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COMMISSION OF THE EUROPEAN COMMUNITIES

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2009/0025 (CNS)

Proposal for a

**COUNCIL REGULATION**

**amending the Convention Implementing the Schengen Agreement as regards long stay  
visa and alerts in the Schengen Information System**

(presented by the Commission)

## EXPLANATORY MEMORANDUM

### Grounds for the proposals

#### Current legal situation

These proposals aim at facilitating the circulation within the Schengen area without internal borders of third-country nationals legally residing in one of the Member States<sup>1</sup> on the basis of a long-stay "D" visa issued by that Member State.

In accordance with the current Schengen acquis, a third-country national holding a national long-stay visa ("D visa") for stays exceeding three months is allowed to stay only in the territory of the Member State which issued the visa and, pursuant to Article 18 of the Convention Implementing the Schengen Agreement (the Schengen Convention)<sup>2</sup> as amended by Regulation 1091/2001<sup>3</sup> is allowed to transit through the territories of the other Member States only in order to reach the State which issued the visa.

Thus, according to present Community law, D visa holders are not allowed to travel to the other Member States during their stay and nor are they allowed to transit through the other States when returning to their country of origin, as this is not provided for by the Schengen Convention.

The wording of the above provision of the Schengen Convention stems from the procedure generally applied at the time by the Member States whereby D visas are converted into a residence permit after arrival on the territory. On the basis of such a residence permit third-country nationals can then circulate within the Schengen area. For this reason, at the time of the conclusion of the Schengen Convention Member States did not consider it necessary to regulate either the circulation and the return journey on the basis of a D visa or a second transit to the Member State that had issued the D visa.

Therefore, the Schengen Convention only provides the principle of equivalence between Schengen residence permits and visas applicable in the Schengen area: a residence permit issued by a Member State allows a third country national, holding the residence permit and a valid travel document, to move freely for up to three months within the territories of the other Member States during his/her stay (Article 21 of the Convention).

Article 5(1)(b) of Regulation (EC) No 562/2006 (Schengen Borders Code)<sup>4</sup> also provides for the possibility for third country nationals in possession of a valid residence permit issued by a Member State to cross the external borders of another Member State without a visa for stays not exceeding three months.

#### Problems in practice

More and more Member States do not replace D visas by residence permits after the entry of third-country nationals into their territory, or replace them only with considerable delays. This

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<sup>1</sup> Within the context of the present proposal, the notion "*Member States*" shall mean EU Member States fully implementing the Schengen acquis

<sup>2</sup> OJ L239, 22.9.2000, p. 1.

<sup>3</sup> OJ L150, 6.6.2001, p. 4.

<sup>4</sup> OJ L105, 13.4.2006, p. 1.

legal and practical situation has important negative consequences regarding the circulation in the Schengen area for third-country nationals legally staying in a Member State on the basis of a D visa. Since such persons have to continue to reside holding a D visa, they can legally neither travel for different, legitimate purposes (e.g. business, conferences, visits) to the other Member States during their stay, nor transit through the territories of the other States when returning to their country of origin.

#### D+C visa - Regulation 1091/2001

In order to partly remedy the situation of delays in issuing residence permits after arrival, the D+C visa was introduced in 2001 (Regulation 1091/2001<sup>5</sup> based on a French initiative), providing the possibility for holders of a long-stay D visa issued by a Member State to move freely in the Schengen area during the first three months of the period of validity of the D visa, on the condition that the visa has been issued according to the Schengen rules valid for short-stay visas (including checking against the list of non-admissible third-country nationals in the Schengen Information System (SIS)).

Nevertheless, in practice it appears that most Member States either do not issue D+C visas at all or only issue very small numbers. It has also been noted on numerous occasions that there is little or no knowledge at all among consular staff about this type of visa or the conditions under which it can be issued, and thus applicants are not informed of this possibility. Moreover, it has been established that in many cases the national visa registration and processing programmes do not even allow for the possibility of considering applications for such a visa or the printing of the visa sticker. At the same time, a number of Member States allow their diplomatic missions and consular posts to directly issue residence permits, thus rendering the D+C visa superfluous.

Moreover, once the period of three months from the initial date of validity of the D+C visa has expired, the holders – by then legally present on the territory of the Member State which issued the visa – are no longer allowed to circulate within the entire territory of the Member States if in the meantime this D+C visa would not have been replaced by a residence permit.

