EU/Brazil Agreement: short-stay visa waiver for holders of ordinary passports

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PURPOSE: to conclude an Agreement between the EU and Brazil on short-stay visa waiver for holders of ordinary passports.

PROPOSED ACT: Council Decision.

BACKGROUND: in accordance with Council Regulation (EC) No 539/2001, Brazilian nationals can travel to all Member States of the European Union without requiring a visa for short stays. This should be reciprocated by Brazil, however the country still requires a visa from the nationals of four Member States: Estonia, Cyprus, Malta and Latvia.

For constitutional reasons, Brazil cannot grant a visa waiver for these Member States unilaterally; it is necessary to conclude a visa waiver agreement to be ratified by its Parliament.

Brazil has bilateral visa waiver agreements with the Member States, except the four concerned. These bilateral agreements differ from each other considerably as regards their personal scope of application (i.e. as regards the categories of persons benefiting from the visa waiver).

It stems from the nature of the common visa policy and the exclusive external competence of the European Union in this area that only the Union can negotiate and conclude a visa waiver agreement, and not the individual Member States. Therefore, on 18 April 2008, the Council adopted a decision authorising the Commission to open negotiations on the conclusion of a short-stay visa-waiver agreement between the European Union and Brazil. The negotiations started on 2 July 2008 and have been finalised on 1 October 2009.

During the negotiations, the Contracting Parties agreed to conclude two separate agreements: one on ordinary passport holders and the other on diplomatic and service passport holders, since the agreement on diplomatic and service passport holders does not need to be ratified by the Brazilian Congress, thus its ratification can go quicker and separately from the agreement on ordinary passport holders.

After the talks have stalled in July 2009 due to the disagreement between the parties on the personal scope of the visa waiver for ordinary passport holders, on 23 September 2009 COREPER adapted the mandate to negotiate the visa waiver agreement with Brazil.

According to the conclusions of COREPER, the Commission had to negotiate a visa waiver agreement with Brazil which provides:

- short-stay visa-free travel for visits of up to three months in a six months period to the Schengen area and to Romania, Bulgaria and Cyprus for Brazilian nationals and to Brazil for EU citizens on a reciprocal basis with a more limited scope than the existing visa regime at present under Regulation 539/2001, i.e. the agreement would basically only apply to tourists and business people;
- a clause maintaining the existing bilateral visa waiver agreements in so far as they establish visa-free travel to Brazil for the categories of persons not covered by the EU agreement;

- and that as far as Brazilian nationals are concerned, the agreement can only cover visits to the Schengen area and to Romania, Bulgaria and Cyprus, and should apply irrespective of their point of departure and their place of residence. As far as EU citizens are concerned, the agreement should apply irrespective of their point of departure and their place of residence when travelling to Brazil.

At the fourth round of negotiations, the text of a short-stay visa-waiver agreement for ordinary passport holders between the EU and Brazil could be finalised and thus the negotiations were concluded.

With regard to the visa waiver agreement for ordinary passport holders, preserving the bilateral agreements, in so far as they establish visa-free travel for categories of persons not covered by the EU-Brazil agreement, is part of the overall package deal with Brazil, which was agreed in Brasilia, in accordance with the mandate.

Given the specific circumstances, in order to pass a clear message to Brazil and to safeguard the existing bilateral agreements, a unilateral declaration has been made by the EU and sent to Brazil in form of a letter on 5 February 2010 that the **European Union might suspend the agreement if Brazil starts denouncing the existing bilateral agreements**. This approach has been endorsed by Member States as well at the Visa Working Party of 20 January 2010.

In its reply dated 14 April 2010 to the EU's letter, Brazil confirmed its intention to renegotiate some of the old bilateral agreements with the Member States. The two letters are attached to this proposal in Annexes II and III.

The Member States have been informed and consulted several times in the Visa Working Party of the Council and at COREPER. The Agreement was initialled on 28 April 2010.

IMPACT ASSESSMENT: no impact assessment was carried out.

LEGAL BASIS: Article 77 (2) (a), in conjunction with Article 218 of the Treaty on the Functioning of the European Union (TFEU).

