



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 23 February 2012

6807/12

**Interinstitutional File:
2011/0138 (COD)**

LIMITE

**VISA 40
CODEC 462
COMIX 111**

OUTCOME OF PROCEEDINGS

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

on: 7 February 2012

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

No prev.doc. 5971/12 VISA 22 CODEC 246 COMIX 68

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

The Working Party examined the text of the draft Regulation on the basis of the proposal of the Commission and of the compromise suggestions made by the Presidency as set out in doc. 5971/12. The outcome of this examination is set out in the Annex. The text of the compromise as agreed by the Working Party appears in **bold** whereas the suggestions still under discussions appear as underlined.

The **Chair** concluded that a new document (see doc. 6312/12) would be issued with a view to preparing for further discussions on the file in the JHA Counsellors Group/Mixed Committee and at higher level. The Chair invited delegations to send comments they might have to the Presidency and to the Commission by 22 February 2012.

It is recalled that following the outcome of JHA Council on 13-14 December 2011, a general approach on Recitals 5b, 8b and on the suspension mechanism (Article 1a) was adopted and is therefore no longer under discussions at the Visa Working Party¹.

¹ See doc. 18775/11

Draft¹

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 procedure²,

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**³ 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 AT entered a scrutiny reservation on the whole doc.

² **Position of the European Parliament of...(not yet published in the Official Journal) and decision of the Council of....**

³ 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.
- (5b) **It is necessary to avoid and counter any abuse resulting from the granting of visa free travel for short-stay visits for nationals of a particular third-country where they pose a threat to the public policy ("ordre public") and internal security of the Member States.**
- (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

- (8b) A substantial and sudden increase as mentioned in Article 1a(2) indicates reaching beyond the threshold of 50 percent, nevertheless it may also be lower if the Commission deems it applicable in the particular case notified by the Member State under pressure.**
- (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:

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.³";

¹ OJ L 131, 1.6.2000, p. 43.

² OJ L 64, 7.3.2002, p. 20.

³ The **Chair** said that this provision would be aligned later on with the new definition of the short-stay, as agreed on in the Working Party on Frontiers.

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

- "- civilian air crew members **when acting in the course of their duties (...)**¹;
- 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.**";²

¹ **DE, FI** and **AT** recalled their reservation on the exemption in favour of air and sea crew members.

² **LV, EE** and **UK** disagreed with a compulsory exemption from the visa requirement for refugees and the stateless persons and asked that the original proposal of the Commission should be reverted to. The **Chair** concluded that this indent would be moved back under Article 4 (see p.14)

(b) paragraph 4 is replaced by the following¹:

"4. Where a third country listed in Annex II has introduced a visa requirement for nationals of a Member State, the following provisions shall apply:

- (a) the Member State concerned shall notify the European Parliament, the Council and the Commission in writing within 90 days of such introduction, or its announcement. This notification shall include a detailed explanation of the preliminary measures that the Member State concerned has taken with a view to restoring visa-free travel with the third country in question and shall include all relevant information. The notification shall be published by the Commission in the C series of the Official Journal of the European Union; it shall specify the date of implementation of the measure and the type of travel documents and visas concerned.

- (b) Immediately following the date of publication of that notification and in consultation with the Member State concerned, the Commission shall take steps with the authorities of the third country in order to restore visa-free travel and shall inform the European Parliament and the Council about these steps at the earliest opportunity.

¹ The **Chair** stressed that the suggestions on the reciprocity mechanism could constitute a good compromise solution, in particular in relation to the amendments tabled by the Members of the European Parliament. **CZ** was of the opinion that the new approach chosen by the Presidency was sound and stressed the need for the EU to show solidarity and unity towards the outside world when a visa requirement was introduced or reintroduced by a third country for a Member State. **CZ** stated that enabling the Commission to simply issue a report was not a sufficient signal to the third country concerned and argued that the Commission should be obliged to put forward a solution, whether in relation to visas or to any other matters (trade, transport,...). **RO** and **BG** agreed with **CZ**. **PL**, **EL** and **PT** believed the new procedure concerning the reciprocity mechanism was too long and too complex. **COM** supported the new suggestions of the Presidency and explained why it thought that responding to a situation of a non-reciprocal visa exemption involving a third country by automatically imposing the visa requirement was not a good solution either from a political or a legal point of view.

- (c) **If within 90 days following receipt of the notification the third country has not lifted the visa obligation, the Member State concerned may request the Commission to propose to suspend the exemption of the visa requirement for the nationals of the third country concerned. Where a Member State makes such a request, it shall inform the European Parliament thereof. The Commission shall examine the notification and the request, taking into account the outcome of the measures taken by the Member State concerned, the steps taken in accordance with point (b) in order to restore visa-free travel, and the consequences of the suspension of the exemption of the visa requirement for the external relations of the EU¹ with the third country in question.**

At the latest three months following the request and, in the absence of such request, within six months following the notification, the Commission:

- (i) may adopt an implementing decision suspending the exemption of the visa requirement for the nationals of the third country concerned or for certain categories of these nationals for a period of six months at the request of the Member State concerned or at its own initiative; this implementing decision shall be adopted in accordance with the examination procedure referred to in Article 4a(2); the implementing decision shall determine a date within three months on which the suspension of the exemption of the visa requirement is to take effect taking into account the available resources in the consulates of the Member States; or**
- (ii) shall submit a report assessing the situation and containing the reasons why it does not propose to suspend the exemption of the visa requirement to the Committee referred to in Article 4a(2). The European Parliament shall be informed thereof.**

¹ **FR**, while stressing the necessity for the draft Regulation to be swiftly adopted, suggested including the consequences of the suspension of the visa requirement for the Member States and not only for the external relations of the EU.

