

Short analysis of the Schengen Acquis aimed at the elaboration of arguments in favour of starting the dialogue with the EU concerning the introduction of visa-free regime for Ukrainian travels to countries of the Schengen Area.

Introduction

The request lodged to UEPLAC on 11 February demanded to highlight which elements of the Schengen Acquis can be used as arguments by Ukraine during the prospective negotiations on a free Visa regime with EU.

It is the opinion of the Consultant that the vast bulk of the Schengen Acquis as such is of a relative interest for the negotiation process on a free VISA regime and that the EU would be more interested in, and find of value, issues directly related with the implementation of some specific Chapters of the Ukraine/EU Action Plan on Freedom, Security and Justice (hereinafter AP FSJ). Those Chapters (in particular on Illegal Immigration, Document Security, and Visa Policy) are indeed elements of the Action Plan that can be linked to the Schengen Acquis, and in particular to the development of the Acquis in the aftermath of September 11th, as far as documents security and contrast to illegal immigration are concerned. Furthermore, Ukrainian own VISA and naturalisation policy will also be under EU scrutiny in order to decide whether agreeing to a free VISA regime.

In other terms, it seems safe to assume that once the different measures of the AP FSJ will be implemented Ukraine will be in a strong negotiating position to proceed further towards the prospective free VISA regime. At the same time, the AP on FSJ does already deal with actual parts of the Schengen Acquis and considering that such Acquis is above all an agreement for cooperation on criminal matters between police and judicial authorities of the Member States the bulk of the legal provisions are not subject, at this moment in time, for accession or implementation from Ukraine (eg, the Schengen Information System, or the rights of hot pursuit, etc.).

It is important also to highlight that a free VISA regime with Ukraine is, in the view of the EU, a long term perspective dependant not only on the correct implementation of the AP FSJ but also on the correct implementation of both the VISA facilitation the Readmission agreements.

In order to fully develop the opinion it seems important to provide at first a brief overview and definition of the Schengen Acquis itself, than to analyse other relevant EU legal texts, in conjunction with elements of the Action Plan, which together can provide useful indications to Ukrainian authorities¹.

Definition of the Schengen Acquis

During the 80ies Member States discussed the exact meaning of the concept of “free movement of persons” and since they could not reach an agreement as to whether it should apply to the EU citizens alone or to everybody within their territories (which meant the abolition of internal borders), 5 Member States (France, Germany and the BeNeLux) decided to proceed with the latter interpretation and agreed in 1985, in the Luxembourg village of Schengen, to gradually abolish checks at their internal borders. Within ten years from that agreement all other Member

¹ The sources of this opinion are the Europa website (in particular Scadplus and the website of DG FSJ), the FSJ Action Plan (and its related Scoreboard) and a number of legal texts directly referred to in the different paragraphs.

States (except, to different extents, UK, Ireland and Denmark) joined the initial group of 5, together with the non-EU countries part to the Nordic Union (ie, Iceland and Norway).

The Schengen Area came into effect as of 1995, abolishing checks at the internal borders of the participating countries and creating a single external border where immigration checks are carried out, in principle, with identical procedures. Accordingly, in order to reconcile freedom and security, this freedom of movement was accompanied by so-called compensatory measures².

The “Schengen Acquis” is the whole of legal provisions stemming from the Schengen Agreement (1985) and its subsequent Schengen Convention (1990), which includes, together with the Agreement and its Implementing Convention, the above mentioned compensatory measures, the relevant decisions and declarations made by the Schengen Executive Committee (created by the previous legal instruments), the acts adopted in order to implement the Convention by the authorities on which the Executive Committee conferred decision-making powers, and the protocols and accession agreements which followed. The list of elements that make up such Acquis was adopted by the EU Council on 20 May 1999 (Decision 1999/435/EC, OJ L 176, 10.7.1999, corrigendum OJ L 9, 13.1.2000). This Acquis, which has been incorporated into the EU framework through a protocol attached to the Treaty of Amsterdam (1997), has been grouped and classified under 5 main headings (OJ L 239, 22.9.2000, p.1-10).

