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Dear President,

The Commission would like to thank the Saeima for its Opinion concerning the proposal for a Regulation of the European Parliament and of the Council establishing a touring visa and amending the Convention implementing the Schengen Agreement and Regulations (EC) No 562/2006 and (EC) No 767/2008 {COM (2014) 163 final}.

1. Concerning the legal basis of the proposal, the Commission would like to underline that the primary purpose of the Regulation is to establish an authorisation allowing third-country nationals to stay on the territory of Schengen Member States for a certain period of time, and thereby to contribute to the EU's common visa policy. The proposal would fill a legal gap in the EU's current Schengen and immigration acquis (see also below). The desire to boost tourism, employment and growth by increasing possibilities for travellers – such as tourists, business people and culture professionals – to visit the Schengen area is certainly an important political consideration for deciding on this proposal, but it is of secondary nature when determining the appropriate legal basis.

The Court of Justice of the European Union applies the so-called "centre of gravity" test when defining the most appropriate legal basis. According to settled case-law¹, the choice of the legal basis for an EU measure "must be based on objective factors which are amenable to judicial review and include in particular the aim and content of the measure". If the examination of that measure reveals "that it pursues a twofold purpose or that it has a twofold component and if one of those is identifiable as the main or predominant purpose or component, whereas the other is merely incidental, the act must be based on a single legal basis, namely that required by the main or predominant purpose or component [...] Exceptionally, if on the other hand it is established that the act simultaneously pursues a number of objectives or has several components that are indissociably linked, without one being secondary and indirect in relation to the other, such an act will have to be founded on the various corresponding legal bases."

¹ See, for instance, Case C-94/03, Commission v. Council [2006] ECR I-1, paras 34–36.

In accordance with that case-law, the legal basis must thus be chosen on the basis of the measure's main or predominant purpose which clearly is to create another form of visa and thereby contribute to the EU's common visa policy. Dual legal bases should only be used in exceptional circumstances. The Commission therefore believes that Article 77(2) TFEU is the correct legal basis for the proposal and should remain its sole legal basis.

Furthermore, the Commission would like to draw the Saeima's attention to the fact that, for the proposal recasting the Visa Code {COM(2014) 164 final}, adopted simultaneously with the touring visa proposal, the same legal basis has been maintained, although it is underpinned by a much stronger economic rationale than the existing Visa Code. As mentioned in the explanatory memorandums of both proposals, due to their strong links it could be envisaged to merge them into one single legal text.

The Saeima also expresses doubts about the chosen legal basis, as Article 77(2)(a) TFEU only allows for short stays of third-country nationals, while the total length of authorised stay under the touring visa may be two years (taking into account a possible extension).

During the preparatory works, the Commission has carefully considered the legal basis. The Saeima is right when recalling that Article 77(2) TFEU makes a reference to "short-stay" and "short period". However, contrary to the preceding Treaty (Treaty establishing the European Community), the TFEU no longer limits such stays to "no more than three months". The very idea of this change was to provide more flexibility to the legislator to adopt legal acts that better correspond to the needs and interests of the EU in the area of visa policy.

When interpreting Article 77(2) of the TFEU it is also important to remember the broad competence of the EU to develop a common immigration policy and establish the conditions of entry and residence of third-country nationals in the territory of the Member States. Under the legal basis of the common immigration policy (Article 79 TFEU) the legislator has the right to adopt legal acts concerning admission of third-country nationals and to define the conditions and rights with regard to their free movement, without any limitation being set by the legal basis as far as the duration of stay is concerned. Directives adopted on this legal basis apply to stays of more than three months in one Member State. For instance, Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents establishes an automatically renewable residence permit with a validity of at least five years and sets important rights and guarantees for third-country nationals.