These people, subject to the short-stay visa requirement in accordance with Council Regulation (EC) No 539/2001<sup>6</sup>, are then required to apply for a separate short-stay C visa in the State of their residence in order to travel to another Member State. However, in practice some Member States refuse to issue Schengen visas to persons already staying in the Schengen area. Furthermore, according to certain Member States' interpretation, these third-country nationals are no longer in a position to apply for an additional short-stay Schengen visa during these six months, as they already have stayed in the Schengen area for three months on the basis of the D+C visa. Following the same reasoning, when these third-country nationals holding a D+C or D visa return to their home country, they may not be allowed to travel through the other Member States, as the 90 days period of permitted stay during a six month-period has already expired.

Based on the above mentioned observations, the Commission - in its proposal for a Regulation establishing a Community Code on visas<sup>7</sup> - proposed to abolish the D+C visa in order to simplify matters and require Member States to speed up the issuance of residence

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<sup>5</sup> OJ L150, 6.6.2001, p. 4.

<sup>6</sup> OJ L81, 21.3.2001, p. 1.

<sup>7</sup> COM(2006) 403 final.

permits to third-country nationals.

However, most Member States – for various reasons – do not seem to be willing or able to issue residence permits in time to third-country nationals residing in their territory. Therefore, the Commission proposes the introduction of the principle of equivalence between long-stay and short-stay visas issued by the Member States fully implementing the Schengen acquis in order to overcome the present problems encountered by third-country nationals legally staying in a Member State with a long-stay visa.

The introduction of the equivalence between D and C visas was first considered by some Member States and the Commission during the discussions of the informal Visa Working Party in Ljubljana on 21-22 January 2008 and was also further conferred in the Visa Working Party on 26-27 March 2008 during the discussions on the Community Code on Visas in the context of the abolition of D+C visas.

The present proposals are also inspired by a number of complaints and questions received from the Member States and from third-country nationals staying in a Member State on the basis of a D+C or a D visa.

#### *The obligation to issue residence permits*

These proposals do not aim at encouraging Member States not to issue residence permits and to let third-country nationals stay on the basis of a long-stay visa. On the contrary, this would not be in line with a number of Directives imposing to Member States the obligation to issue residence permits to certain categories of third-country nationals.

According to Council Directive 2005/71/EC<sup>8</sup> on a specific procedure for admitting third-country nationals for the purposes of scientific research, the decision on the application for a residence permit shall be adopted as soon as possible, and where appropriate, in an accelerated procedure.

Council Directive 2004/114/EC<sup>9</sup> on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service provides for the obligation to issue residence permits to the students covered by this Directive for a period of at least one year (which is renewable) or at least for the duration of the course if that is shorter than one year. The decision on such an application shall be adopted and the applicant shall be notified of it within a period that does not hamper the pursuit of the relevant studies. Moreover, fast-track procedures for issuing residence permits or visas for students can be established by agreements between the educational establishments and the authorities of the Member States responsible for entry and residence issues.

Council Directive 2003/86/EC<sup>10</sup> on the right to family reunification also sets out the obligation of the issuance of a residence permit of at least one year's duration to family members of third-country nationals already legally residing in the territory of a Member State.

Based on Directive 2004/38/EC<sup>11</sup> on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, family members

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<sup>8</sup> OJ L289, 3.11.2005, p. 15.

<sup>9</sup> OJ L375, 23.12.2004, p. 12.

<sup>10</sup> OJ L251, 3.10.2003, p. 12.

of EU nationals residing with the Union citizen longer than three months in another Member State different from that of the home country of the Union citizen should be issued with a residence card no later than six months from the date of application. A certificate of application for the residence card shall be issued immediately.

Council Directive 2003/109/EC<sup>12</sup> on long-term residents is also relevant given that a long-term resident has the right – under certain circumstances – to reside in the other Member States which have to issue to such a third-country national a residence permit at the latest six months after the application.

These rules would not be affected by the proposals.

### Content of the proposals

The present proposals extend the principle of equivalence between a residence permit and short-stay visas to long-stay D visas; hence a long-stay visa would have the same effects as a residence permit as regards circulation in the Schengen area.

