MOTION FOR A RESOLUTION

pursuant to Rule 108(5) of the Rules of Procedure

by Gérard Deprez

on behalf of the Committee on Civil Liberties, Justice and Home Affairs

on the debate of the 23rd of April: "Negotiations between the European Union and the United States with regard to visa exemptions (Visa Waiver)"
The European Parliament,

– having regard to Articles 2, 6, 24 and 29 of the Treaty on European Union and Articles 62, 63, 286 and 300 of the EC Treaty, which are the legal foundation for a European area of freedom, security and justice and for international negotiations with third countries and organisations,

– having regard to the Council and the Commission declarations to the Committee on Civil Liberties, Justice and Home Affairs on 6 March 2008 and 21 April 2008,

– having regard to Rule 83 and Rule 108(5) of its Rules of Procedure,

A. whereas, since the entry into force of the Amsterdam Treaty in 1999, the Council is responsible for establishing the rules on visas, including the list of third countries whose nationals must be in possession of a visa or are exempt from visa requirement (Article 62(2)(b)(i) of the EC Treaty);

B. whereas the Community's competence in visa matters must ensure equal treatment for all EU citizens, not only in the granting or refusal of visa-free status per se, but also when it comes to the terms and conditions under which such status is granted to, or withheld from, different Member States by third countries;

C. whereas, since 2001 the Council exempted (1) US citizens from the visa requirement; though unfortunately a comparable exemption does not apply to all EU citizens as the US still maintains the visa requirement for nationals of some Member States (currently: Bulgaria, Czech Republic, Estonia, Greece, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Romania and Slovakia) the rate of visa refusal being greater than 10% of applications and other non-transparent criteria being applied;

D. whereas, since 2005 a reciprocity mechanism may be activated at Community level (2) following: a notification from a Member State, contacts by the Commission with the third country concerned and a Commission report to the Council, which could then decide on “a temporary restoration of the visa requirement for nationals of the third country in question.”;

E. whereas even if reciprocity has been reached with several third countries, this is still not the case with the US, so that the Commission (3) in 2006 proposed: “temporarily restoring the visa requirement for US nationals holding diplomatic and duty/official passports, in order to expedite progress towards reciprocity”; whereas, however, this symbolic proposal was not followed by the Council;
F. whereas several Member States continued their direct bilateral contacts with the US administration notwithstanding the Community's clear competence in the matter;

G. whereas the situation became legally complicated when the US, on 3 August 2007, with the enactment of Section 711 on "Secure Travel and Counterterrorism Partnership Act of 2007" (4) reformed their visa waiver regime by adding seven security enhancements (5) so that all the Member States wishing to be part of the visa waiver program (VWP) should agree to sign a bilateral Memorandum of Understanding (MoU) and its binding 'implementing rules';

H. even if the content of these so called “implementing rules” is still unknown to the EU institutions, it is clear from the MoUs that some of the new “security enhancements” fall under the Community's competence (such as the one on visa delivery or the European Security Transport Association (ESTA) complementary future obligations), some under the EU's competence (such as on stolen passport6, PNR data, or Schengen crime related data), and the remaining reinforcement falls within the exclusive competence of each Member State (such as the ones linked to the criminal records of its own nationals or the ones providing for the presence of air marshals on transatlantic flights);

I. whereas to resolve this issue and in order for all the Member States in 2009 to participate in the reformed US visa waiver regime, the Council decided on 18 April 2008, a two tier approach by:
(a) giving the Commission a formal mandate to negotiate with the US on all Community related issues and
(b) adopting the "red lines" that the Member States shall respect in their dialogue with the US before the conclusion of the EC/US negotiations; these "red lines" outline what falls within EC/EU competence and what, since it falls within national competence, may be negotiated bilaterally and make clear that, as far as bilateral negotiations are concerned the Member States shall respect the principle of loyal cooperation with the other Member States and the EU institutions as laid down in Article 10 of the EC Treaty and in the judgement by the Court of Justice (C-105/03 with regard to the fulfilment of obligations stated under the EU Treaty);

J. whereas even for matters that fall within the exclusive competence of the Member States, the principle of loyal cooperation could be threatened via bilateral agreements containing different conditions for the granting of visa-free status to some Member States, which would result in different treatment of citizens between the Member States in the visa field;

