

How harmonised can visa policy be? The new EC proposals on Schengen visa rules

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‘Europe needs a smarter visa policy. We need to attract more tourists, business people, researchers, students, artists and culture professionals to our shores. Now, we want to boost our economy and create new jobs by underlining the economic dimension in our visa policy, while keeping a high level of security at our borders. Today’s proposals will greatly facilitate the procedures for short-stay visitors.’

Cecilia Malmström, Commissioner for Home Affairs¹

Executive Summary

Many third country nationals wishing to travel to the European Union are often faced with cumbersome, lengthy and costly visa procedures. On 1 April 2014, the European Commission presented two proposals based on the evaluation report² of the implementation of the Visa Code, which aim to address some of the Visa Code’s shortcomings: a proposal for a recast of the Visa Code and a proposal for a regulation establishing a touring visa. The proposals aim to shorten and simplify visa procedures to boost economic activity and job creation in the tourism sector as well as in related activities. The following observations on the new proposals aim at contextualising the new features of the proposals and at evaluating them against the background of consulates’ practices. Many of the proposed changes seem in fact to formalise existing practices already in place in consulates. However, the proposals do not fully address some of the major challenges identified by the evaluation report or tackle other important issues at stake.

**‘A smarter visa
policy for
economic growth’**

Current Framework and Main Issues

In the current context, states employ visa regimes in an attempt to manage the complex trade-off between facilitation of legitimate cross-border movement, on the one hand, and control of such movement, whether for reasons of migration control or on grounds of public security, on the other. From an economic perspective, visa restrictions have a detrimental effect, reducing the bilateral flow of travellers and therefore benefits associated with freedom of travel (Neumayer 2010). In addition, visa policies also have a strong foreign policy dimension, reflecting and impacting on interstate relations. From a migration control perspective, visa regimes are an important instrument to pre-screen aspiring visitors to a country in addition to any controls at the border, not available in a visa-free context. The visa is thus a key State instrument to exercise selectivity on mobility. Consulates and their agents are the key actors implementing visa policies and managing migration ‘at the source’, as well as promoting travel. In the European context, harmonisation of visa policies has been on the agenda since the early 1990s. However, harmonisation has been a difficult process, as individual Member States face different

national realities and pursue different interests.

The common Schengen visa policy has its legal basis in Art. 77(2) of the Treaty on the Functioning of the European Union (TFEU, better known as the Lisbon Treaty). The TFEU mandated the European Parliament and the Council to adopt measures concerning the common policy on visas and other short-stay residence permits. Importantly, the European Union visa policy covers only the regulation of short-term visas (up to 90 days), while the issuing of long-term visas remains under the exclusive competence of the Member States. While specific legislation on visa policy was only adopted in 2009, there had been a gradual harmonisation of visa policies for about two decades preceding that date.

Thus, after the conclusion of the Schengen Agreement (1985) and the Implementing Convention (1990), Common Consular Instructions (CCI) were issued to all participating Schengen states' consular authorities for the purpose of determining visa applications. CCI were confidential and remained confidential until they became part of EU law. Although the Amsterdam Treaty incorporated the Schengen acquis into the EU legal framework with the Amsterdam Protocol, the status of the CCI remained unclear. In addition, they were not legally binding.

With Regulation 810/2009, the EU pooled all legal acts governing the conditions and procedures for issuing short-stay visas into one legal instrument and repealed obsolete parts of the Schengen acquis. The Community Code on Visas (widely referred to as Visa Code) became applicable on 5 April 2010. It incorporated the CCI, as well as parts of the Schengen Convention and eleven Schengen Executive Committee Decisions. Article 57(1) of the Visa Code requires the Commission to send the European Parliament and the Council an evaluation of the Visa Code's application two years after all its provisions have become applicable (i.e. 5 April 2013).³ Article 57(2) provides that the evaluation may be accompanied by a proposal for an amendment to the Regulation. In April 2014, the Commission submitted a proposal for amendments to the Visa Code and another one for establishing a 'touring visa', together with the evaluation report 'A smarter visa policy for economic growth' (COM (2014) 165 final).

As part of the preparation for the evaluation, DG Home Affairs consulted with interest groups, advocacy groups and professional organisations between 25 March and 17 June 2013 to gather their views and experiences.⁴ As highlighted in the Commission's evaluation report, 'the implementation of the legal provisions [of the Visa Code] has not been optimal. This can largely be explained by the fact that most elements of flexibility are formulated as options ('may'-clauses) rather than mandatory rules'.