A third-country national holding a long-stay D visa issued by a Member State could travel to the other Member States for three months in any half year, under the same conditions as the holder of a residence permit. The rules regarding the issuance of long-stay visas remain unchanged as it was the case with the rules on the issuance of residence permits when the principle of equivalence between a residence permit and a short-stay visa was introduced. This would restore the basic philosophy underlying the Schengen area without internal borders, i.e. that a person can travel around in the Schengen area for short stays for three months in any half year with the document on the basis of which he is legally present in a Member State.

Drawn up on the legal basis of Articles 62 (2)(a) and (3) and 63 (3)(a) of the TEC, the proposed Regulations will amend:

- Articles 18, 21 and 25 of the Convention Implementing the Schengen Agreement of 14 June 1985 (between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their borders);
- Article 5(1)(b) of 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), on the entry conditions for third-country nationals.

Due to the conflicting decision making procedures attached to the different legal basis, the Commission had to draw up two separate proposals:

- The Proposal for a Regulation of the European Parliament and of the Council amending the Convention Implementing the Schengen Agreement and Regulation (EC) No 562/2006 as regards movement of persons with a long-stay visa is based on Article 62 (2)(a) and (3) of the TEC and shall be adopted in accordance with the co-decision procedure.

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<sup>11</sup> OJ L229, 29.6.2004, p. 35.

<sup>12</sup> OJ L16, 23.1.2004, p. 44.

- The Proposal for a Council Regulation amending the Convention Implementing the Schengen Agreement as regards long stay visa and alerts in the Schengen Information System is based on Articles 63 (3)(a) of the TEC and shall be adopted at unanimity in the Council after consulting the European Parliament.

The proposals were drawn up with regard to the present text of the proposal for a Regulation of the European Parliament and of the Council establishing a Community Code on visas (Visa Code), which will repeal the provisions on D+C visa. The Visa Code is presumed to be adopted by the time of the adoption of these Regulations. The date of application of these Regulations should be aligned with the application of the Visa Code (six months after its entry into force).

#### Security aspects

Article 25 of the Convention obliges Member States considering the issuance of a residence permit to a third-country national to consult the SIS. In case the third-country national concerned is a person for whom an alert has been issued for the purpose of refusing entry, the Member State shall first consult that Member State which issued the alert and shall take account of its interests. In such cases the residence permit shall be issued only for substantive reasons, notably on humanitarian grounds or by reason of international commitments. Similarly, in case an alert for the purpose of refusing entry has been issued for a third-country national who already holds a residence permit issued by another State, the Member State issuing the alert shall consult the other Member State which issued the residence permit in order to determine whether there are sufficient reasons for withdrawing the residence permit.

This Article will be amended by the Proposal for a Council Regulation amending the Convention Implementing the Schengen Agreement as regards long stay visa and alerts in the Schengen Information System by adding a reference with the effect that the obligation to consult the SIS and the other Member States in case of an alert would also apply when Member States consider the issuance of a long-stay visa to a third-country national or when Member States discover an alert which has been issued to a third-country national who holds a valid long-stay visa.

The requirement to consult the SIS when processing the long-stay visa applications will ensure the same control over long-stay visa applicants as the existing one applicable for holders of a residence permit issued by a Member State. Thus, the free circulation of the holders of a long-stay visa in the other Member States will not constitute any additional security risk for Member States compared to the holders of Schengen residence permits and short-stay visas.

Moreover, according to the knowledge of the Commission, long-stay visas are issued by the Member States by using the highly-secured uniform format for short-stay visas as set out in Council Regulation (EC) No 1683/95 of 29 May 1995 laying down a uniform format for visas<sup>13</sup>.

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<sup>13</sup> OJ L 164, 14.7.1995, p. 1

Proposal for a

## COUNCIL REGULATION

### **amending the Convention Implementing the Schengen Agreement as regards long stay visa and alerts in the Schengen Information System**

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 63 (3)(a) thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Parliament,

Whereas:

