EU Immigration and Asylum Law

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certain circumstances, an entry ban procedure. According to the Handbook, it is possible for a Member State to launch the procedure once knowledge of the overstay is acquired and complete it 'in absentia' if national law so allows provided that the national procedure complies with the right to be heard and the right to a fair trial, including the right to a hearing. The issuing of an entry ban in these circumstances is however a narrow discretion which is subject to the principles mentioned above and which should be exercised in accordance with the general objective of promoting voluntary departure.[175] Entry bans will be recorded in the SIS, but even in cases where no action is taken by national authorities, overstays and deviations from the authorised stay, in terms of the Member State from where the individual leaves the EU, will be captured by the EES.[176] In light of the interoperability between the EES and the VIS, this information will become the 'visa history' of the individual which is examined by national authorities on the occasion of new visa applications.[177]

III. Multiple-entry visas

3 Article 24(2) provides for the mandatory issuing of multiple-entry visas with a long validity according to a 'cascade' system, with some safeguards, which are subject to a narrow interpretation (Article 24(2a)), and the possibility of adapting the rules in each jurisdiction to take into account local circumstances (Article 24(2b) and (2d)). These new rules are among the most significant amendments introduced by Regulation (EU) 2019/1155. The Commission had supported their introduction since its 2014 recast proposal with a view to lessening the administrative burden on consulates by reducing the number of applications to be processed, facilitating bona fide regular travel and preventing visa-shopping as it results from the lack of a uniform approach to the issuing of multiple-entry visas. Multiple-entry visas may contribute to reduce the effect that visa policy has of decreasing the outflows of migrants,[178] contrary to the perception of consulates that visas with a long validity increase migratory risk.[179] Prior to these amendments, the Visa Code already contained provisions on the mandatory issuing of multiple-entry visas but these were considered largely ineffective by the Commission as a result of their unclear formulation.[180] The old provisions are nevertheless preserved in Article 24(2c) and provide cases of possible eligibility for multiple-entry visas in addition to those established by Article 24(2). Some changes have however been introduced. In particular, Article 24(2c) no longer establishes an obligation to issue multiple-entry visas but rather a discretion. This and the imprecise formulation of the provision means that it will continue to be of little practical benefit to individuals and not conducive to a harmonised approach. Moreover, Article 24(2c) no longer refers to family members of EU citizens, family members of third country nationals legally

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[175] Commission Recommendation, C(2017) 6505 final, paras 5.1 and 11.3–4.

[176] Under Article 12 Regulation (EU) 2017/226 (OJ 2017 L 327/20) establishing an entry/exit system (EES), the EES automatically generates a list of overstayers (persons for whom there is no exit data following the date of expiry of their authorised stay) available to the competent national authorities to enable them to adopt appropriate measures, with the data retained for 5 years. See also Article 16 of the EES Regulation on information included in the EES individual file.

[177] Article 8 Regulation (EU) 2017/2226 (OJ 2017 L 327/20) establishing an Entry/Exit System (EES); Articles 17a-19a Regulation (EC) No 767/2008 (OJ 2008 L 218/60) on the Visa Information System (VIS).

[178] For an analysis of the effect of visa policy on migratory flows, see Czaika/de Haas, The Effect of Visas.

[179] Commission Staff Working Document, SWD(2018) 77 final, p. 14.

[180] Commission Staff Working Document, SWD(2018) 77 final, p. 13 and 18.

residing in the Member States, representatives of civil society organizations, etc. as specific categories of third country nationals that should benefit from multiple-entry visas, which had been the only clear aspect of the provision. As mentioned above (see Article 1 MN 6), this has been justified on the ground that multiple-entry visas 'should not be limited to specific travel purposes or categories of applicants', although Member States are expected to 'have particular regard for persons travelling for the purpose of exercising their profession such as business people, seafarers, artists and athletes'.[181] Visa facilitation agreements between the EU and third countries cover the specific categories previously included in Article 24(2c), as well as additional categories, providing, inter alia, for more generous rules on multiple-entry visas than the Visa Code.[182]

4 By virtue of the conditionality mechanism in Article 25a, introduced to further strengthen the legal link between visa policy and cooperation on readmission by third countries, the application of Article 24(2) and (2c) can be temporarily suspended in relation to applicants or categories of applicants who are nationals of countries which are considered as uncooperative in the field of readmission, in accordance with a Council implementing decision adopted under Article 25a(5)(a). The conditionality mechanism in Article 25a also creates the possibility for the Council, in the case a third country is considered as cooperating sufficiently in the field of readmission, to adopt an implementing decision whereby applicants or categories of applicants who are nationals of that country will benefit from an increase in the period of validity of multiple-entry visas under Article 24(2).