K. whereas in order better to protect US and EU citizens from the terrorist threat transatlantic cooperation should improve: (a) the identification of the threat through joint analysis and broad information exchange, including exchange of best practice, within the framework of strict data protection measures (b) coordination at EU and transatlantic level between law enforcement and intelligence agencies, while always respecting the rule of law, fundamental rights and privacy and (c) the operational capacity by closer cooperation between EU and US law enforcement and intelligence agencies, based on a deeper level of mutual trust, between the different agencies and bodies involve;
1. Considers that any form of direct or indirect discrimination between European citizens on the grounds of their nationality should be prohibited not only inside the European Union as laid down in Article 12 of the EC treaty, but also, outside the European Union, notably when such discrimination is the consequence of a lack of coordination in international negotiations between the EU institutions and Member States;

2. Welcomes the fact that, for the first time the US have recognized the Community's competence to negotiate international visa policy agreements during the JHA Ministerial Troika on 13 March 2008 by agreeing in a joint statement to follow a "twin track" approach; the statement provides that "those matters that fall within national responsibilities will be discussed with national authorities while those that fall within EU responsibility will be discussed with EU authorities". Under such a statement the US should from now on, negotiate:

- with the Commission visa matters, as the they already did for air transport (7);
- with the Council on the EU policies on security related matters (PNR agreement or EU-US Agreements on extradition and mutual legal assistance); and
- with the Member States on the presence of air marshals on transatlantic flights and on the security related issues as far as related to their own nationals;

3. Reiterates that from the EC/EU side any agreement should comply with fundamental rights and individual freedoms as stated in Article 6(2) of the EU Treaty, including the rights to privacy and data protection as stated in:
   - Articles 7 and 8 of the Charter of Fundamental Rights of the European Union;
   - Directive 96/46/EC and specific rules of Community law (and measures related to Schengen) when transfer to a third country is at stake;
   - Council of Europe Convention n. 108 or the Protection of Individuals with regard to Automatic Processing of Personal Data and its Additional Protocol 181 regarding supervisory authorities and transborder data flows;

4. Endorses the Council mandate given to the Commission to negotiate an agreement securing visa waivers for all EU citizens entering the territory of the US, as is already the case for US citizens entering the territory of the EU; call the Commission to inform the competent parliamentary committee after each negotiation meeting (if needed on a confidential basis);

5. Considers that negotiations should be finalised before June 2009 and by then, no discrimination should be allowed between EU citizens;

6. Shares the view that the Council's “red lines” should be followed by the Member States (8) according to the principle of loyal cooperation outlined in Article 10 of EC Treaty and also applicable, following the case-law of the Court of Justice (C-105/03) or the AETR case (22/70) with regard to the fulfilment of the obligations stated in the EU Treaty; stresses notably the fact that:
   - participation in the VWP should as soon as possible create the same rights for all citizens of the Member States, under the same conditions, in terms of the status of their passports;
any access for the US to EU/EC databases or information systems should be prohibited unless expressly permitted by EC law and, if so, should be commonly agreed to by the EU and based on full respect for the principle of reciprocity;

any extension of the reporting data to Interpol on lost and stolen passports should be commonly agreed by the EU;

airport security in accordance with the International Civil Aviation Organisation (ICAO) standards is sufficiently guaranteed by the existing EC rules (US inspections might be agreed where there are direct flights between airports in the territory of the EU and the US);

any formal agreement on repatriation of EU citizens should be acceptable only on the basis of reciprocity, to be negotiated and concluded between the EC and the US;

obligations relating to the possible introduction of electronic system for travel authorisations for US citizens travelling to the EU should be negotiated by the EC.

7. Instructs its President to forward this resolution to the Council and the Commission, the parliaments and the governments of the Member States, the United States Congress and to the United States Secretary of Homeland Security.

1 See annex II of COUNCIL REGULATION (EC) No 539/2001
2 See art. 1 par 4 of COUNCIL REGULATION (EC) No 539/2001 CONSOLIDATED WITH REGULATION (EC) No 851/2005 (http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:2001R0539:20070119:EN:PDF) “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 Council on its report. The Council shall act on such proposal by a qualified majority within three months;”
5 Four of them are mandatory such as: (1) an Electronic System Travel Authorization (ESTA) system; (2) more robust security data sharing efforts; (3) requirements for timely reporting of blank as well as issued lost and stolen passports; and (4) guarantees that VWP countries accept the repatriation of their nationals ordered removed from the United States. There are also three discretionary enhanced security factors to be taken into consideration when determining whether the 3% visa denial rate requirement can be waived: (1) airport security standards; (2) air marshals programs; and (3) standards for national travel documents.