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NOTE

From: Presidency
To: Strategic Committee on Immigration, Frontiers and Asylum
Subject: The future of visa policy - revision of the visa suspension mechanism
- Discussion paper

BACKGROUND

The visa suspension mechanism, enshrined in Article 8 of Regulation (EU) 2018/1806¹, was first introduced in EU law in 2013² with the main purpose of enabling a temporary suspension of the visa exemption in the event of a substantial increase in irregular migration. The mechanism was subsequently revised in 2017 in order to strengthen it and to allow the EU to respond quickly and in a more effective manner³.

¹ Regulation (EU) 2018/1806 of the European Parliament and of the Council of 14 November 2018 of the European Parliament and of the Council 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 (codification), OJ L 303, 28.11.2018, p. 39.

² Regulation (EU) No 1289/2013 of the European Parliament and of the Council of 11 December 2013 amending Council 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, OJ L 347, 20.12.2013, p. 74–80

³ Regulation (EU) 2017/371 of the European Parliament and of the Council of 1 March 2017 amending Council 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), OJ L 61, 8.3.2017, p. 1–6.

Since its introduction, the mechanism has been triggered twice (Albania in 2019 and Vanuatu in 2022) and applied only once (Vanuatu), despite several situations where EU Member States had to deal with the negative implications of visa exemption granted to certain third countries.

Against this background, there is a growing consensus among Member States that, as currently regulated, the visa suspension mechanism does not represent a sufficient safeguard against the abuse of visa exemption and that it should be reformed to adequately respond to current and future challenges⁴.

Suspending visa exemption is a cumbersome procedure. Its length and complexity⁵ are, at least partially, justified by the seriousness of the decision to suspend the visa-free regime. It should not be taken lightly, given the political and practical repercussions for the nationals concerned, and it should remain a measure of last resort, to be taken only when other solutions, including political outreach, have failed. Also, it should be performed according to a procedure made up of incremental steps.

That being said, a safeguard which is not working in practice loses its deterrent effect. In addition, the difficulty of meeting the high standards of proof for triggering the suspension mechanism makes any new decision to enlarge the list of visa-free countries more difficult to take. A more efficient suspension mechanism could allow for more regular revisions of the list, in the knowledge that any decision could be reversible in the event of problems for the Schengen area.

⁴ See debate in the Visa Working Party meeting of 20 January 2023 on the basis of the Presidency discussion paper 5210/23.

⁵ The complexity is even more evident when there is also an international agreement between the EU and the third country, which also need to be suspended. This is the case for third countries with which the EU does not have a visa liberalisation dialogue.

A revision of the mechanism could imply lowering the thresholds for triggering it and making reference periods and deadlines shorter so as to allow for a faster procedure and a quicker response to new circumstances.

However, for the purpose of this discussion paper, the focus will stay on the grounds for triggering the mechanism.

a) Asymmetry between the criteria for granting visa exemption and the grounds for suspending it

The grounds for triggering the suspension mechanism, as indicated in Article 8(2) of Regulation (EU) 2018/1806, are the following:

- (a) a substantial increase in refusals of entry of nationals of that third country or in overstayers;
- (b) a substantial increase in the number of asylum applications from nationals of that third country for which the recognition rate is low;
- (c) a decrease in cooperation on readmission;
- (d) an increased risk or imminent threat to the public policy or internal security of Member States, in particular a substantial increase in serious criminal offences.

The recitals of the amending regulation shed more light on how to understand ‘substantial increase’ (exceeding 50%) and ‘low recognition rate’ (around 3 or 4%).

As it can be seen from the list above, the grounds for triggering the mechanism pertain only to migration and internal security.

In contrast thereto, Article 1 of Regulation (EU) 2018/1806, listing, in a non-exhaustive manner, the criteria on the basis of which visa exemption can be granted, is much broader. It mentions illegal immigration, public policy and security, economic benefit, in particular in terms of tourism and foreign trade, and the Union's external relations with relevant third countries, including, in particular, considerations of human rights and fundamental freedoms, as well as the implications of regional coherence and reciprocity.

It is open to debate whether such asymmetry is justified and whether the suspension of the visa exemption should remain linked only to migratory and security problems directly generated by the abuse of visa exemption, or whether it should become a broader tool in EU external relations so as to re-introduce the visa requirement for third countries which have considerably diverged from EU values and political interests. The latter option could be seen as being more in line with the current trend of using visa policy more effectively as a leverage vis-à-vis third countries in different areas. Such an approach is not without risks, including politicising the mechanism and therefore going beyond safeguards.

b) Grounds for triggering the mechanism

Irrespective of the response given to the first question above, experience seems to indicate that, even if limited to migration and security, the current grounds are insufficient to cover all the situations where a third country abuses its visa-free regime. The non-alignment of visa policy of some Western Balkans countries, which recently resulted in a substantial increase in irregular migratory flows towards the Schengen area, is a case in point: not only was visa policy alignment not a requirement under the visa liberalisation dialogues with the EU's neighbouring countries, but the criteria listed in Article 8(2) refer only to nationals of the third country which enjoys the visa-free regime and not to third-country nationals that it lets transit through its territory⁶.

⁶ With one notable exception, in case of non-cooperation on readmission where there is a readmission agreement with a third-country nationals clause.

In the area of internal security, there might also be room for better spelling out the circumstances that could lead to suspension of the visa-free regime, for example the investor citizenship schemes put in place by some third countries and which represent a serious risk for the security of the Schengen area, or document security issues, where domestic legislation allows easy changes in identity, etc.

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In light of the above, delegations are invited to reply to the following questions:

- a) Do delegations see an added value in better matching the criteria for granting visa exemption (Article 1 of Regulation (EU) 2018/1806) and the grounds for suspending it (Article 8(2))?*
- b) Concerning the grounds for triggering the mechanism, do delegations agree with the above suggestions as useful additions to Article 8(2)?*
- c) Would other additions be useful to better equip the EU to respond to the abuse of visa exemption?*