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Article 25
Issuing of a visa with limited territorial validity

1. A visa with limited territorial validity shall be issued exceptionally, in the following cases:

(a) when the Member State concerned considers it necessary on humanitarian grounds, for reasons of national interest or because of international obligations,

(i) to derogate from the principle that the entry conditions laid down in Article 5(1)(a), (c), (d) and (e) of the Schengen Borders Code must be fulfilled;

(ii) to issue a visa despite an objection by the Member State consulted in accordance with Article 22 to the issuing of a uniform visa; or

(iii) to issue a visa for reasons of urgency, although the prior consultation in accordance with Article 22 has not been carried out;

or

(b) when for reasons deemed justified by the consulate, a new visa is issued for a stay during the same 180-day period to an applicant who, over this 180-day period, has already used a uniform visa or a visa with limited territorial validity allowing for a stay of 90 days.

2. A visa with limited territorial validity shall be valid for the territory of the issuing Member State. It may exceptionally be valid for the territory of more than one Member State, subject to the consent of each such Member State.

3. If the applicant holds a travel document that is not recognised by one or more, but not all Member States, a visa valid for the territory of the Member States

[181] Recital 11, Regulation (EU) 2019/1155 (OJ 2019 L 188/25).

[182] See, for example, Article 5 EU-Azerbaijan Visa Facilitation Agreement (OJ 2014 L 128/49).

recognising the travel document shall be issued. If the issuing Member State does not recognise the applicant's travel document, the visa issued shall only be valid for that Member State.

4. When a visa with limited territorial validity has been issued in the cases described in paragraph 1(a), the central authorities of the issuing Member State shall circulate the relevant information to the central authorities of the other Member States without delay, by means of the procedure referred to in Article 16(3) of the VIS Regulation.

5. The data set out in Article 10(1) of the VIS Regulation shall be entered into the VIS when a decision on issuing such a visa has been taken.

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I. Scope

1 As seen above, once the examination of the visa application under Article 21, and where applicable Article 22, is completed, Article 23 envisages four possible decisions, including the issuing of a limited territorial validity (LTV) visa under Article 25, defined in Article 2 as 'a visa valid for the territory of one or more Member States but not all Member States'. One question that arises is whether Article 25(1), in light of the use of the term 'shall', has the effect of precluding the Member States from issuing uniform visas in all the cases that it lists. As Peers points out, such an interpretation is possible only if the cases listed in Article 25(1) correspond to the grounds for visa refusal in Article 32(1), since the ECJ has clarified, in *Koushkaki*, that the grounds for refusing a visa in Article 32(1) are exhaustive to the effect that no further grounds can be added.[183] This interpretation is supported by the reference in Article 32(1) to Article 25(1). Accordingly, the purpose of Article 25(1) appears to be to establish derogations from Article 32(1). Article 25(1)(a)(i) provides for the issuing of an LTV visa when the entry conditions in Article 6 of the Schengen Borders Code Regulation (EU) 2016/399 are not fulfilled, with such entry conditions corresponding to the grounds for visa refusal under Article 32(1). Article 6(1)(a) of the Schengen Borders Code Regulation (EU) 2016/399 establishes, however, additional requirements in relation to the temporal validity of the travel document which are not mentioned in Article 32(1), but which are set out in Article 12 and constitute conditions for the admissibility of the visa application under Article 19. In this context, the situation is unclear in relation to the case of an application that is inadmissible, because the visa applicant's travel document does not meet the temporal validity requirements in Article 12, but is nevertheless considered admissible under Article 19(4) on humanitarian grounds, for reasons of national interest or because of international obligations.[184] The Visa Code is not clear as to whether a uniform visa or an LTV visa should be issued in these circumstances. The uncertainty results from the fact that the only ground for refusing a uniform visa in

[183] Peers, in Peers/Guild/Tomkin (eds), EU Immigration and Asylum, p. 251, 261. ECJ, *Koushkaki*, C-84/12, EU:C:2013:862.

