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from: Presidency

to: Delegations

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No. prev. doc.: 17574/12 VISA 248 CODEC 2998 COMIX 729

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

At the meeting of the JHA Counsellors group on 30 November 2012 the draft text for the reciprocity mechanism in Article 1(4) set out in 16848/12 received strong support.

The Presidency presented this text, slightly amended in the light of comments made by delegations, to the European Parliament (EP) at a trilogue meeting on 4 December 2012 as a basis for a compromise.

The EP reacted positively and indicated that the text proposed was acceptable and that the full text of the draft Regulation could be agreed with the Council. However, the Commission maintained its reservation on legal and political grounds on the use of delegated acts (Art.290 TFEU) and on the use of that instrument combined with implementing acts (Art.291 TFEU) in the framework of the procedure with a view to temporarily reintroducing the visa requirement towards a third country in breach of reciprocity, and doubted also the effectiveness of the mechanism as proposed.

The Cyprus Presidency intended to invite Coreper to approve a compromise text of the draft regulation with a view to reaching agreement at first reading with the EP. However, as the Commission maintained its reservation, and as it was uncertain if there would be the necessary unanimity to confirm the agreement with the European Parliament, the item was withdrawn from the agenda.

The adoption by the LIBE Committee of the report on the proposal, first scheduled for 18 December 2012, has been postponed.

The Presidency has been in contact with the EP and a number of delegations and, in the light of the above, now proposes the text set out in the Annex for the purpose of finding a compromise.

The Annex contains a revised text for the reciprocity mechanism, based on replacing the reference to delegated acts in the previous text by a system with some degree of automaticity and including the use of implementing acts of the Council.

The Presidency invites delegations to agree to the text set out in the Annex with a view to further negotiations with the EP.

Reciprocity mechanism

Compromise suggested by the Presidency

A. Text amending Article 1(4)(c) of Regulation 539/2001

1. Article 1 is hereby amended as follows:

(a) paragraph 4 is replaced by the following:

"4. Where a third country listed in Annex II applies a visa requirement for nationals of one or more Member State(s), the following provisions shall apply:

(a) Within [30] days of the application by the third country of the visa requirement or, in cases where the visa requirement existing on [...insert the date of entry into force of this Regulation...] is maintained, within [30] days of that date, the Member State(s) concerned shall notify the European Parliament, the Council and the Commission in writing.

This notification:

(i) shall specify the date of application of the visa requirement and the type(s) of travel documents and visas concerned;

(ii) shall include a detailed explanation of the preliminary measures that the Member State(s) concerned has taken with a view to ensuring visa-free travel with the third country in question and all relevant information.

Information about that notification shall be published without delay by the Commission in the C series of the Official Journal of the European Union, including information on the date of application of the visa requirement and the type(s) of travel documents and visas concerned.

If the third country decides to lift the visa requirement before the expiry of the deadline referred to in the first subparagraph, the notification shall not be made or shall be withdrawn and the information about that notification shall not be published.

- (b) The Commission shall, immediately following the date of publication of the notification(s) referred to in point (a) and in consultation with the Member State(s) concerned, take steps with the authorities of the third country in question, in particular in political, economic and commercial fields, in order to restore or introduce visa-free travel and shall inform the European Parliament and the Council about these steps without delay.
- (c) If within [90] days following the date of publication of the notification(s) referred to in point (a) and despite all the steps taken in accordance with point (b), the third country has not lifted the visa requirement, the Member State(s) concerned may request the Commission to suspend the exemption from the visa requirement for certain categories of nationals of the third country in question.

Where a Member State makes such a request, it shall inform the European Parliament and the Council thereof.

- (d) The Commission shall, when considering further steps in accordance with points (e) or (f), take 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 or introduce visa-free travel, and the consequences of the suspension of the exemption from the visa requirement for the external relations of the Union and its Member States with the third country in question.

