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Recommendation for a

COUNCIL DECISION

**authorising the opening of negotiations on an agreement between the European Union
and the Republic of San Marino on several aspects in the field of border management**

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

• Background

With this recommendation, the Commission recommends that the Council (i) authorise the Commission, as the negotiator of the agreement, to open and conduct negotiations for an agreement between the Union and the Republic of San Marino, (ii) set out directives to the Negotiator and (iii) designate a special committee in consultation with which the negotiations must be conducted.

The Republic of San Marino is an independent sovereign State, which enjoys specific relations with the neighbouring Member State, Italy, due to its geographical situation, small size and population. Notably, San Marino is a landlocked country, surrounded by the territory of Italy. There are no international airports on the territory of San Marino. In some exceptional circumstances, there is a service of ambulance helicopter for seriously ill or injured persons which connects San Marino hospital to the main hospitals in the Italian region Emilia-Romagna. San Marino has an airfield, which allows ultralight and light recreational aircrafts to land and take off. They come mostly from Italy. A very small percentage come from outside the Schengen area, but before landing in San Marino, they would have made one or more stops in Italy, where border checks are carried out. Therefore, third-country nationals need to travel through the Schengen area to reach San Marino where they undergo border checks by a Schengen State and have to comply with the obligations to enter the Schengen area in accordance with the Schengen *acquis*. This special geographical situation and the distinct relationship it has with Italy pre-dating the establishment of the Union are the reasons for a ‘*de facto*’ absence of systematic border checks between Italy and San Marino as normally required at the external borders of the Schengen States.¹ San Marino currently also does not issue any visas to third-country nationals because visa-required travellers will have to pass via Italy to reach San Marino and, therefore, have to apply for a Schengen visa with the responsible Italian authorities.

• Reasons for and objectives of the proposal

The objective of the recommendation is to provide appropriate legal basis for the ‘*de facto*’ absence of checks at the external border between Italy and San Marino and, as a compensatory measure, to include rules on residence permits.

Upcoming changes concerning the Schengen *acquis* also require adjustments, especially the future entry into operation of the new EU information systems, including the Entry/Exit System (‘EES’)² and the European Travel Information and Authorisation System (‘ETIAS’)³. Residence permits issued by San Marino to third-country nationals currently do not allow

¹ See also Convenzione di amicizia e di buon vicinato tra l'Italia e San Marino del 31 marzo 1939, signed in Rome on 31 March 1939, and its amendments.

² Regulation (EU) 2017/2226 of the European Parliament and of the Council of 30 November 2017 establishing an Entry/Exit System (EES) to register entry and exit data and refusal of entry data of third-country nationals crossing the external borders of the Member States and determining the conditions for access to the EES for law enforcement purposes, and amending the Convention implementing the Schengen Agreement and Regulations (EC) No 767/2008 and (EU) No 1077/2011 (*OJ L 327*, 9.12.2017, p. 20), Article 2(3)(f) (‘EES Regulation’).

³ Regulation (EU) 2018/1240 of the European Parliament and of the Council of 12 September 2018 establishing a European Travel Information and Authorisation System (ETIAS) and amending Regulations (EU) No 1077/2011, (EU) No 515/2014, (EU) 2016/399, (EU) 2016/1624 and (EU) 2017/2226 (*OJ L 236*, 19.9.2018, p. 1), Article 2(2)(d) (‘ETIAS Regulation’).

their holders to travel freely within the Schengen area. Whereas nationals of San Marino are exempt from the obligation to be registered in the EES and in ETIAS⁴, third-country nationals holding a residence permit of San Marino transiting through Member States to access their place of residence in San Marino will normally be recorded in the EES at entry in the Schengen area (typically in Italy). As they would not be recorded in the EES leaving the Schengen area upon entry into San Marino, they would be automatically recorded in the EES as ‘overstayers’ if their presence exceeds the time allowed to stay within the Schengen area. The overstay would then have a negative impact on these *bona fide* third-country nationals, in particular concerning their applications for a Schengen visa, an ETIAS travel authorisation, long-stay visa or residence permit.

In addition, the objective of the recommendation is to close a current gap by agreeing on rules for San Marino to issue residence permits to third-country nationals. Currently, residence permits to third-country nationals are not subject to any verification by the Member States while their holders can ‘*de facto*’ access and move freely in the Schengen area without having a valid Schengen visa or an ETIAS travel authorisation.

The goal of this agreement would be to lift the border checks on persons and grant a Schengen-wide recognition of residence permits issued by San Marino to third-country nationals.