[184] As regards entry in such circumstances, see Article 6(5)(c) of the Schengen Borders Code Regulation (EU) 2016/399.

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relation to the applicant's travel document which is mentioned in Article 32 relates to the document's genuineness, as emphasized by the ECJ in *Air Baltic Corporation*.[185] Indeed, although Article 21, on verification of entry conditions, provides that it shall be ascertained whether the applicant fulfils the entry conditions set out in Article 6 of the Schengen Borders Code Regulation (EU) 2016/399, the Article only specifically refers, in relation to the travel document of the visa applicant, to an examination of its genuineness. On the other hand, Article 24, on determining the period of validity of a uniform visa and the length of the authorised stay in any given case, refers to the obligation for the visa applicant to satisfy all entry conditions in the Schengen Borders Code Regulation (EU) 2016/399, including those in Article 6(1)(a) in order to be issued with a multiple-entry visa. In the same way, Article 35, on the issuing of visas at the border, establishes that visas may be issued at the border provided, inter alia, that the applicant fulfils the entry conditions in Article 6 of the Schengen Borders Code Regulation (EU) 2016/399.

2 Article 25(1)(a)(ii) cover cases where a visa would be refused under Article 32(i)(a)(vi) on the ground that the visa applicant is considered a threat to a fundamental interest of a Member State. This is so as the purpose of prior consultation under Article 22 is to establish that a visa applicant is not considered to be a threat to public policy, internal security or public health or to the international relations of any Member State (see Article 22 MN 1). In this context, Article 25(1)(a)(iii) is more problematic as it covers circumstances where prior consultation is not carried out because of urgency so that, strictly speaking, the visa applicant cannot be considered a threat to a Member State as required by Article 32(i)(a)(vi). In this context, it needs to be clarified that, consistently with the interpretation of the purpose of Article 21 by the ECJ in *Koushkaki* (see Article 21 MN 1), prior consultation under Article 22 is a means to establish whether a ground for visa refusal exists and not, in itself, a condition for issuing a uniform visa. However, in order to avoid a situation where Article 22 is devoid of meaning and given that the Visa Code pursues, inter alia, security objectives and, for this purpose, leaves to the Member States a wide discretion in assessing whether a third country national poses a threat,[186] it could be argued that Article 32(i)(a)(vi) requires that for a uniform visa to be issued prior consultation, when required, is carried out. In this context, Article 25(1)(a)(iii) provides some flexibility by stating that, when prior consultation is not possible, an LTV visa is to be issued providing the relevant conditions are met. Article 25(1)(b) covers visa refusal, under Article 32(1)(a)(iv), in the case of a visa applicant who has already stayed for 90 days in a given 180-day period. Although the general purpose of Article 25(1) is to establish derogations from Article 32(1), Article 25(1) does not expressly provide for the issuing of an LTV visa in the case when a uniform visa is refused, in accordance with Article 32(1)(a)(vii), because the visa applicant does not provide proof of holding travel medical insurance. This is the result of the fact that Article 25(1)(a)(1) refers to the entry conditions in the Schengen Borders Code Regulation (EU) 2016/399, which do not include travel medical insurance, rather than the conditions for refusing a visa in Article 32 (see MN 1). The situation is the same for LTV visas issued at the border under Article 35(4). On the other hand, travel medical insurance may be waived in case of (uniform) visas issued at the border under Article 35(2). Furthermore, Article 15(3) establishes travel medical insurance requirements specifically in relation to LTV visas covering the territory of more than one Member State.

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[185] ECJ, *Air Baltic Corporation*, C-575/12, EU:C:2014:2155, para 35.
[186] ECJ, *Koushkaki*, C-84/12, EU:C:2013:862, paras 67–73.