(e) If the third country in question has not lifted the visa requirement the Commission shall at the latest [6] months from the date of publication of the notification(s) referred to in point (a) and then with intervals of no longer than six months within a total period which may not go beyond [54] months following the date of publication of the notification(s) referred to in point (a) or at any case beyond the date when the automatic suspension of the exemption from the visa requirement for nationals of the third country in question takes effect pursuant to the procedures laid down in point (f):

(i) adopt, at the request of the Member State(s) concerned or on its own initiative, an implementing act temporarily suspending the exemption from the visa requirement for certain categories of nationals of the third country concerned for a period of up to six months. This implementing act shall determine a date within 90 days of its adoption on which the suspension of the exemption from the visa requirement is to take effect, taking into account the available resources in the consulates of the Member States; the Commission may modify the categories of nationals of the third country in question for which the exemption from the visa requirement is suspended. These implementing acts shall be adopted in accordance with the examination procedure referred to in Article 4a(2);

or

(ii) submit to the committee referred to in Article 4a(1) a report assessing the situation and containing the reasons why it decided not to suspend the exemption from the visa requirement and inform the European Parliament and the Council thereof. All relevant factors shall be taken into account in this report, such as the outcome of the measures taken by the Member State concerned, the steps taken in accordance with point (b) in order to restore or introduce visa-free travel, and the consequences of the suspension of the exemption of the visa requirement for the external relations of the Union and its Member States with the third country in question. The Council and the European Parliament may have a political discussion on the basis of that report.

(f) If within [30] months following the date of publication of the notification(s) referred to in point (a), the third country in question has not lifted the visa requirement, the exemption from the visa requirement for the nationals of that third country shall automatically be suspended temporarily for a period of [12] months, unless at the latest [2] months before that date the Council decides to request the Commission to continue beyond that date the negotiations with the third country in question on lifting the visa requirement for the Member State(s) concerned and that the automatic suspension shall not take effect.

In that latter case, if within [42] months following the date of publication of the notification(s) referred to in point (a), the third country in question has not lifted the visa requirement, the exemption from the visa requirement for the nationals of that third country shall automatically be suspended temporarily for a period of [12] months, unless at the latest [2] months before that date the Council decides to request the Commission to continue beyond that date the negotiations with the third country in question on lifting the visa requirement for the Member State(s) concerned and that the automatic suspension shall not take effect.

In that latter case, if within [54] months following the date of publication of the notification(s) referred to in point (a), the third country in question has not lifted the visa requirement, the exemption from the visa requirement for the nationals of that third country shall automatically be suspended temporarily for a period of [12] months, unless at the latest [2] months before that date the Council decides to request the Commission to continue beyond that date the negotiations with the third country in question on lifting the visa requirement for the Member State(s) concerned and that no automatic suspension shall apply.

- (g) When exercising its powers as specified in point (f), the Council shall take into account the available resources in the consulates of the member States.

If the Council considers to decide to request the Commission to continue the negotiations with the third country in question on lifting the visa requirement for the Member State(s) concerned and that the automatic suspension shall not take effect or shall not apply, it shall inform the European Parliament and the Commission thereof before taking its decision. The Council, the Commission and the European Parliament may have a political discussion on the matter.

If the automatic suspension of the exemption from the visa requirement for nationals of the third country in question takes effect pursuant to the procedures laid down in point (f), the relevant information shall be published by the Commission in the Official Journal of the European Union without delay.

- (h) Any subsequent notification made by another Member State pursuant to point (a) concerning the same third country before the end of the period of application of the procedures set out in points (b) to (f) with regard to that third country shall be merged into these ongoing procedures without prolonging the deadlines or periods of application of these procedures or of the measures adopted within their framework.
- (i) If within [6] months following the date where the temporary suspension referred to in point (f) has taken effect the third country in question has not lifted the visa requirement, the Commission may submit a legislative proposal in order to transfer the third country in question from Annex II to Annex I.

(j) The procedures referred to in points (e) and (f) shall not affect the right of the Commission to submit at any time a legislative proposal in order to transfer the third country in question from Annex II to Annex I.