The report addresses three main problem areas to be revised:

- cumbersome, lengthy and costly visa procedures
- limited facilitation procedures (waiving of the requirement to lodge the application in person and to submit certain/all supporting documents) for family visits and for 'known applicants'
- the lack of a visa or other authorisation allowing travellers to stay more than 90 days in any 180-day period in the Schengen area.

As regards procedures, visa applicants face high indirect costs, firstly because of the obligation to appear in person, which is particularly costly for those living in areas where Schengen states have limited consular coverage⁵ or in large third countries, as they have to spend time and money on travelling. Sometimes arranging the appointment also constitutes a cost. In addition, the current supporting documents required are very burdensome, as many are required and often involve costs for translation and certification. Even though in some countries consulates have cooperated at the local level in developing a common list of supporting documents, in practice, each consulate can require different documents. According to a survey in Ukraine (Hobolth 2012), the maximum number of documents was required by Greece (16), followed by Finland,

***The Visa Code
(2009)***

***EC evaluation
report (2014): main
issues***

***Access to the
consulate and
supporting
documents***

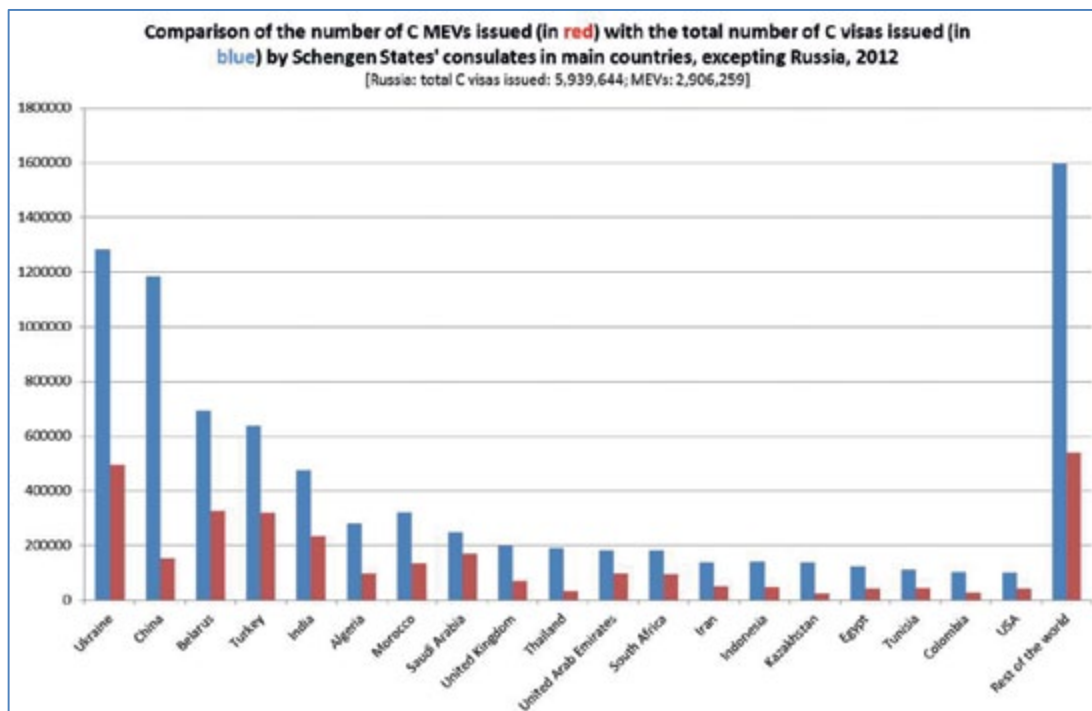
France, Italy, Portugal and Slovenia (9 each). Moreover, whereas Italian national law requires both parents to sign a child's application, for example, German national law only requires one parent to do so. Also, in China, for example, depending on the Schengen consulate, an applicant may be required to submit eight different sizes of photographs. In addition, consulates apply different rules with regard to the admissibility of copies/faxes and different requirements are set concerning the translation of documents.⁶ Comments received during the consultations also showed that the requirement to have a valid travel medical insurance is perceived as costly and having a questionable added value.