Article 77 TFEU confers the power on the EU to act on "short-stays" in the Schengen area, while Article 79 TFEU confers the power on the EU to act on long-stay visas and residence permits in the context of legal residence in Member States. It logically follows from these Articles that the EU also has competence to introduce an authorisation for stays longer than 90 days in any 180-day period in the Schengen area. A narrow interpretation, i.e. that the EU "only" has competence to regulate short-stays in the Schengen area and long-stay in individual Member States but no competence to regulate the situations in between, would not be legally coherent.

The Saeima notes that the total length of stay of a touring visa holder can go up to two years which it considers too long in the context of the short-stay visa policy. In this regard, it should be mentioned that, while the envisaged one-year stay of a touring visa holder is four times more than the 90 days which is provided for third-country nationals as a maximum consecutive stay in the Schengen area in the current Schengen acquis, under the existing rules on short-stay visas, it is already possible to issue multiple-entry visas which authorise their holders to spend years in the Schengen area – although not in a continuous manner. The entire duration of authorised stay of a holder of a multiple entry short-stay visa issued with a validity of five years, is ten times 90 days which is equal to 2.5 years. This is already provided by Article 24 of the Visa Code.

2. In its Opinion, the Saeima considers that the Commission has not sufficiently substantiated the need for and added value of creating the proposed new type of Schengen visa, i.e. the touring visa, in particular when taking into consideration the rather limited number of potential beneficiaries.

The Commission has justified the reasons for putting forward the proposal in the Explanatory Memorandum.

First of all, the Commission sees a practical need for the proposed touring visa: The Commission has received many complaints from individuals and also from touring live performing groups (such as the "Cirque du Soleil") who are faced with problems when they want to travel within the Schengen area for more than 90 days. There is currently no visa or other authorisation allowing for more than 90 days' stay in the Schengen area. However, since these people are moving around and never staying in one Member State for more than three months, they cannot apply for national residence permits either. This proposal aims at filling this legal gap by establishing a new visa type (the touring visa). There are third-country nationals (live performing artists, culture professionals, business people, researchers, tourists, etc.) having a legitimate interest in travelling in the Schengen area for more than 90 days in a given 180-day period without being considered as "immigrants" (i.e. they do not want and/or do not need to reside in a particular Member State for a period beyond three months).

There is also another legal reason for introducing the touring visa: The Schengen Convention (Article 20(2)) currently allows for Member States to "extend" the authorised stay of nationals of visa-free third countries (US, Australia, New Zealand, Japan, Israel, etc.) beyond 90 days on the basis of bilateral visa waiver agreements concluded in the past. This leads to a situation where certain third-country nationals can stay for practically unlimited periods in the Schengen area under short-stay visa waivers without applying for a residence permit or any other authorisation. For instance, New Zealand citizens can remain 51 months in the territory of the Schengen area (3 months Schengen visa-free stay plus 48 months on the basis of 16 bilateral visa waiver agreements). US citizens have 30 months, Guatemalans 21 months and so on. As long as these visitors keep moving between Schengen States, they can – at least in theory – repeat these cycles for as long as they wish. This situation is not compatible with a common visa policy and leads to a lot of confusion, including among border guards, as no effective control is possible. It is not in line with the principle of

reciprocity either, as EU citizens do not enjoy similar visa-free privileges in the third countries and will have to apply for visas or residence permits if they want to stay longer than three months. Therefore the Commission has proposed to repeal the relevant provision of the Schengen Convention (allowing a 5-year transitional period for phasing-out the prolonged visa-free stay on basis of bilateral agreements). However, in order to preserve the EU's and Member States' good relations with the third countries concerned, an alternative instrument – providing for better possibilities of control, such as the proposed touring visa – should be proposed as a substitute to third-country nationals who have a legitimate interest in staying in the Schengen area for periods of more than three months.

Finally, there is an economic rationale to the Commission's proposal: According to the Impact Assessment, although the number of potential beneficiaries of the proposed touring visa seems to be rather low (100,000 to 120,000 applicants per year), these travellers are considered to be 'big spenders'. The additional income for the Schengen area's tourism industry and related sectors was estimated at around EUR 1 billion per year. The proposal thus has its right place in a legislative package which intends to make the visa policy smarter in order to boost economic growth.