(k) Where the third country in question lifts the visa requirement, the Member State(s) concerned shall immediately notify the European Parliament, the Council and the Commission thereof.

The information about that lifting of the visa requirement shall be published without delay by the Commission in the C series of the Official Journal of the European Union.

In case the third country in question lifts its visa requirement without the Member State(s) concerned notifying it in accordance with the previous subparagraph, the Commission shall on its own initiative proceed to the publication referred to above.

Any temporary suspension pursuant to points (e)(i) and (f) concerning the third country in question shall terminate seven days after the publication referred to in the second subparagraph above. In case the third country in question has introduced a visa requirement for nationals of two or more Member States, any temporary suspension pursuant to points (e)(i) and (f) concerning that third country shall cease to apply seven days after the publication of the information concerning the last Member State concerned.

(l) In case the third country in question lifts its visa requirement after the adoption of an amendment to this Regulation as referred to in point (i) or (j), that third country shall be automatically transferred from Annex I to Annex II seven days after the publication of the information referred in point (k). The Commission shall publish that change in the Official Journal of the European Union.

B. Text of the recitals on reciprocity mechanism

(Changes to the basis text, as set out in 17574/12, are "Underlined". Deleted text is "~~Stroke through~~")

- (2b) *The mechanism regarding reciprocity should be applicable when a third country listed in Annex II to Regulation (EC) No 539/2001 applies a visa requirement for nationals of a Member State.*
- (3) The mechanism regarding reciprocity to be implemented if one of the third countries included in Annex II to Regulation (EC) No 539/2001 decides or continues ~~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 of Justice of the European Union on secondary legal bases. *In addition, the mechanism needs to be adapted to provide for a Union answer as an act of solidarity, if third countries included in Annex II to ~~this~~ Regulation (EC) No 539/2001 decides or continues ~~decides~~ to make the nationals of one or more Member States subject to visa requirements.*
- (3a) *Upon receipt of a notification from a Member State that a third country listed in Annex II to ~~this~~ Regulation (EC) No 539/2001 has decided to introduce visa requirements for that Member State's nationals, all Member States should react in common, thus providing a Union ~~Community~~ response to a situation which affects the Union in its entirety and allows for its citizens to be subjected to differing treatments.*
- (3b) *Full visa reciprocity is an objective which the Union should pursue in a proactive manner in its relations with third countries, thus contributing to improving of the credibility and consistency of the Union's external policy at international level*
- (3b1) *In order to ensure the efficiency of the reciprocity mechanism certain implementing powers should be conferred on the Commission and on the Council at different stages of the reciprocity mechanism.*

(3b2) The power to determine the categories of the nationals of the third country concerned that should be subject to a temporary suspension of the exemption from the visa requirement, as well as the powers to determine the corresponding temporary scope of that suspension, should be conferred on the Commission. These 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 Member States of the Commission's exercise of implementing powers. The examination procedure should be applicable for the adoption of such acts.

(3b3) The power to determine whether a temporary suspension of the exemption from the visa requirement with regard to all the nationals of the third country concerned should take effect on the dates foreseen in the Regulation (EC) No 539/2001 should be conferred on the Council.

Such an implementing power conferred on the Council ensures the adequate involvement of the Member States in the functioning of the reciprocity mechanism, given the particularly sensitive political nature of the suspension of the exemption from the visa requirement and its horizontal implications for the Member States, the Schengen associated countries and the Union itself, including for the external relations of the Union.

Conferring such power on the Council takes into account the need for political discussions at ministerial level on the Union policy on visas in the Schengen area, given that such discussions take place within the Mixed Committee, made up of the EU Member States and the Schengen associated countries, with a view to the Council taking decisions within the scope of its competences to ensure its efficient functioning.

Conferring such power on the Council reflects also the need to ensure the coordination at Union level, which such a suspension decision entails, notably the necessity to take into account the preparation of the consulates of the Member States and Schengen associated countries.