutes a development of the provisions of the Schengen *acquis* within the meaning of the Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the latters' association with the implementation, application and development of the Schengen

*acquis*⁴, which fall within the area referred to in Article 1, point B of Council Decision 1999/437/EC of 17 May 1999 on certain arrangements for the application of that Agreement⁵.

- (5) As regards Switzerland, this Regulation constitutes a development of the provisions of the Schengen *acquis* within the meaning of the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen *acquis*⁶, which fall within the area referred to in Article 1, point B of Council Decision 1999/437/EC read in conjunction with Article 3 of Council Decision 2008/146/EC⁷.
- (6) As regards Liechtenstein, this Regulation constitutes a development of the provisions of the Schengen *acquis* within the meaning of the Protocol between the European Union, the European Community, the Swiss Confederation and the Principality of Liechtenstein on the accession of the Principality of Liechtenstein to the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen *acquis*, which fall within the area referred to in Article 1, point B of Council Decision 1999/437/EC read in conjunction with Article 3 of Council Decision 2011/350/EC⁸.
- (7) In accordance with Articles 1 and 2 of the Protocol (No 22) on the position of Denmark, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, Denmark is not taking part in the adoption of this Regulation and is not bound by it or subject to its application. Given that this Regulation builds upon the Schengen *acquis*, Denmark shall, in accordance with Article 4 of that Protocol, decide within a period of six months after the Council has decided on this Regulation whether it will implement it in its national law.
- (8) This Regulation constitutes a development of provisions of the Schengen *acquis* in which the United Kingdom does not take part, in accordance with Council Decision 2000/365/EC of 29 May 2000 concerning the request of the United Kingdom of Great Britain and Northern Ireland to take part in some of the provisions of the Schengen *acquis*⁹; the United Kingdom is therefore not taking part in its adoption and is not bound by it or subject to its application.
- (9) This Regulation constitutes a development of provisions of the Schengen *acquis* in which Ireland does not take part, in accordance with Council Decision 2002/192/EC of 28 February 2002 concerning Ireland's request to take part in some of the provisions of the Schengen *acquis*¹⁰; Ireland is therefore not taking part in its adoption and is not bound by it or subject to its application.
- (10) As regards Cyprus, this Regulation constitutes an act building upon or otherwise related to the Schengen *acquis* within the meaning of Article 3(2) of the 2003 Act of Accession.
- (11) This Regulation constitutes an act building upon or otherwise related to the Schengen *acquis* within the meaning of Article 4(2) of the 2005 Act of Accession,

⁴ OJ L 176, 10.7.1999, p. 36.

⁵ OJ L 176, 10.7.1999, p. 31.

⁶ OJ L 53, 27.2.2008, p.52.

⁷ OJ L 53, 27.2.2008, p. 1.

⁸ OJ L 160, 18.6.2011, p. 19.

⁹ OJ L 131, 1.6.2000, p. 43.

¹⁰ OJ L 64, 7.3.2002, p. 20.

HAVE ADOPTED THIS REGULATION:

Article 1

In Article 3 (5) of Regulation (EC) No 810/2009 points (b) and (c) are replaced by the following:

- "(b) third-country nationals holding a valid residence permit issued by a Member State of the European Union which does not take part in the adoption of the present Regulation or by a Member State of the European Union which does not yet apply the provisions of the Schengen acquis in full, or holding one of the valid residence permits listed in Annex V issued by Andorra, Canada, Japan, San Marino or the United States of America guaranteeing the holder's unconditional readmission;
- (c) third country nationals holding a valid visa for a Member State of the European Union which does not take part in the adoption of the present Regulation or for a Member State of the European Union which does not yet apply the provisions of the Schengen acquis in full, Canada, Japan or the United States of America, when travelling to the issuing country or any other third country, or when having used the visa they return from the issuing country;"

Article 2

This Regulation shall enter into force on the [twentieth] day following its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaties.

Done at Brussels,

For the European Parliament
The President

For the Council
The President