3 LTV visas issued under Article 25(1) are normally valid for the territory of the issuing Member State only. Article 25(4) and 5 provides for data relating to LTV visas to be entered into the VIS and for information to be exchanged through the VISMail communication network in accordance with Article 10(da) and Article 16(3) of the VIS Regulation.[187] Article 25(3) provides rules for the issuing of LTV visas in cases where a travel document is not recognised by one or more Member States. Article 2(7) defines 'recognised travel document', and the list of such documents is drawn pursuant to Decision 1105/2011/EU (see Article 12 MN 2). The list is incorporated in the VIS to enable automatic verification.[188] Recital 30 of the Visa Code clarifies that the conditions governing the issue of visas do not affect the rules currently governing recognition of the validity of travel documents.

II. Rights of appeal

4 On the basis of Article 23, it is unclear whether an applicant who is refused a uniform visa and issued instead with an LTV visa can appeal against the uniform visa refusal in accordance with Article 32(3) (see above Article 23 MN 2). With regard to refusal of an LTV visa, the Regulation does not expressly provide for a right of appeal as in cases of uniform visa refusal, annulment and revocation. The significance of this omission, from the perspective of Article 47 CFR, is linked to the question of whether Article 25(1) establishes an obligation for the Member States to issue LTV visas when the relevant conditions are satisfied and a consequent right to an LTV visa.

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III. Does Article 25 establish an obligation to issue LTV visas?

5 It has been argued that the reasoning of the ECJ in *Koushkaki* (see below Article 32 MN 6) can be applied by analogy to Article 25(1), particularly in light of the use of the term 'shall', to the effect that applicants who satisfy the relevant conditions for the issuing of LTV visas in Article 25(1) are entitled to such visas.[189] The purpose of Article 25(1) appears to be to regulate derogations by the Member States from Article 32(1) and the term 'exceptionally', in this context, may be taken to refer to the obligation to approach derogations narrowly. Subject to the requirement of a narrow approach, the conditions for issuing an LTV visa in Article 25(1) are vaguely formulated and appear to leave a high degree of discretion to the Member States, by providing that LTV visas shall be issued 'when the Member State concerned considers it necessary on humanitarian grounds, for reasons of national interest or because of international obligations'. The result is that it would be extremely difficult for an individual to challenge a decision to refuse an LTV visa, particularly when no procedural shortcomings are evident. However, as Peers points out, the situation is different when international obligations are involved as 'arguably, the binding nature of the relevant international obligations, … override[s] the discretion

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[187] Regulation (EC) No 767/2008 (OJ 2008 L 218/60) on the Visa Information System (VIS).

[188] See Article 1(6) and (11) Regulation 2021/1134 (OJ 2021 L 248/11) amending Regulations (EC) No 767/2008, (EC) No 810/2009, (EU) 2016/399, (EU) 2017/2226, (EU) 2018/1240, (EU) 2018/1860, (EU) 2018/1861, (EU) 2019/817 and (EU) 2019/1896 and repealing Council Decisions 2004/512/EC and 2008/633/JHA, for the purpose of reforming the Visa Information System.

[189] Peers, 'External processing of applications for international protection in the EU', EU Law Analysis Blog of 24 April 2014, available at: http://eulawanalysis.blogspot.co.uk/2014/04/last-autumns-huge-loss-of-lives-near.html [last accessed 06 April 2021]; Jensen, Humanitarian Visas, p. 16–17; ECJ, *Koushkaki*, C-84/12, EU:C:2013:862, paras 47–55.

suggested by the words "considers it necessary"'.[190] In this context, it is recognised that while states are free to control the entry and residence of aliens into their territory as part of their sovereignty, state sovereignty in this area is not absolute. Principles of general international law and obligations arising out of treaties limit state discretion as to entry, transit, residence and expulsion of aliens.[191] Before the judgements of the ECtHR in *M. N. and Others v. Belgium* and the ECJ in *X and X* (see Article 1 MN 11), in the context of the use of visas as an interdiction measure, a question which emerged with particular force was whether the prohibition of refoulement in instruments such as the Geneva Convention, the ECHR and the CFR was applicable to such extraterritorial settings as the issuing of visas, in which case LTV visas could be used by the Member States to fulfil such obligations.[192] In *M. N. and Others v. Belgium*, the ECtHR was called to clarify whether Belgium was in breach of Article 3 ECHR by refusing humanitarian visas to a family from Syria who intended to enter Belgium to claim asylum. The ECtHR found that in the circumstances of the case Belgium did not exercise jurisdiction over the visa applicants within the meaning of Article 1 ECHR and could therefore not be held liable for acts or omissions allegedly constituting a breach of the Convention. The Court reiterated that jurisdiction within the meaning of Article 1 ECHR is primarily territorial. While jurisdiction may exceptionally be exercised extraterritorially, that requires a finding that the state has in the circumstances of the case exercised a certain degree of authority or control over the individuals concerned.[193] This was found by the Court not to be so in relation to the visa refusal decision in the case.[194] Furthermore, the Court found that there was no other 'jurisdictional link' between the applicants and Belgium as it could have resulted if the applicants had pre-existing ties of family or private life with Belgium.[195] In such a situation, the general impression is that LTV visas are generally accessible by individuals only through special channels controlled by the Member States (see Article 8 MN 3).

