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NOTE

from: Presidency

to: Visa Working Party/Mixed Committee
(EU-Iceland/Liechtenstein/Norway/Switzerland)

on: 23 November 2011

No. Cion prop.: 10834/1/11 REV1 VISA 96 CODEC 927 COMIX 369 (COM(2011) 290 final/2)

No prev.doc. 16220/11 VISA 219 CODEC 1857 COMIX 675

Subject: Draft Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 539/2001 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

With a view to the discussions at the Visa Working Party on 23 November 2011, the Presidency has prepared the compromise suggestions set out in the Annex.

The amendments to the text of the draft Regulation as already agreed by the Working Party appears in **bold**, the suggestions still under discussions have been underlined whereas new suggestions by the Presidency as well as corrections made for legal and linguistic reasons are **in bold and underlined**.

Draft

REGULATION (EU) No .../2011 OF THE EUROPEAN PARLIAMENT AND OF THE
COUNCIL

amending Council Regulation (EC) No 539/2001 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

of

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the **Functioning** of the European Union, and in particular
Article 77(2)(a) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national **parliaments**,

Acting in accordance with the ordinary legislative procedure¹,

Whereas:

- (1) This Regulation **should establish** a **mechanism for the** temporary suspension of the visa waiver for a third country **listed in Annex II to Council Regulation (EC) No 539/2001**² in case of an emergency situation, where an urgent response is needed in order to resolve the difficulties faced by one or more Member States, and taking account of the overall impact of the emergency situation on the European Union as a whole.
- (2) **(...)**. See recital 8a.
- (3) The mechanism regarding reciprocity to be implemented if one of the third countries **listed** in Annex II to Regulation (EC) No 539/2001 decides to make the nationals of one or more Member States subject to the visa obligation needs to be adapted to the entry into force of the **Treaty of** Lisbon in combination with the case law of the Court **of Justice of the European Union** on secondary legal bases.

¹ **Position of the European Parliament of...(not yet published in the Official Journal) and decision of the Council of....**

² OJ L 81, 21.3.2011, p.1

- (3a) **The mechanism regarding reciprocity should be applicable both in the case of introduction as well as reintroduction and maintaining of the visa requirement by a third country listed in Annex II to Regulation (EC) No 539/2001, for nationals of a Member State.**
- (4) In order to ensure consistency with Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code)¹, this Regulation **should align** the definition of visa with the Visa Code.
- (5) Further progress should be made towards a full harmonisation of the common visa policy as regards the categories of exceptions which Article 4 of Regulation (EC) No 539/2001 allows the Member States to provide for. To this end, this Regulation **should amend** Article 4 of Regulation (EC) No 539/2001 on matters where a de facto harmonisation or a quasi harmonisation already exists on the basis of convergent practices of Member States.
- (5a)** This regulation should provide a legal basis for the visa requirement or exemption of holders of **travel documents** issued by certain entities subject to international law which are not intergovernmental organisations.
- (6) As **the visa rules applicable for refugees and stateless persons, introduced by Council Regulation (EC) No 1932/2006² of 21 December 2006 amending Regulation (EC) No 539/2001** do not apply to such persons when they are residing in the United Kingdom or Ireland, it is necessary to clarify the situation concerning the visa requirement for certain refugees and stateless persons who reside in the United kingdom or in Ireland. This Regulation **should** leave Member States free to decide on the visa exemption or obligation for that category of persons. Such national decisions **should** be notified to the Commission.
- (7) Having regard to certain obligations on the Member States under international agreements concluded by the **European** Community before the entry into force of Regulation (EC) No 539/2001 which imply the need to derogate from the common visa rules, **the jurisprudence of the Court of Justice of the European Union should be taken into account.**³
- (8) **(...)**. See 5a.
- (8a)** In order to ensure uniform conditions for the implementation of the visa safeguard clause, implementing powers should be conferred on the Commission. Those powers should be exercised in accordance with Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by the Member States of the Commission's exercise of implementing powers⁴.

¹ OJ L 243 15.9.2009, p. 1.

² OJ L 405, 30.12.2006, P.23

³ The Council Legal Service (CLS) is of the opinion that this Recital should be deleted.