The agreement should therefore include that in case a third-country national intends to arrive directly in San Marino, San Marino ensures that they first undergo border checks carried out by Italy.

By exempting them from the obligation to register in the EES, this would prevent *bona fide* third-country nationals holding Sammarinese residence permits from being registered as ‘overstayers’ in the EES. Third-country nationals holding Sammarinese residence permits would have visa-free access to the Schengen area for up to 90 days in any 180-day period in line with the relevant provisions of Union law and would be exempt from the obligation to register in the EES and from the obligation to hold a visa or ETIAS travel authorisation to enter and stay in the Schengen area.

To give the residence permits issued or renewed by San Marino a Schengen-wide effect, it is essential that the high-level of security of the Schengen area is guaranteed. Therefore, the agreement would provide for San Marino to undertake that issuing, renewing or withdrawing Sammarinese residence permits for third-country nationals would be conditional on a security assessment to be carried out by Italy. Italy would carry out a binding security assessment before San Marino can issue or renew those residence permits, in particular checks in the relevant EU, national, and international databases including checks ensuring the respect and effectiveness of EU restrictive measures. Following a positive opinion issued within a set timeframe, San Marino would issue or renew those residence permit in the uniform format established by Council Regulation (EC) No 1030/2002 of 13 June 2002 laying down a uniform format for residence permits for third-country nationals⁵ and Italy would perform all necessary operations in the Visa Information System⁶. A negative opinion issued by Italy would result in San Marino rejecting or withdrawing the residence permit application or the

⁴ Based on Article 2(3)(f) of the EES Regulation; and Article 2(2)(g) of the ETIAS Regulation.

⁵ Council Regulation (EC) No 1030/2002 of 13 June 2002 laying down a uniform format for residence permits for third-country nationals (*OJ L 157, 15.6.2002, p. 1*).

⁶ Regulation (EC) No 767/2008 of the European Parliament and of the Council of 9 July 2008 concerning the Visa Information System (VIS) and the exchange of information between Member States on short-stay visas, long-stay visas and residence permits (VIS Regulation) (*OJ L 218, 13.8.2008, p. 60*).

application to renew a residence permit. Italy would need to notify the residence permits issued by San Marino to third-country nationals in accordance with the Schengen Borders Code (Article 39) to give them a Schengen-wide effect.

The envisaged agreement should provide for rules requiring that residence permits already issued by San Marino to third-country nationals at the time of the agreement's entry into force are to be replaced by residence permits issued in accordance with the agreement within two years from its entry into force. The agreement should provide that existing residence permits issued by San Marino to third-country nationals are notified to Italy to perform checks in the relevant databases and, if required, to request San Marino to withdraw these permits on grounds of public policy or internal security.

The envisaged agreement should provide for an evaluation mechanism. The agreement would also need to define the modalities of the cooperation between Italy and San Marino to issue or renew residence permits as well as rules on appeals against decisions taken by San Marino on the basis of a negative opinion by Italy.

In addition, the envisaged agreement should provide that acquiring and maintaining the right to reside in San Marino would be conditional on the existence of a real connection with San Marino to be established based on actual and regular physical presence over an appropriate period of time and on other objective and verifiable criteria with the exclusion of investment in San Marino's economy or real estate, or of predetermined financial payments to Sammarinese authorities.

The envisaged agreement should provide for rules on the exchange of information between the law enforcement authorities of San Marino and Italy, including information on criminal records and information on wanted and missing persons and objects, both upon request and spontaneously, where this is relevant for the prevention, detection or investigation of crime in San Marino or in Italy, the safeguards against and the prevention of threats to public safety.

Furthermore, to ensure the high level of security and trust, the envisaged agreement should contain rules providing for the possibility of cross-border operational cooperation, such as the possibility of cross-border surveillance, cross-border 'hot pursuit' of criminal suspects, the organisation of joint patrols and other joint operations. There should also be rules allowing for the performance of enhanced police checks in the areas near the land border between the Schengen area and the territory of San Marino, for both law enforcement and migration purposes.

Concerning falsely presumed touristic 'overstayers' registered in the EES, i.e. third-country nationals, visa-required or visa-exempt and registered in the EES on entry into the Schengen area, whose stay in the territory of San Marino is automatically calculated as a stay in the Schengen area due to the absence of border checks, the envisaged agreement should provide that, except for residents in San Marino, time spent in San Marino will be counted as time spent in the Schengen area for the purpose of the calculation of authorised stay.

Furthermore, the envisaged agreement should also provide that in case San Marino was to issue short-stay or long-stay visas to third-country nationals in the future, the agreement would need to be revised accordingly.