Those 5 headings are:

- horizontal issues;
- abolition of checks at internal borders and the free movement of persons,
- police cooperation;
- judicial cooperation in criminal matters;
- the Schengen Information System.

For the reasons explained in the introduction to this opinion the part of this Acquis that interests Ukraine, as specified in the terms of the request to UEPLAC, are above all those referring to the free movement of persons.

Relevant issues

In terms of the EU Acquis it is necessary to analyse Regulation 2001/539 of 15 March 2001, OJ L 81, 21.3.2001, p.1) *listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement.*

This regulation provides for the list of third countries with whom EU has a free VISA regime for stays up to 3 months and those countries whose nationals must obtain a VISA to enter the Schengen area. The instrument follows on from the Schengen acquis in accordance with the Protocol attached to the Treaty of Amsterdam and it does not interfere with specific cases where special visa rules are warranted (eg, for local border traffic cards).

² The main measures include: - the abolition of checks at common borders, replacing them with external border checks; - a common definition of the conditions for crossing external borders and uniform rules and procedures for checks there; - separation in air terminals and ports of people travelling within the Schengen area from those arriving from countries outside the area; - harmonisation of the conditions of entry and visas for short stays; - coordination between administrations on surveillance of borders (liaison officers and harmonisation of instructions and staff training); - the definition of the role of carriers in measures to combat illegal immigration; - requirement for all non-EU nationals moving from one country to another to lodge a declaration; - the drawing up of rules governing responsibility for examining applications from asylum seekers (Dublin Convention, replaced in 2003 by the Dublin II Regulation); - the introduction of cross-border rights of surveillance and hot pursuit for police forces in the Schengen States; - the strengthening of judicial cooperation through a faster extradition system and faster distribution of information about the enforcement of criminal judgments; - the creation of the Schengen Information System (SIS).

In the whereas of Reg.2001/539 it is stated upon which grounds the EU will decide whether to move towards a free-visa regime with a specific third country.

(5) The determination of those third countries whose nationals are subject to the visa requirement, and those exempt from it, is governed by a considered, case-by-case assessment of a variety of criteria relating inter alia to illegal immigration, public policy and security, and to the European Union's external relations with third countries, consideration also being given to the implications of regional coherence and reciprocity. Provision should be made for a Community mechanism enabling this principle of reciprocity to be implemented if one of the third countries included in Annex II to this Regulation decides to make the nationals of one or more Member States subject to the visa obligation.

The text indeed makes reference to a variety of criteria whose reference can also be found in the revised AP on Freedom, Security and Justice.

Such criteria concern 4 major counts:

- illegal immigration;
- public policy and security;
- EU external relations;
- Reciprocity.

Of the above list the first two criteria are those more relevant for Ukraine as they depend on positive action from Ukraine, and they find a direct reference into the Action Plan on Freedom, Security and Justice, while recalling some aspects of the Acquis. The third criteria is rather related to EU external policy aims and objectives (which of course in the case of Ukraine means the ENP and its Action Plan, inclusive of the AP FSJ), and the last one is currently met as Ukraine has already opted for a free VISA regime for EU citizens wishing to enter the country for short stays up to 3 months.

In terms of “Illegal Immigration” what matters is that Ukraine ensures the EU that a free VISA regime will not result in a facilitation for Ukrainian citizens to legally enter the EU and then, once the legal terms of stay expire, illegally remain in the territory of the Member States. With this in mind, what it is crucial is the implementation of the Readmission Agreement, which will demonstrate the willingness of Ukrainian Authorities to take responsibility for its subjects, as well as the implementation of the measures contained in the FSJ Scoreboard.