In the Saeima's Opinion, the Commission's proposal does not explain how the likely benefits of the touring visa will be balanced against the costs of introducing the new measure.

The Commission acknowledges that the number of potential beneficiaries of the proposed touring visa would be rather low, in particular compared against the number of 17 million short-stay visa applications lodged in 2013. However, as stated above, the Commission is convinced that these beneficiaries will comparatively have a far larger positive economic impact than short-stay visa holders, both due to the main target groups (tours of artists and other live performers, wealthy tourists etc.) and the much longer stay in the Schengen area. Also a larger number of Member States will benefit from these visitors, as a touring visa is designed for stays in at least two Member States, but will most probably be used for even more Member States.

As regards the costs and administrative burden of setting up this new type of visa, it is impossible to make precise estimations. However, it should be kept in mind that the procedures and infrastructure involved would in principle be those for short-stay visas. The competent authorities would be the same, just as the application and issuing procedures. The supporting documents required by applicants would be similar, the data on applicants would be stored in the existing Visa Information System, the same visa sticker would be used, etc. The amount of specific information and training required for visa-issuing authorities and border guards would therefore be manageable. Costs, while higher at the introduction of the touring visa, would not be significant, not least because of the expected number of applications and the fee to be charged.

Finally, the Saeima considers that there is a "risk of an abuse of the rights" provided under the proposed Regulation establishing a touring visa.

The Saeima most probably refers to the lack of a possibility to control whether touring visa holders would stick to the 90-day limit for every Member State, due to the absence of internal

border checks, and to the risk that touring visa holders might stay longer than allowed in the same Member State, possibly even taking up irregular work.

There are two elements in the proposal to reduce that risk before applicants obtain a touring visa and enter the Schengen area:

- Applicants for a touring visa would have to present proof that they will not stay longer than 90 days in any single Member State. That would be easy for touring groups which have a pre-determined tour schedule or researchers with clear assignments, but admittedly a bit more difficult for individual tourists. In their case, they would have to present travel reservations or other credible evidence.*
- In order to avoid that applicants wanting to stay and work illegally in one Member State get a touring visa, the proposal provides for a strict test of the financial means of subsistence. Only applicants who can prove they have sufficient means for such a long stay (e.g. bank statements, regular revenues) would get a touring visa. Also those who intend to work during their stay in the Schengen area would have to obtain and present their work permit before they apply for the touring visa.*

Once the applicants have obtained their touring visa and are within the Schengen area, there is no ultimate guarantee that they would stick to the rules and in particular the 90-day limit. In an area without internal border checks, it is not possible to control how long visitors stay in each Member State. However, this situation is not any different e.g. from that of third-country nationals holding a residence permit or long-stay visa issued by one of the Member States. There are about 20 million non-EU nationals legally residing in the EU, who are entitled to go for stays of 90 days (in any 180-day period) to other Schengen Member States on the basis of their residence permit or long-stay visa. However, there is no way of controlling whether they respect the 90-day limit.

When drafting the proposal the Commission considered the option to set up a system whereby touring visa holders would have to notify where they are staying and for how long. However, that would be an enormous burden for Member States' administrations, and disproportionate taking into account the estimated number of annual applicants for touring visas. The Commission thus believes that the risks, which are not very high from the outset considering the target groups of the proposed touring visa, can be kept under control through other means, notably the ex-ante checks mentioned above.

The points made above are based on the initial proposal presented by the Commission which is currently in the legislative process involving both the European Parliament and the Council at which your government is represented.

The Commission hopes that these clarifications address the concerns raised by the Saeima and looks forward to continuing our political dialogue in the future.

Yours faithfully,

*Maroš Šefčovič
Vice-President*