The EC evaluation report also acknowledges the suboptimal use of certain forms of consular cooperation, with a growing reliance on external service providers, whereas according to the Visa Code this should be a 'measure of last resort' and Member States should offer all applicants the possibility to lodge applications directly at the consulate (but very often this is de facto not provided or is discouraged). Given the differences in local circumstances⁷, legislators have acknowledged the need to ensure coherent cooperation among Member States and the Commission at the local level. With Article 48, the Visa Code provides instructions for local consular cooperation, renamed 'local Schengen cooperation' (LSC), to ensure a proper assessment of migratory and/or security risks, as well as a harmonised application of general legislative provisions to prevent 'visa shopping' and different treatment of visa applicants. LSC is a collective task to be shared among Member States' consulates and the Commission and carried out via EU Delegations. The role of the EU Delegation in each location is to convene LSC meetings (generally every two months) and ensure that consistent reports of meetings are drawn up. Attendance at meetings seems fairly good, but reports are not always forwarded to Member States, and often there is a lack of operational conclusions and follow-up on the issues raised in individual meetings.⁸ Under certain circumstances, such cooperation may be carried out in a less formal and structured manner, such as daily exchanges of information between officials by telephone or email. The EU Delegation is also in charge of drafting annual reports in each location. In March 2010, the Commission invited all heads of EU Delegations to designate a contact point from among their staff members to coordinate LSC (COM (2012) 648 final).

Local Schengen cooperation

In terms of facilitation, the Commission argues that consulates do not sufficiently distinguish between unknown applicants and those who have a positive visa record. According to the Visa Code, applicants known to consulates for their 'integrity' and 'reliability' may already benefit from certain simplified procedures (e.g. waiving of the requirement to lodge the application in person and to submit certain supporting documents). However, Member States do not seem to apply this procedure to known applicants systematically. In legal terms, this is mainly due to the fact that this is a 'may' clause and that the eligibility criteria of 'integrity' and 'reliability' have not been defined. In concrete terms, Member States or individual consulates do not use these options for facilitation more widely probably because of policy reasons (such as fear of fraud) or operational reasons, including higher standards of integrity, defined by individual Member States.

Although there are provisions on the issuing of multiple entry visas (MEV), their mandatory nature is undermined by the discretionary assessment of eligibility conditions for a MEV, which again include the notions of 'integrity' and 'reliability'. In 2012, 41.6% of all short-stay visas issued were MEVs, but with considerable differences between countries, as shown in the figure below. Thus, while more than 80% of the C visas issued by Finland and Slovenia were MEVs, the share of MEVs in the total number of C visas issued by Germany, Spain, the Czech Republic and Iceland was less than 20%.⁹



Source: DG Home Affairs, Overview of visa statistics 2009–2012.

In its evaluation report of the implementation of the Visa Code (COM (2014) 165 final), the Commission also considers it a problem for some categories of third country nationals that authorised stays in the Schengen area are limited to 90 days in any 180-day period. Travel agencies, as well as numerous queries addressed to the Commission, suggest that more and more individual travellers such as students, researchers, artists and culture professionals, pensioners, business people, service providers, etc. experience visa validity-related difficulties in organising tours in Europe. As they are not eligible for a national long-stay visa or a short-stay Schengen visa or other authorisation, they find themselves in a legal vacuum. Business representatives in the Schengen area also highlighted that they are directly and indirectly affected by the limitations of current visa regulations, which, as a result, adversely affects their business activities.

The 90/180 day limitation

The EC Proposals

On 1 April 2014, the EC presented two proposals based on the evaluation report of the implementation of the Visa Code and the impact assessment of policy options:

- Proposal for a Regulation establishing a touring visa (COM (2014) 163 final)
- Proposal for a Regulation on the Union Code on Visas (Visa Code) (COM (2014) 164 final).

'Flexible visa rules to boost growth and job creation'

The objectives of the proposals are to simplify the legal framework in the interest of Member States and make travel easier for legitimate travellers, clearly fostering the EU's attractiveness for highly-skilled travellers and cultural professionals. Although many provisions of the Visa Code should apply to the new type of visa, a separate proposal for the touring visa is justified, as the scope of the Visa Code are the rules and procedures for issuing visas to third country nationals, not visa typologies.