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IV. Statistics on LTV visas

6 No comprehensive statistics are available on the number of LTV visas issued for the period since the Visa Code entered into force. Generally, the number of LTV visas

[190] Peers, 'External processing of applications for international protection in the EU', EU Law Analysis Blog of 24 April 2014, available at: http://eulawanalysis.blogspot.co.uk/2014/04/last-autumns-huge-loss-of-lives-near.html [last accessed 06 April 2021]; Jensen, Humanitarian Visas, p. 20.

[191] For an overview of the international obligations in the context of visas, see Meloni, Visa Policy, p. 7–24.

[192] This question has been considered in great depth by scholars. See for example Noll, Seeking Asylum; Goodwin-Gill/McAdam, The Refugee, p. 244–252; Lauterpacht/Bethlehem, in Feller/Türk/Nicholson (eds), Refugee Protection, p. 109–128; Hathaway, The Rights of Refugees, p. 160–171; den Heijer, Europe and Extraterritorial Asylum, p. 120–141; Moreno Lax, 'Must EU Borders have Doors for Refugees? On the Compatibility of Schengen Visas and Carriers' Sanctions with EU Member States' Obligations to Provide International Protection', EJML 10 (2008), p. 315–364; Moreno Lax, Accessing Asylum, p. 247–394. On national courts' attitudes to the extraterritorial application of the Geneva Convention, see the US Supreme Court, *Sale v. Haitian Center Council*, Judgment of 21 June 1993, (1993) 113 S.Ct 2549, paras 181–182; UK House of Lords, *R (European Roma Rights Centre) v. Immigration Officer at Prague Airport*, Judgment of 9 December 2004, [2004] UKHL 55, paras 17,64,70. On domestic cases relating to visa/entry refusal interfering with ECHR's rights see, for example, UK Court of Appeal, Judgment of 30 April 2002, *R v. Secretary of State for the Home Department, ex parte Louis Farrakhan* [2002] EWCA Civ 606, para 55; UK Supreme Court, Judgment of 12 November 2014, *R (Lord Carlile of Berriew) v. Secretary of State for the Home Department* [2014] UKSC 60; and UK Supreme Court, Judgment of 26 February 2021, *R (Begum) v. Secretary of State for the Home Department* [2021] UKSC 7.

[193] ECtHR, Judgment of 5 May 2020, No 3599/18, *M. N. and Others v. Belgium*, paras 98–108.

[194] ECtHR, Judgment of 5 May 2020, No 3599/18, *M. N. and Others v. Belgium*, paras 118–119.

[195] ECtHR, Judgment of 5 May 2020, No 3599/18, *M. N. and Others v. Belgium*, paras 109 and 115.

issued by the Member States is very low, with 0.76 % visa applicants receiving LTV visa in 2019.[196] LTV visas are issued primarily to bypass the prior consultation procedure in Article 22.[197] However, before the ECJ judgment in *X and X* (Article 1 MN 11), some Member States also used to issue LTV visas to family members who did not meet the legal requirements for family reunion and to asylum seekers in certain circumstances,[198] with 16 Member States having available Schengen visas for such humanitarian purposes.[199]

Article 25a
Cooperation on readmission

1. Depending on the level of cooperation of a third country with Member States on the readmission of irregular migrants, assessed on the basis of relevant and objective data, Article 14(6), Article 16(1), point (b) of Article 16(5), Article 23(1), and Article 24(2) and (2c) shall not apply to applicants or categories of applicants who are nationals of a third country that is considered not to be cooperating sufficiently, in accordance with this Article.