Within the EU the “public policy and security” are traditional limits to the freedom of movement of persons that through the years have been defined and shaped both by several legal texts and the case law of the European Court of Justice in Luxembourg. Whoever represents a threat to public order or security can be legitimately denied the freedom of movement within the EU MSs’ territory. In this sense, eg, the European Court has found legitimate the limitation of this freedom for sentenced drug dealers, for individuals related to criminal groups or yet for football hooligans. In recent years this limitation has been focusing more and more around the international concerns on terrorist activities, and increasing attention has been given to prevent the entry and freedom of movements of those potentially threatening public order and security by, amongst other, securing above doubt the identity of a person crossing any border.

To the extent of meeting the above two criteria, and beside what already said regarding Illegal Immigration, it is safe to assume that EU authorities will consider very positively the full implementation of the AP FSJ’s objectives on VISA and Document Security and in particular:

- the establishment of a National VISA register, as agreed in the AP on FSJ;

- the stiffing up of criminal sanctions for those attempting to forge official documents and documents of personal identity, whose possibility has been included in the AP on FSJ for consideration by Ukrainian Authorities;
- the enhancement of the capacity to detect forged documents for entry into Ukraine (in particular at Diplomatic and Consular missions abroad) by providing state of the art technical equipment and clear directives on how to use them (Council Recommendation OJ/C, 189, of 17.6.1998, and OJ/C, 140, 20.5.1999). What exactly the Council requires here from the Member States is that they ensure uniform levels of equipment at all their points of entry, and it would be important for Ukraine to ensure such uniformity at all points of entry into the Ukrainian territory.
- the inclusion of biometrics features in passports and travel documents (Council Regulation EC/2252/2004 of 13.12.2004 and Commission Decision of 28.6.2006, C(2006) 2909 final, not published in the OJ). The biometric features the EC has required EU Member States to include are:
 - o primary biometrics - face;
 - o secondary biometrics – fingerprints;
 The Commission in its 2006 Decision also addressed in details the storage media and its security, electronic passport chip layout, data security and integrity issues, and how to assess the conformity of the new documents to the required attributes. With regard to biometrics and storage of data it is also important to highlight the need for the implementation of the Council of Europe Data Protection Convention to balance the potentials for misuse of the information stored;
- the replacement of old travel documents with new secure ones, as also noted in the final report (2006) of the EU JFS Assessment Mission to Ukraine, and as included in the relevant objectives of the AP on FSJ;
- Another measure the EU would welcome concerns the stiffing up of financial penalties for air carriers that do not provide enough care in ensuring that their passengers have the requisites to travel to the EU (ie, preliminary control of VISA and documents validity at check-in, Directive 2001/51/EC that obliges Member States to impose minimum financial penalties ranging from 3000 EURO up to 500,000 EURO in case of repeated negligence).

As last point to be taken into account it is also, as mentioned earlier, Ukrainian own VISA policy. The reasons for the attention paid by the EU on the VISA regime for people entering Ukraine is linked to the possibility of those persons residing in Ukraine long enough to get Ukrainian passport or travel documents, and hence, once the free VISA regime with EU in place, the further possibility for the individuals concerned to freely travel to EU. In this sense, the Ukrainian Government could also consider the inclusion of biometrics for VISA requests to enter Ukrainian territory, together with the other measures already agreed with the EU under the AP FSJ.

In conclusion the most important elements for the EU in the frame of the negotiations on a free VISA regime are mostly already known to Ukraine. These are the ones agreed in particular in the Action Plan on Freedom, Security and Justice, including a positive and satisfactory implementation of the Readmission Agreement. Within this frame, Document Security is of essential importance, as well as Ukrainian VISA policy and fight against illegal Immigration. It is also crucial to consider that the decision on whether moving towards a free VISA regime is essentially political in its nature, and it is understood from the EU as being a long term perspective that will feed on the successful implementation of the engagements Ukraine has already agreed with the EU both in general and on the above mentioned issues.

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