⁴ OJ L 55, 28.2.2011, p.13

- (9) This Regulation constitutes a development of the Schengen acquis, in accordance with the Protocol integrating the Schengen acquis into the framework of the European Union, as defined in Annex A to Council Decision 1999/435/EC of 20 May 1999 concerning the definition of the Schengen acquis for the purpose of determining, in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union, the legal basis for each of the provisions or decisions which constitute the acquis¹.
- (10) As regards Iceland and Norway, this Regulation constitutes a development of the provisions of the Schengen acquis within the meaning of the Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the latter's association with the implementation, application and development of the Schengen acquis², which falls within the area referred to in Article 1, point (B), of Council Decision 1999/437/EC of 17 May 1999 on certain arrangements for the application of that Agreement³.
- (11) As regards Switzerland, this Regulation constitutes a development of the provisions of the Schengen acquis within the meaning of the Agreement concluded between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen acquis⁴, which fall within the area referred to in Article 1, point (B) of Council Decision 1999/437/EC read in conjunction with Article 3 of Council Decision 2008/146/EC⁵.
- (12) As regards Liechtenstein, this Regulation constitutes a development of the provisions of the Schengen acquis within the meaning of the Protocol between the European Union, the European Community, the Swiss Confederation and the Principality of Liechtenstein on the accession of the Principality of Liechtenstein to the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen acquis, which fall within the area referred to in Article 1, point (B) of (...) Decision 1999/437/EC read in conjunction with Article 3 of Council Decision **2011/350/EU**⁶.

¹ OJ L 176, 10.7.1999, P.1

² OJ L 176, 10.7.1999, p. 36.

³ OJ L 176, 10.7.1999, p. 31.

⁴ OJ L 53, 27.2.2008, p. 52.

⁵ OJ L 53, 27.2.2008, p. 1.

⁶ **OJ L 160, 18.6.2011, p.19**

- (13) This Regulation constitutes a development of **the** provisions of the Schengen acquis in which the United Kingdom does not take part, in accordance with Council Decision 2000/365/EC of 29 May 2000 concerning the request of the United Kingdom of Great Britain and Northern Ireland to take part in some of the provisions of the Schengen acquis¹. The United Kingdom is therefore not taking part in its adoption and is not bound by it or subject to its application.
- (14) This Regulation constitutes a development of **the** provisions of the Schengen acquis in which Ireland does not take part, in accordance with Council Decision 2002/192/EC of 28 February 2002 concerning Ireland's request to take part in some of the provisions of the Schengen acquis². Ireland is therefore not taking part in its adoption and is not bound by it or subject to its application,

HAVE ADOPTED THIS REGULATION:

¹ OJ L 131, 1.6.2000, p. 43.

² OJ L 64, 7.3.2002, p. 20.

Article 1

Regulation (EC) No 539/2001 is **hereby** amended as follows:

(1) Article 1 is **hereby** amended as follows:

(a) paragraph 2 is amended as follows:

(i) the first subparagraph is replaced by the following:

"Nationals of third countries **listed** in Annex II shall be exempt from the requirement set out in paragraph 1 for stays not exceeding three months in any six-month period from the date of first entry in the territory of the Member States.";

(ii) in the second subparagraph, the following indents are added:

"- civilian air crew members **when acting in the course of their duties (...)**;

- civilian sea crew members when they go ashore who hold a seafarer's identity document issued in accordance with the International Labour Organisation Conventions (No 108 of **13 May 1958** or No 185 of **16 June 2003**) **or the International Maritime Organisation Convention on Facilitation of International Maritime Traffic of 9 April 1965 (FAL Convention)**;

- recognised refugees and stateless persons and other persons who do not hold the nationality of any country who reside in the United Kingdom or in Ireland and are holders of a travel document issued by **the United Kingdom or Ireland, which is recognised by the Member State concerned.**"¹

(b) in paragraph 4, point (c) is replaced by the following:

"(c) within 90 days after publication of that notification, the Commission, in consultation with the Member State concerned, shall report to the European Parliament and the Council. The report may be accompanied by a proposal providing for the temporary restoration of the visa requirement for nationals of the third country in question. The Commission may also present this proposal after deliberations in the European Parliament and the Council on its report. The European Parliament and the Council shall act on such proposal by the ordinary legislative procedure."²

¹ Moved from page 10 based on a suggestion by CLS.

² The Presidency invites delegations to further discuss during the Working Party the drafting suggestion made by CZ in 14333/11.