According to the EC (2014) press release, the main elements of the proposed package are: (1) reducing the allowed time for processing and taking a decision from 15 to 10 days; (2) making it possible to lodge visa applications in other EU countries' consulates if the Member State competent for processing the visa application is neither present nor represented; (3) facilitating the visa process for regular travellers, including mandatory

issuing of multiple entry visas valid for three years; (4) simplifying the application form and allowing for online applications; (5) allowing Member States to devise special schemes to grant visas at the borders for up to 15 days in one Schengen state in order to promote short-term tourism (now only exceptionally in cases of emergency situations or humanitarian cases); (6) allowing Member States to facilitate the issuing of visas for visitors attending major events; (7) establishing a new type of visa (touring visa) allowing legitimate travellers to circulate in the Schengen area for up to 1 year (with the possibility of extension up to 2 years) without staying in one Member State for more than 90 days in any 180-day period.

Moreover, procedural facilitation is envisaged for family members and close relatives of EU citizens, as well as a visa waiver for applicants under 18 years of age and for researchers for scientific research or participation in a seminar/conference. The maximum deadline for lodging an application has been increased from three to six months before the intended trip to allow travellers to plan ahead and avoid peak seasons. The list of supporting documents will be simplified and become exhaustive, while the obligatory travel medical insurance will be abolished.

The touring visa (T-type visa) applies to 'legitimate travellers' such as live performance artists, students, researchers, culture professionals, pensioners, business people, service providers or tourists with a legitimate interest in travelling within the Schengen area for more than 90 days. This visa is to be issued in the uniform format, since it would create an excessive burden for Member States to issue it in card format as residence permits, and it will always allow for multiple entries. Consulates may waive the requirement to present one or more supporting documents if the applicants work for or are invited by a reliable company, organisation or institution known to the consulate, in particular at the managerial level, or as a researcher, student, artist, culture professional, sportsman or a staff member with specialised knowledge, experience and technical expertise and, if adequate, proof is submitted to the consulate in this regard (Art. 5(8) of the Proposal). The proposal also concerns third country nationals who are exempt from the short-stay visa requirement, providing a common legal framework enabling them to stay in the Schengen area more than 90 days, not in the framework of bilateral visa waive agreements.¹⁰ Since, in principle, travellers from these countries do not pose security and migratory risks for the Member States, according to the principle of proportionality, collecting their fingerprints is not justified.

While the prospective introduction of a touring visa is undoubtedly in the direction of boosting tourism and economy, the recast of the Visa Code seems at first glance to deal with the main issues identified in the evaluation report; however, a more thorough analysis of the text shows the limits of the proposed new features. Drawing on some recent field investigations in consulates (Cimade 2010; Infantino, Rea 2012; Zampagni 2011), it can be argued that some of the proposed amendments are a de facto acknowledgment of practices already in place in consulates. By contrast, various deep-rooted problems have not been addressed.

First of all, facilitation of procedures for 'known' applicants or business travellers is already often the case in consulates, even though it has not been formalised until now. Internal lists of bona fide and mala fide applicants are kept in some consulates in order to speed up the application process for (economically) 'reliable' travellers, and sometimes the consulates even provide a dedicated counter for business travellers. In this sense, the recast proposal is also focused on boosting the economy and tourism and on making the two-tier system of visa application and issuing procedures clearer.

With regard to the list of supporting documents, the new proposal envisages an exhaustive list (Annex II). Nevertheless, according to the new Article 13(9), the completion and harmonisation of the lists of supporting documents shall be carried out via local Schengen cooperation in each location in order to take into account local circumstances, reflecting what is already happening now in most cases. Moreover, if there is no harmonised list of supporting documents in a given location, Member States are free to define the exact

Touring visa

New features or acknowledgments?

supporting documents to be submitted by visa applicants in order to prove the fulfilment of the entry conditions. Therefore, the stated aim of harmonising the required documents appears not to be accomplished, in favour of the formalisation of the ongoing process of harmonisation at the local level.

The 'one-stop principle' (according to which applicants should only be required to come to one location in order to submit the application) is eliminated in this formulation, which now states that applicants should only appear in one location for the purpose of lodging the application but this should be without prejudice to the possibility of carrying out a personal interview with the applicant. In practice, a personal interview is already often required by consulates, in particular in countries considered as high migration risk countries.