The envisaged agreement should provide for a mechanism whereby future relevant developments of Union law would, where necessary, be reflected in adaptations to the agreement. The envisaged agreement should also include a provision whereby the agreement would be terminated by the Union in case the adaptation is not effected.

Relationship with existing or future Union agreements

In December 2023, the EU and San Marino finalised negotiations on an association agreement that will result in San Marino applying Directive 2004/38/EC of the European Parliament and of the Council⁷ to Union citizens and their family members, including third-country nationals. However, the issues that could potentially fall under this recommendation are not in the scope of the negotiations on an association agreement.

The conclusion of the association agreement is now subject to the internal procedures of both parties. Once the association agreement is concluded and will have entered into force, third-country nationals who are family members of Union citizens to whom Directive 2004/38/EC applies and who hold a residence card pursuant to Directive 2004/38/EC issued by San Marino would be exempt from the obligation to be registered in the EES⁸, in ETIAS⁹, and to hold a visa¹⁰. As a consequence, the provisions of the EES Regulation regarding the calculation of the duration of the authorised stay and the generation of alerts to Member States when the authorised stay has expired would not apply to third-country nationals who are family members of a Union citizen to whom Directive 2004/38/EC applies and who do not hold a residence card pursuant to Directive 2004/38/EC. Similarly, family members of nationals of San Marino to whom Directive 2004/38/EC would apply would fall within the scope of the relevant EU *acquis* referring to members of the family of a national of a third country enjoying the right of free movement equivalent to that of Union citizens under an agreement between the Union and its Member States, on the one hand, and a third country, on the other.

In view of the above, once the association agreement will have entered into force, family members of Union citizens to whom Directive 2004/38/EC applies should not be covered by the provisions of the envisaged agreement applicable to the issuance of residence permits by San Marino to third-country nationals.

On the other hand, should the agreement envisaged by this recommendation enter into force earlier than the association agreement, the envisaged agreement would apply to the family members of the Union citizen who are third-country nationals until the association agreement starts to apply.

2. LEGAL BASIS AND PROPORTIONALITY

The legal basis for this recommendation is Article 218(3) and (4) TFEU.

The definite substantive legal basis for the signature and conclusion of the new agreement can only be determined at the end of the negotiations, in light of its contents.

The Union is competent to conclude this international agreement with San Marino, on the aspects of border management covered by this recommendation including granting the residence permits issued by San Marino to third-country nationals Schengen-wide effect.

⁷ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ L 158, 30.4.2004, p. 77).

⁸ Article 2(1)(b) EES Regulation.

⁹ Article 2(2)(b) ETIAS Regulation.

¹⁰ Article 5(2) of Directive 2004/38/EC.

This envisaged agreement is required to solve issues of falsely presumed overstay and to close the identified security gaps. The envisaged agreement does not go beyond what is necessary to achieve the objectives at stake since these cannot be achieved by the Member States alone.

3. RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS

As this will be a new agreement, no evaluation or fitness checks of existing instruments could be carried out. No impact assessment is required for the negotiation of this agreement.

4. IMPLEMENTATION PLANS AND MONITORING, EVALUATION AND REPORTING ARRANGEMENTS

The Commission will ensure proper monitoring of the implementation of the agreement.

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THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 218(3) and (4) thereof,

Having regard to the recommendation from the European Commission,

Whereas:

- (1) An agreement is considered necessary to provide the legal basis for the absence of border control between Italy and San Marino.
- (2) It appears beneficial to conclude such an agreement in view of San Marino's geographical proximity and economic interdependence with the Union.
- (3) It is required to ensure the fair treatment of third-country nationals possessing residence permits issued by San Marino at the Union's external borders.
- (4) The issuance of such residence permits by San Marino has to be conditional on a binding opinion by Italy based on its security assessment.
- (5) The agreement should allow for the conclusion of implementing administrative arrangements of an operational nature between Italy and San Marino on matters covered by this agreement provided that their provisions are compatible with those of the agreement and with Union law.
- (6) Negotiations should therefore be opened with a view to concluding an agreement between the European Union, of the one part, and San Marino, of the other part. The Commission should be nominated as the Union negotiator.

HAS ADOPTED THIS DECISION:

Article 1

The Commission is hereby authorised to negotiate, on behalf of the Union, an agreement with the Republic of San Marino on several aspects in the field of border management.

Article 2

The negotiating directives are set out in the Annex.

Article 3

The negotiations shall be conducted in consultation with the [name of the special committee to be inserted by the Council].

Article 4

This Decision is addressed to the Commission.

Done at Brussels,

*For the Council
The President*