- (d) **If the third country concerned has not lifted the visa requirement in the case referred to in point (c)(ii), the Commission, in cooperation with the Member State concerned, shall report to the Committee referred to in Article 4a(2) at the latest six months after the publication of the report referred to in point (c)(ii), and every six months thereafter. The Commission may, on the basis of such report, adopt an implementing decision referred to in point (c)(i). The European Parliament shall be informed thereof.**
- (e) **Where an implementing decision has been adopted pursuant to points (c) or (d), the Commission may extend its validity for six months, in accordance with the procedure referred to in Article 4a(2).**
- (f) **Before the end of the period of validity of the implementing decision adopted pursuant to points (c) or (d) or its extension adopted pursuant to point (e), the Commission, in cooperation with the Member State concerned, shall submit a report to the European Parliament and the Council. The report shall be accompanied by a legislative proposal for amending this Regulation in order to transfer the third country concerned to Annex I. The European Parliament and the Council shall act on such proposal by the ordinary legislative procedure. The procedures referred to in points (c) to (e) do not prevent the Commission from presenting a proposal amending this Regulation in order to transfer the third country concerned to Annex I at any time.**
- (g) **Where the Commission has proposed to transfer the third country concerned to Annex I pursuant to point (f), it can extend the validity of the implementing decision for a period of maximum twelve months. The decision to extend the validity of the implementing decision shall be adopted in accordance with the procedure referred to in Article 4a(2).**

(h) **Where the third country in question abolishes the visa requirement, the Member State concerned shall immediately notify the European Parliament, the Council and the Commission to that effect. The notification shall be published by the Commission in the C series of the Official Journal of the European Union. Any implementing decision adopted pursuant to points (c), (d) or (e) shall terminate seven days after the publication in the Official Journal of the European Union. In case the third country in question has introduced a visa requirement for nationals of two or more Member States, the implementing decision adopted pursuant to points (c), (d) or (e) will only terminate after the last publication."**

(c) paragraph 5 is replaced by the following:

"5. The provisions listed in paragraph 4 shall apply mutatis mutandis where a third country listed in Annex I has introduced a visa requirement for civilian air crew members and/or civilian sea crew members who are nationals of a Member State."

(d) **the following paragraph is inserted:**

"6. Member States whose nationals on [date of entry into force of the Regulation] are subject to a visa requirement by a third country listed in Annex II shall notify the European Parliament, the Council and the Commission in writing by [one month after the entry into force of the Regulation]. The notification shall include a detailed explanation of the preliminary measures that the Member State concerned has taken with a view to restoring visa-free travel with the third country in question. The notification shall be published by the Commission in the C series of the Official Journal of the European Union. The provisions of points (b) to (h) of paragraph 4 shall apply."

(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 **substantial and** sudden 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 **substantial and** sudden increase (...), **leading to specific pressures on the asylum system** over a six month period, in comparison with the **corresponding period of the previous year or the last six months prior to the introduction of the visa waiver**, in the number of asylum applications from the nationals of a third country listed in Annex II **which are manifestly unfounded or which do not fulfil the conditions for international protection**;

 - (c) a **substantial and** sudden 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**.

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.

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

3. The Commission shall examine the notification(s) made by one or more Member State(s) pursuant to paragraph 2, taking into account:
- (a) the number of Member States affected by any of the situations described in paragraph 2;
 - (b) the scale of the **substantial and sudden** 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, in consultation with the Member State(s) concerned and, if necessary, after consultations with Europol, having regard to its tasks;**
 - (e) **the consequences of a suspension of the exemption of the visa requirement for the external relations of the EU and its Member States.**

(...) **Where the Commission, on the basis of this examination, determines that action is needed, it shall submit a proposal, within three months following receipt of the notification, with a view to the adoption by the Commission of 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 4a(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 **twelve** months. The decision to extend the validity of the implementing decision shall be adopted in accordance with the **examination** procedure referred to in Article 4a(2).".

(3) Article 2 is replaced by the following:

“For the purposes of this Regulation, the term „visa” shall mean as defined in Article 2(2)(a) of Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas”.

(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 passports¹;
- (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 other entities **recognised by the Member State concerned as subject of international law**, to (...) officials **of these organisations or entities**".

(b) (...) ²

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

¹ **DE** recalled its reservation since it was of the opinion that unilateral decisions of Member States on such exemptions were to be avoided and that the Council should decide upon them (as in the now-repealed Regulation 789/2001). **EL, IT** and **PT** disagreed with **DE**. **COM** reminded delegations that after the entry into force of the Treaty of Lisbon no right of initiative for the Member States, as laid down in repealed Regulation 789/2001, could be envisaged.

² Provision in relation to "recognised refugees and stateless persons" to be reintroduced (see 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 consistency, as the current articles of Regulation 539/2001 have no title.

² OJ L 55, 28.2.2011, p. 13.