With regard to the assessment of the migration risk, the new proposal stipulates that applicants registered in the VIS who have obtained and lawfully used two visas within the 12 months prior to the application should be presumed as being of low risk of overstaying their visas (the meaning of the notion of 'migratory risk'). In addition, they should be presumed as fulfilling the sufficient means requirements. However, this presumption should be rebuttable where the competent authorities establish that one or more of these conditions are not fulfilled in individual cases. In such cases, the consulates may carry out an interview and request additional documents (new Art. 18(3)). Therefore, the consulates still have great leeway in this process, as is also the case for the processing time of applications. In most cases they are already processed in the envisaged time frame, except when more thorough checks are needed. On the one hand, the proposal further lowers the processing time to 10 days, but on the other hand, that period may still be extended up to a maximum of 20 calendar days in individual cases, notably when further scrutiny is needed (new Art. 20 (2)).

The use of external service providers is not seen as a 'last resort' anymore (new Art. 38(3)) and the obligation to enable all applicants to lodge their applications directly at the consulate is eliminated (new Art. 15(3)), acknowledging current practices by consulates.

Finally, the issuing of visas at the external border should, in principle, remain exceptional (new Art. 32–33), and there are no concrete changes except for seafarers, for whom Member States should be authorised to issue visas at the external border if they are crossing the border in order to embark, re-embark on or disembark from a ship (new Art. 34).

Conclusions

The observations on the new proposals are not exhaustive, but aimed at contextualising its changes against consulates' current practices. Besides the substantial recognition of practices already in place in consulates, the proposals do not solve some of the major challenges nor tackle other issues at stake. The main points that emerged from the analysis and the issues that need to be tackled can be summarised as follows.

- Lack of transparency in the visa application process: decisions on required documents and the outsourcing of application procedures remain at the discretion of each embassy, coupled with indications by Member states at the central level or harmonisation procedures agreed via local Schengen cooperation, which are, however, not made public. To enhance the transparency of visa procedures, such decisions and localised rules should be made public.
- Limitations on touring visas: the temporal limitation to one or two years could be changed to a longer time period. As an example, the French long-stay visa 'Skills and Talent' (Carte Compétences et Talents) is similar in its scope to the

envisaged touring visa, but has a duration of three years. A longer period makes sense for the development of a professional project, and with the appropriate checks, it would lighten the embassies' workload in the long term.

- Motivations for refusal are still unclear: since 2010, the Visa Code has required the justification and notification of the refusal for all visas with a standard form with tick boxes according to the compliance of entry conditions provided by Article 5 of the Schengen Borders Code. However, box n.9 states 'your intention to leave the territory of the Member States before the expiry of the visa could not be ascertained'. Thus, the consular staff can always refuse the visa on the grounds of 'migration risk', without allowing the applicant to understand and improve their application.
- Legal uncertainty on access to effective remedies against the refusal of a visa: according to the response of the Meijers Committee to the EC consultations regarding the new proposals,¹¹ given that this issue is only dealt with by the national courts of Member States, these judgments do not bind the national courts in other Member States. The result is legal uncertainty affecting both the applicants and the Member States. Moreover, the appeal route is hardly accessible from abroad (both in financial and practical terms) and it is very difficult to demonstrate a legitimate interest in the issuance of a visa (especially a tourist visa).
- Lack of division of work and common funding: the pattern of visa applications remains highly unbalanced between Member States, something that existing policies have failed to address. While the Visa Code provides for the option to establish 'Common Application Centres' jointly run by several Member States, this option is rarely used, due to both a lack of funding and reservations from Member States.
- Limits to harmonisation: the inextricable connection between visa regimes and national sovereignty, the very nature of visa regimes as an instrument of foreign policy, and their function in controlling entry into the state, has inevitably resulted in resistance to a truly common system. Agreement was therefore reached on common procedures instead. In a polity where both national typologies of Schengen visas and administrative cultures vary, harmonisation has been ultimately limited to certain formal aspects and has not addressed deep-rooted differences in administrative procedures and their widely varying outcomes. More far-reaching attempts at harmonisation would also mean that Member States would have to harmonise their quite heterogeneous administrative practices as a whole.

To conclude, current visa procedures are still complicated and non-transparent and often result in largely differing outcomes. This policy brief suggests some avenues for reform.