(2) The following article (...) is inserted:

"Article 1a (...) ¹

1. **By way of derogation from Article 1(2), Article 1(1) shall temporarily apply in emergency situations in relation to a third country listed in Annex II when so decided in accordance with this Article.**

2. A Member State may notify the Commission if it is confronted with one or more of the following circumstances leading to an emergency situation which it is unable to remedy on its own:
 - (a) a sudden and substantial increase (...), over a six month period, in the number of nationals of a third country listed in Annex II found to be illegally staying in the Member State's territory, in comparison with the **corresponding period of the previous year [or the last six months prior to the introduction of the visa waiver]**;

 - (b) a sudden and substantial increase (...), leading to specific pressures on the asylum system over a six month period, in comparison with the **corresponding period of the previous year**, in the number of asylum applications from the nationals of a third country listed in Annex II for which the recognition rate of asylum applications **from the nationals of this third country** was less than 3% over that **corresponding period of the previous year [or the last six months prior to the introduction of the visa waiver]**;

 - (c) a sudden and substantial increase (...), over a six month period, in the number of rejected readmission applications submitted by a Member State to a third country listed in Annex II for its own nationals, in comparison with the **corresponding period of the previous year [or the last six months prior to the introduction of the visa waiver]**.

¹ The title has been deleted for reasons of coherence as the current articles of Regulation 539/2001 have no title.

This notification shall be duly motivated and shall include relevant data and statistics as well as a detailed explanation of the preliminary measures that the Member State concerned has taken with a view to remedying the situation.

Where a Member State notifies the Commission in accordance with the above, it shall inform the European Parliament thereof.

3. The Commission shall examine the notification taking into account:
 - (a) the number of Member States affected by any of the situations described in paragraph 2;
 - (b) **the scale of the sudden and substantial increase mentioned in points a), b) and/or c) of paragraph 2;**
 - (c) the overall impact of the increases on the migratory situation in the Union as the latter appears from the data provided by the Member States as well as from reports prepared by FRONTEX and/or the European Asylum Support Office; (...);
 - (d) **the overall question of public policy and internal security, if necessary after consultation with Europol;**
 - (e) **the consequences of a suspension of the exemption of the visa requirement for the external relations of the EU and its Member States.**

(...) Within three months following receipt **of the notification**, the Commission may adopt an implementing decision providing that Article 1(1) shall temporarily apply in relation to the third country concerned for a period of six months. The implementing decision shall be adopted in accordance with the **examination** procedure referred to in Article 4 a (2). The implementing decision shall determine the date on which the suspension of the exemption of visa requirement is to take effect.

4. Before the end of the period of validity of the implementing decision adopted pursuant to paragraph 3, the Commission, in cooperation with the Member State(s) concerned, shall submit a report to the European Parliament and the Council. The report may be accompanied by a proposal amending this Regulation in order to transfer **the reference to** the third country concerned to Annex I.
5. Where the Commission has proposed an amendment to this Regulation in order to transfer **the reference to** a third country to Annex I pursuant to paragraph 4, it can extend the validity of the implementing decision adopted pursuant to paragraph 3 for a period of maximum nine months. The decision to extend the validity of the implementing decision shall be adopted in accordance with the **examination** procedure referred to in Article 4 a (2).

(3) Article 2 is replaced by the following:

"For the purposes of this Regulation, "visa" **means** an authorisation issued by a Member State with a view to transit through or an intended stay in the territory of the Member States of a duration of no more than three months in any six-month period from the date of first entry in the territory of the Member States.".

(4) Article 4 is **hereby** amended as follows:

(a) **paragraph** 1 is replaced by the following:

"1. A Member State may provide for exceptions from the visa requirement provided for by Article 1 (1) or from the exemption from the visa requirement provided for by Article 1 (2) as regards:

- (a) holders of diplomatic passports, service/official passports or special passports;
- (b) **flight crew and attendants on emergency or rescue flights and other helpers in the event of disaster or accident;**
- (c) **(...)** civilian crew of ships navigating in international **inland** waters;
- (d) **(...)** holders of **travel documents** issued by **(...)** intergovernmental international organisations **of which one or more Member States are members,** or by **(...)** entities subject to international law **which are recognised by the Member State concerned** to **(...)** officials **of these organisations or entities**".

(b) **(...)**¹

(c) **(...deleted...)**

¹ Moved to Art.1(1)(a)(ii), p.6).

(5) The following article (...) is inserted:

"Article 4a

(...)¹

1. The Commission shall be assisted by a committee. That committee shall be a committee within the meaning of Regulation (EU) No 182/2011 **of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers**².

2. Where reference is made to this paragraph, Article 5 of Regulation (EU) No 182/2011 shall apply.

3. Where the committee delivers no opinion, the Commission shall not adopt the draft implementing act and the last subparagraph of Article 5(4) of the said Regulation shall apply."

Article 2

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaties.

Done at , [...]

For the European Parliament

For the Council

The President

The President

¹ The title has been deleted for reasons of coherence as the current articles of Regulation 539/2001 have no title.

² OJ L 55, 28.2.2011, p. 13.