CONTENT: the final content of the visa waiver agreement for ordinary passport holders can be summarised as follows:

The Commission considers that the objectives set by the Council in its negotiating directives – including the adaptation of the mandate by COREPER on 23 September 2009 – were attained and that the draft visa waiver agreement is acceptable to the Union.

The final content of the visa waiver agreement for ordinary passport holders can be summarised as follows.

Purpose and Scope: the EU-Brazil agreement gives a reciprocal visa waiver for travel for the purpose of tourism and business for all Brazilian and EU citizens, including the nationals of the four Member States not enjoying visa-free travel to Brazil at present. The two purposes "tourism" and "business" are widely defined in the agreement, including e.g. sportsmen and artists provided that no remuneration is received for their activity, and also certain disputed categories, such as family visits or official meetings, which will also be covered by the categories of "tourists" and "business people" respectively. These two categories covered by the EU-Brazil agreement would cover 90-95 % of all the travellers.

Categories excluded from the scope: a series of categories (e.g. **students, researchers, artists, religious people** etc., which are defined by the Brazilian national law) are excluded from the scope of the agreement. The agreement provides that the bilateral agreements concluded between Brazil and the Member States covering such other categories not covered by the EU-Brazil agreement continue to apply insofar as they provide for visa waiver for those categories. This way EU citizens falling under other

categories (than tourism and business) covered by the bilateral agreements, can continue to benefit from the visa waiver under these bilateral agreements.

The category of **persons travelling for the purpose of carrying out a paid activity** is also excluded from the scope of the Agreement. For this category, each Member State and also Brazil remain free to impose the visa requirement on the citizens of the other Party in accordance with the applicable Union or national law, or in accordance with bilateral agreements, which cover this category.

In consequence, the EU-Brazil agreement does not reduce the access to visa free travel to Brazil for the citizens of Member States having a bilateral agreement with Brazil, but basically maintains the status quo for these citizens.

Duration of stay: the duration of stay is limited by the agreement to three months during a six-month period in the Schengen area. Thus, this agreement puts an end to the possibility provided to Brazilian nationals by the bilateral agreements to cumulate the three months stays per Member State in the Schengen area. The agreement takes into account the situation of the Member States that do not yet apply the Schengen acquis in full. As long as they are not part of the Schengen area without internal borders, the visa waiver confers a right for the nationals of Brazil to stay for three months on the territory of each of those Member States (Cyprus, Bulgaria, Romania), independently of the period calculated for the whole Schengen area.

Territorial application: as the overseas territories of France and the Netherlands do not form part of the Schengen area and the visa rules (e.g. Regulation 539/2001) do not apply there, the EU-Brazil agreement cannot cover these territories. On the other hand, EU nationals residing in any third country or an overseas territory of a Member State should be covered by the visa waiver (eg. a Dutch national residing in the USA or in Aruba, or a French residing in French Polynesia) in accordance with their nationality. The Agreement provides for visa-free travel for the citizens of Brazil when travelling to the European territories of the Member States and should apply irrespective of their point of departure and their place of residence.

As far as EU citizens are concerned, the agreement provides for visa-free travel when travelling to Brazil, irrespective of their point of departure and their place of residence.

Nevertheless, such rules on the territorial application are not pronounced explicitly in the Agreement, but the existing rules under Union law and Brazilian national law continue to apply, including bilateral agreements between Brazil and France and the Netherlands covering the non-European territories.

This approach has been accepted by Member States at the meeting of the JHA Counsellors of 5 October 2009.

Other provisions: in order to safeguard equal treatment of all EU citizens, a provision has been included in the Agreement stating that Brazil may suspend or terminate the Agreement only in respect of all the Member States of the European Union and, reciprocally, the Union may also suspend or terminate the Agreement only in respect of all of its Member States. The Agreement sets up a Committee of experts for the management of the Agreement. The specific situation of the United Kingdom and Ireland is reflected in the preamble. A clause on the exchange of specimen of the passports has been inserted to the agreement.

Joint declaration: a joint declaration has been made on full dissemination of information for the smooth implementation of the agreement.

This proposal constitutes the legal instruments for the conclusion of the Agreement. The Council will decide by qualified majority. The European Parliament will have to give its consent on the conclusion of the Agreement, in accordance with Article 218 (6) (a) (v) of the TFEU.

BUDGETARY IMPLICATION: this proposal has no implications for the EU budget.