Policy Recommendations

- **The local Schengen cooperation framework, its decisional mechanisms and its effectiveness in terms of local consular practices should be strengthened. In addition, a clear funding system for LSC should be established.** Currently, LSC often mainly serves as an informal mechanism of information exchange. Measures should be adopted that enhance formal decision-making on operational issues in relation to the application of the common visa policy at the local level. Decisions on harmonised procedures should be clearly communicated to visa applicants in order to enhance transparency and to avoid 'visa shopping'.

- **The Commission's monitoring role, both at the central level and at the local level via EU Delegations, should be strengthened.** It should be ensured that a LSC coordinator is designated in each Delegation. Reports of LSC meetings should be always forwarded to the Member States, followed by operational conclusions. Since there are no EU delegations in 31 locations, measures should be adopted to ensure communication and information to and from these locations.
- **Common training in each location should be carried out in order to concretely harmonise local practices.** The assessment of visa applications and the administrative cultures vary among Member States' consulates. Common training for officials should be provided in each location, for example by the EU Delegations. Such training would require the development of training methodologies and curricula for consular officials and training of trainers. Such training could be linked to or run in parallel with specific training, such as training on document recognition (profiling, breeder documents, stolen identity, new trends in forgeries, etc.), risk analysis and information exchange.
- **The introduction of 'Common Application Centres' should be fostered and funding for these initiatives should be introduced.** Currently, there is a suboptimal use of certain forms of consular cooperation, with a growing reliance on external service providers. The introduction of CACs and the provision of specific funds for them would reduce the need for resources and the burden on Member States' consulates. The Commission would ensure that the work of the CACs is secure and meets the applicable standards through close monitoring.
- **The homogenisation of Schengen C visa typologies among Member States should be boosted, and the number of typologies should be reduced.** National visa types (under the same label of 'Uniform Schengen Visa') are different for each Member State, thus entailing different requirements for different visas in each consulate, and preventing a complete harmonisation among Member States.
- **The visa application process should be facilitated for all travellers, making them accessible, transparent and user-friendly. Access to effective remedies should also be ensured.** Current visa procedures are still cumbersome and costly and result in largely differing outcomes. Measures should be adopted that enhance the transparency of application and issuing procedures. Harmonisation could be furthered through launching an intergovernmental dialogue among Member States on their heterogeneous administrative practices.

Notes

¹ EC press release, 'More flexible visa rules to boost growth and job creation', IP/14/347, Brussels 01.04.2014; http://europa.eu/rapid/press-release_IP-14-347_en.htm.

² European Commission, COM (2014) 165 final, 'A smarter visa policy for economic growth'.

³ The provisions regarding notification and the requirements on providing the grounds of refusal, revocation and annulment of visas and the right to appeal against such decisions became applicable on 5 April 2011.

⁴ Report accessed on 10.04.2014: http://ec.europa.eu/dgs/home-affairs/what-is-new/publicconsultation/2013/docs/consultation_025/report_on_the_results_of_the_consultation_en.pdf.

⁵ DG Home Affairs, List of Member States' consular presence, representation arrangements and forms of cooperation for the collection of visa applications, collection by Honorary Consuls or outsourcing of the collection of visa applications, 01.04.2014: http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/borders-and-visas/visa-policy/docs/en_annex_28_ms_consular_representation_20.pdf.

⁶ Impact Assessment, accessed on 09.04.2014: http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/borders-and-visas/visapolicy/docs/ia_visa_code_final_report_eu_template_14032014_en.pdf.

⁷ 'Local circumstances' relate to aspects such as documentary proof of, for instance, employment, depending on the administrative and legal structure of the host country; or the specifics of different categories of applicants in a given third country, e.g. as a result of migratory pressure.

⁸ COM (2012) 648 final, p. 5.

⁹ DG Home Affairs, Overview of visa statistics 2009–2012: http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/visa-policy/docs/overview_of_schengen_visa_statistics_en.pdf.

¹⁰ Since now Art. 20(2) of the Convention Implementing the Schengen Agreement (CISA), according to which bilateral visa waive agreements concluded before the CISA may extend the visa-free stay for longer than 3 months, is not compatible with Art. 77(2) of the TFEU, because the common policy on visas cannot be based on the existence of bilateral agreements from the past.

¹¹ DG Home Affairs, Public consultations, June 2013. http://ec.europa.eu/dgs/home-affairs/what-is-new/public-consultation/2013/consulting_0025_en.htm.

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Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ L 105.

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