- (1) This Regulation, by amending the Convention Implementing the Schengen Agreement<sup>14</sup>, re-defines the long-stay visa and sets out measures complementing Regulation No .../... of the European Parliament and of the Council of [...] amending the Convention Implementing the Schengen Agreement and Regulation (EC) No 562/2006 as regards movement of persons with a long-stay visa.
- (2) Based on the current practice followed by the Member States, this Regulation establishes the obligation for Member States to issue the long-stay visas in the uniform format for visas as set out in Council Regulation (EC) No 1683/95.
- (3) The rules on consultation of the Schengen Information System and of the other Member States in case of an alert when processing an application for a residence permit should also apply to the processing of long-stay visa applications. Therefore, the free movement of holders of a long-stay visa in the other Member States should not constitute any extra security risk for Member States.
- (4) Since the objective of this Regulation, namely the establishment of the rules on the long-stay visa and alerts in the Schengen Information System, cannot be sufficiently achieved by the Member States and can therefore be better achieved at Community level, the Community may adopt measures, in accordance with principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve those objectives.
- (5) This Regulation respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. It should

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<sup>14</sup> OJ L 239, 22.9.2000, p. 1.

be applied in accordance with the Member States' obligations as regards international protection and non-refoulement.

- (6) This Regulation constitutes a development of the Schengen acquis, in accordance with the Protocol integrating the Schengen acquis into the framework of the European Union, as defined in Annex A to Council Decision 1999/435/EC<sup>15</sup> of 20 May 1999 concerning the definition of the Schengen acquis for the purpose of determining, in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union, the legal basis for each of the provisions or decisions which constitute the acquis.
- (7) 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 latter's association with the implementation, application and development of the Schengen acquis, which falls within the area referred to in Article 1(B) of Council Decision 1999/437/EC<sup>16</sup> of 17 May 1999 on certain arrangements for the application of that Agreement.
- (8) As regards Switzerland, this Regulation constitutes a development of the provisions of the Schengen acquis, within the meaning of the Agreement concluded 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<sup>17</sup>, which falls within the area referred to in Article 1(B) and (C) of Council Decision 1999/437/EC, read in conjunction with Article 3 of Council Decision 2008/146/EC<sup>18</sup> of 28 January 2008.
- (9) As regards Liechtenstein, this Regulation constitutes a development of the provisions of the Schengen acquis, within the meaning of the Protocol signed 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 falls within the area referred to in Article 1(B) and (C) of Council Decision 1999/437/EC, read in conjunction with Article 3 of Council Decision 2008/261/EC<sup>19</sup> of 28 February 2008.
- (10) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and to the Treaty establishing the European Community, 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 under the provisions of Title IV of Part Three of the Treaty establishing the European Community, Denmark should, in accordance with Article 5 of the said Protocol, decide within a period of six months after the date of adoption this Regulation whether it will implement it in its national law.

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<sup>15</sup> OJ L??

<sup>16</sup> OJ L176, 10.7.1999, p. 31.

<sup>17</sup> OJ L53, 27.2.2008, p.52.

<sup>18</sup> OJ L53, 27.2.2008, p. 1.

<sup>19</sup> OJ L83, 26.3.2008, p. 3.

- (11) In accordance with Article 1 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and to the Treaty establishing the European Community, the United Kingdom and Ireland are not taking part in the adoption of this Regulation and consequently, without prejudice to Article 4 of the said Protocol, are not bound by it or subject to its application.
- (12) As regards the Member States not yet fully implementing the Schengen acquis, this Regulation constitutes provisions building on the Schengen acquis or otherwise related to it within the meaning of Article 3 (2) of the 2003 Act of Accession and Article 4 (2) of the 2005 Act of Accession.

HAS ADOPTED THIS REGULATION:

*Article 1*

The Convention Implementing the Schengen Agreement is amended as follows:

- (1) Article 18 is replaced by the following:

" *Article 18*

Visas for stays exceeding three months shall be national visas issued by one of the Member States in accordance with its national law or Community law. Such visas shall be issued in the uniform format for visas as set out in Council Regulation (EC) No 1683/95 of 29 May 1995 laying down a uniform format for visas<sup>20</sup> with the heading specifying the type of the visa with the letter "D".

- (2) In Article 25, paragraph 3 is added:

"3. Paragraphs 1 and 2 shall apply also in case of long-stay visas."

*Article 2*

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

It shall be applicable from the date of application of the Regulation (EC) No .../... of the European Parliament and of the Council of [...] establishing a Community Code on visas (Visa Code).

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<sup>20</sup> OJ L 164, 14.7.1995, p. 1

This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaty establishing the European Community.

Done at Brussels,

*For the Council  
The Presiden*