



EUROPEAN COMMISSION

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Dear President,

The Commission would like to thank the Senat 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. In its Opinion, the Senat considers that the Commission has inadequately substantiated the need for creating the proposed new type of Schengen visa, i.e. the touring visa. 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

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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.

The Senat also considers that the Commission has inadequately substantiated the compliance of this proposal with the subsidiarity principle.

In the Commission's view, the proposal is fully in line with the principle of subsidiarity, as laid down in Article 5(3) of the Treaty on European Union. As explained above, the purpose of the proposal is to fill a legal gap between a short-stay Schengen visa (up to 90 days) and national long-stay visas or residence permits, by establishing a visa allowing for travel through the Schengen area up to a year with stays of no more than 90 days in any single Member State. Individual Member States – while in charge of national residence permits – could not introduce, out of their own initiative, any authorisation allowing for stays in the entire Schengen area; such authorisation valid for all Schengen Member States can only be introduced at EU level. Also, for a Schengen visa, issuing conditions and procedures need to be uniform. The objective of the proposed action can thus only be achieved at Union level.

2. The Senat questions the legal basis of the proposal.

During the preparatory works, the Commission has carefully considered the legal basis. The Senat is right when recalling that Article 77(2) of the Treaty on the Functioning of the European Union (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) 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 Senat notes that the "entire duration" 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.

3. In the Senat's opinion, only a very narrow group of third-country nationals will benefit from the touring visa. The Senat therefore wonders whether the cost of creating a special type of visa for them does not outweigh the advantages to be derived from its issuance.

The Commission fully agrees 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 have – comparatively – 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 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.

4. Finally, the Senat states that the presented proposal "does not provide for any checks to ensure that the touring visa holder actually complies with the visa conditions" and expresses concern about possible abuses.

The Senat most probably refers to the lack of 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 Senat and looks forward to continuing our political dialogue in the future.

Yours faithfully,

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