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

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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 15226/11. 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.

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 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 Commission¹,

After transmission of the draft legislative act to the national Parliaments,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) This Regulation establishes **a mechanism for the temporary suspension of the visa waiver for a third country listed in Annex II to Regulation (EC) No 539/2001** 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) In order to ensure uniform conditions for the implementation of **a mechanism for the temporary suspension of the visa waiver**, 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 powers².
- (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 Lisbon Treaty in combination with the case law of the Court on secondary legal bases.

¹ OJ C [...], [...], p. [...].

² OJ L 55, 28.2.2011, p. 13.

- (3a) **The mechanism regarding reciprocity is 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 aligns 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 amends 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.
- (6) As Regulation (EC) No 1932/2006 on the visa rules applicable for refugees and stateless persons does 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 leaves Member States free to decide on visa exemption or obligation for that category of persons. Such national decisions shall be notified to the Commission.
- (7) Having regard to certain obligations on the Member States under international agreements concluded by the 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.**

¹ OJ L 243 15.9.2009, p. 1.

- (8) This Regulation provides a legal basis for the visa requirement or exemption of holders of laissez-passer, diplomatic or service passports issued by certain entities subject to international law which are not international intergovernmental organisations.
- (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/EC¹ 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 acquis.
- (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 Council Decision 1999/437/EC read in conjunction with Article 3 of Council Decision [xx/2011/EU]. FN [ref. to JO, adopted on 7.3.11; not yet published]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

- (13) This Regulation constitutes a development of 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 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 amended as follows:

Article 1 is 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 and in accordance with the Convention on International Civil Aviation of 7 December 1944 (Chicago Convention)**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** and No 185 of **16 June 2003**) **or the International Maritime Organisation Convention on Facilitation of International Maritime Traffic of 9 April 1965 (FAL Convention) (...).**"

¹ **DE** entered a scrutiny reservation since it opposed any harmonisation in this field. **COM** stated that there is yet a de facto harmonisation in this field and was of the opinion that the EU position would be stronger by adopting its proposal. **BE** questioned the need to refer to the Chicago Convention since it was of the opinion that the provisions of that Convention would only further complicate the scope of application of this provision. Furthermore, **DE** added that by referring to the Chicago Convention some third countries that are not parties to it would not be covered. **COM** agreed that this indent could be reworded along the lines of "holders of a pilot license as referred to in the Chicago Convention". **FI, SI** and **CZ** stressed on the need for having reciprocal treatment by third countries and on the lack of any means of pressure towards third countries in the case this provision would be implemented. **COM** replied that in the case the third country concerned had concluded a Visa Facilitation Agreement, the EU could react efficiently. The **Chair** concluded that a new wording would be suggested in view of the next meeting of the Working Party.

(b) in paragraph 4, point (c) is replaced by the following¹:

"(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."

¹ **CZ** presented its position as set out in 14333/11. **EL, SK** and **BG** supported the initiative. **EL** stressed that there should be no automaticity in this field and that the delays suggested as regards the reaction of the EU were too long. **COM** said that the Commission had examined the **CZ** initiative in a positive way and was envisaging to suggest having the retaliation measures adopted under the Committee procedure. The **Chair** concluded that a new wording would be suggested in view of the next meeting of the Working Party.

The following Article 1a¹ is inserted:

"Article 1a (...) ²

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 increase³ (...), 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**;
 - (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% ⁴ over that previous six month period;
 - (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**.

¹ **COM** stressed that, in the absence of a clear opinion from the European Parliament, the Commission was not in a position to agree on any amendments suggested in this article.

² The title has been deleted for reasons of coherence as the current articles of Regulation 539/2001 have no title.

³ **BE** was of the opinion that, as the increase is the important element in points a, b and c, a reference to the previous period is superfluous and that this reference should be added to paragraph 3(b). **HU** entered a reservation on the new suggested wording and stressed, like **IT**, **RO**, **LV**, **SI** on the need to have objective criteria. **SK** stressed on the need for having a reference to "organised crime" in paragraph 2.

⁴ **BE** and **FR** thought that this percentage should not be linked to a particular Member State but should rather reflect the average of all Member States concerned.

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 1¹;
 - (b) whether the sudden and substantial increase mentioned in paragraph 1, points a), b) and/or c) as applicable is at least 50%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 ³ public order and internal security, if necessary after consultation with Europol;**
 - (e) **the consequences of the suspension of the exemption of the visa requirement for the external relations of the EU and its Member States⁴.**

(...) Within three months following receipt thereof, 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 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.

¹ **DE, FR, FI** and **NL** stated that this criterion was irrelevant. **HU** asked to include a reference to the percentage of the "bona fide" travellers of the third country concerned.

² **FR, NL, DE, CH** and **NO** opposed any percentage figures to be inserted in this article.

³ **EE** suggested rephrasing this provision along the lines of "the overall question of the threat to public order.."

⁴ **NO** asked the associated countries be covered as well.

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 third country concerned to Annex I.
5. Where the Commission has proposed an amendment to this Regulation in order to transfer 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 procedure referred to in Article 4 a (2).

Article 2 is replaced by the following:

"For the purposes of this Regulation, "visa" shall mean 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."

Article 4 is 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) the civilian crew of ships navigating in international **inland** waters;
- (c) the holders of **travel documents**¹ issued by some intergovernmental international organisations² or by other entities subject to international law¹ to their officials, **if such entities are recognised by the Member States in question.**"

(b) in paragraph 2, the following point (d) is added:

"(d) 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 those Member States".

(c) (...deleted...)³

¹ **COM** suggested adding the "Laissez-passer".

² **EL, DE** and **AT** were of the opinion that this definition was unclear. **AT, CY** and **EE** did not agree with the deletion of the provision covering "emergency and rescue flights" as it stands under the current point (c) of Article 4(1) of Regulation 539/2001. **COM** asked delegations to communicate any visa waiver they would like to apply to the categories referred to in that point c since, so far, the Commission was aware of only one Member State having done so.

³ **COM** agreed that this provision was not legally indispensable but regretted that the reference to the Association Agreement had been deleted.

The following Article 4a 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.
2. Where reference is made to this paragraph, Article 5 of Regulation (EU) No 182/2011 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.