2. The Commission shall regularly assess, at least once a year, third countries' cooperation with regard to readmission, taking account, in particular, of the following indicators:

(a) the number of return decisions issued to persons from the third country in question, illegally staying on the territory of the Member States;

(b) the number of actual forced returns of persons issued with return decisions as a percentage of the number of return decisions issued to nationals of the third country in question including, where appropriate, on the basis of Union or bilateral readmission agreements, the number of third country nationals who have transited through the territory of the third country in question;

(c) the number of readmission requests per Member State accepted by the third country as a percentage of the number of such requests submitted to it;

(d) the level of practical cooperation with regard to return in the different stages of the return procedure, such as:

(i) assistance provided in the identification of persons illegally staying on the territory of the Member States and in the timely issuance of travel documents;

(ii) acceptance of the European travel document for the return of illegally staying third-country nationals or laissez-passer;

(iii) acceptance of the readmission of persons who are to be legally returned to their country;

(iv) acceptance of return flights and operations.

Such an assessment shall be based on the use of reliable data provided by Member States, as well as by Union institutions, bodies, offices and agencies. The Commission shall regularly, at least once a year, report its assessment to the Council.

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[196] Available at: http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/visa-policy/index_en.htm [last accessed 06 April 2021].

[197] Commission Staff Working Document, SWD(2014) 101 final, p. 24; Meloni, The Community Code, p. 684.

[198] See ECtHR, Judgment of 5 May 2020, No 3599/18, *M.N. and Others v. Belgium*, paras 50–51.

[199] Jensen, Humanitarian Visas, p. 6.

3. A Member State may also notify the Commission if it is confronted with substantial and persisting practical problems in the cooperation with a third country in the readmission of irregular migrants on the basis of the same indicators as those listed in paragraph 2. The Commission shall immediately inform the European Parliament and the Council of the notification.

4. The Commission shall examine any notification made pursuant to paragraph 3 within a period of one month. The Commission shall inform the European Parliament and the Council of the results of its examination.

5. Where, on the basis of the analysis referred to in paragraphs 2 and 4, and taking into account the steps taken by the Commission to improve the level of cooperation of the third country concerned in the field of readmission and the Union's overall relations with that third country, including in the field of migration, the Commission considers that a country is not cooperating sufficiently and that action is therefore needed, or where, within 12 months, a simple majority of Member States have notified the Commission in accordance with paragraph 3, the Commission, while continuing its efforts to improve the cooperation with the third country concerned, shall submit a proposal to the Council to adopt:

(a) an implementing decision temporarily suspending the application of any one or more of Article 14(6), point (b) of Article 16(5), Article 23(1), or Article 24(2) and (2c), to all nationals of the third country concerned or to certain categories thereof;

(b) where, following an assessment by the Commission, the measures applied in accordance with the implementing decision referred to in point (a) of this paragraph are considered ineffective, an implementing decision applying, on a gradual basis, one of the visa fees set out in Article 16(2a) to all nationals of the third country concerned or to certain categories thereof.

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6. The Commission shall continuously assess and report on the basis of the indicators set out in paragraph 2 whether substantial and sustained improvement in the cooperation with the third country concerned on readmission of irregular migrants can be established and, taking also account of the Union's overall relations with that third country, may submit a proposal to the Council to repeal or amend the implementing decisions referred to in paragraph 5.

7. At the latest six months after the entry into force of the implementing decisions referred to in paragraph 5, the Commission shall report to the European Parliament and to the Council on progress achieved in that third country's cooperation on readmission.

8. Where, on the basis of the analysis referred to in paragraph 2 and taking account of the Union's overall relations with the third country concerned, especially in cooperation in the field of readmission, the Commission considers that the third country concerned is cooperating sufficiently, it may submit a proposal to the Council to adopt an implementing decision concerning applicants or categories of applicants who are nationals of that third country and who apply for a visa on the territory of that third country, providing for one or more of the following:

(a) reduction of the visa fee referred to in Article 16(1) to EUR 60;

(b) reduction of the time within which decisions on an application referred to in Article 23(1) are to be made to 10 days;

(c) increase in the period of validity of multiple-entry visas under Article 24(2).

That implementing decision shall apply for a maximum of one year. It may be renewed.