Visas: third countries whose nationals are subject to or exempt from a visa requirement

2011/0138(COD) - 24/05/2011 - Legislative proposal

PURPOSE: to revise certain parts of Regulation (EC) No 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders (the negative list) and those whose national are exempt from that requirement (the positive list).

PROPOSED ACT: Regulation of the European Parliament and of the Council.

BACKGROUND: since its adoption, Regulation (EC) No 539/2001 has been amended eight times. All the recent modifications of the Regulation focused on the revision of the positive and the negative visa lists annexed to the Regulation. Over the past few years, the need arose to make some further, technical modifications as well to the main text of the Regulation, e.g. strengthening legal certainty by providing rules for certain situations which were not covered yet by the Regulation and adjusting certain definitions due to recent changes brought by secondary legislation, particularly by the adoption of the Visa Code.

Furthermore, ten years after the integration of the Schengen acquis into the framework of the EU and the establishment of the common visa policy, it is necessary to make progress towards further harmonisation of the EU's common visa policy with regard to certain categories listed in the Regulation and left until now to the unilateral decisions of individual Member States.

Lastly, as a result of the entry into force of the Lisbon Treaty, further modifications are required, such as the introduction of a safeguard clause and a modification of the reciprocity mechanism.

This proposal aims to reconcile these objectives.

IMPACT ASSESSMENT: no impact assessment was undertaken.

LEGAL BASIS: Article 77(2)(a) of the Treaty on the Functioning of the European Union. (TFEU).

CONTENT: the present modification of the Regulation aims at :

(1) making provision for a visa safeguard clause allowing the rapid, temporary suspension of the visa waiver for a third country on the positive list in case of an emergency situation, where an urgent response needs to be given to solve the difficulties faced by Member States. Following the adoption of the visa waiver for Albania and Bosnia Herzegovina, certain Member States suggested the insertion of a safeguard clause into Regulation 539/2001, giving power to the Commission to decide on a temporary suspension of the visa waiver, in accordance with a comitology procedure, if certain conditions are met.

The clause would be complementary to, but distinct from, the safeguard clause in Article 78(3) of the TFEU. It should be applied only as a temporary measure in clearly defined emergency situations. It should cover only a short period of time and be triggered only in case of an emergency situation, i.e. if there is a sudden change of the situation, e.g. when the relevant figures increase suddenly within a relatively short period of time, and where an urgent "visa" response needs to be given to solve the difficulties faced by the Member States affected.

Before the safeguard clause is triggered, the Commission will have to assess the situation and there should be no automatism flowing from the notifications by Member States. The Commission will take into

account the number of Member States affected by the sudden occurrence of any of the situations listed in this proposal and the overall impact of them on the migratory situation in the EU.

In accordance with the comitology rules in Regulation (EU) No 182/2011, under the examination procedure, the European Parliament and the Council will receive the proposal for a Commission decision suspending the visa waiver for one or more third countries. The proposal makes provisions ofr information to be available in sufficient time for the European Parliament and the Council to reject or adopt the proposal to amend the lists of Regulation (EC) No 539/2001.

(2) modifying the reciprocity mechanism: a suggestion has been made by a Member State to modify the current reciprocity mechanism in order to make it more efficient. According to the suggestion, the Commission would be obliged to present a proposal, within a very short period of time, for a temporary restoration of a visa requirement for nationals of a third country, which does not lift the visa obligation within a period of no longer than 12 months of its introduction for a Member State. However, such a modification of the reciprocity mechanism would infringe the exclusive right of initiative of the Commission and would not necessarily lead to adoption of the proposed retaliatory measure. The initial reciprocity mechanism of Regulation (EC) No 539/2001 already contained a certain automatism: the notification of non-reciprocity cases was not mandatory; the Member State concerned was free to decide to notify or not. But if notification took place, then Member States were obliged to impose the visa requirement for nationals of the third country concerned provisionally and automatically, 30 days after the notifications, unless the Council decided otherwise. This automatism was considered to be the weakness of the initial reciprocity mechanism and thus it has been abandoned in 2005 as being counter-productive. There is no reason to believe that it would entail more efficiency now. The current reciprocity mechanism, as modified in 2005, is considered to be overall efficient, and the cases of non-reciprocity have been considerably reduced. The remaining non-reciprocity situations are mostly cases where some Member States are considered by third countries not to meet objective criteria for visa waiver set out by these third countries in their domestic legislation. Most Member States also cautioned against an "automatic" (re)imposition of a visa requirement for citizens of third countries due to its political implications and advocated instead a tailor-made approach and application of provisional measures in other fields.

(3) ensuring compliance with the Visa Code by providing e.g. for appropriate definitions concerning short stay and visa. Accordingly, a visa is an authorisation of transit through or for an intended stay in the territory of the Member States for 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. The airport transit visa is excluded from this definition, since the visa regime applicable by Member States to third-country nationals transiting through the international airports of Member States is regulated by and contained in the Visa Code.

(4) ensuring that the Regulation determines exhaustively whether a third-country national is to be subject to or exempt from the visa requirement. Apart from aligning the definition of “visa” with that in the Visa Code, the proposal seeks to ensure legal clarity by complementing the rules applicable to refugees and stateless persons in order to clarify the applicable visa regime for those residing in the United Kingdom or in Ireland. On the basis of the Protocol on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and to the Treaty establishing the European Community, Ireland and the United Kingdom are not participating in the adoption of Regulation (EC) No 539/2001 and its amendments. Thus, for Regulation (EC) No 539/2001 the United Kingdom and Ireland are not considered to be Member States. Consequently, the provisions of Regulation (EC) No 1932/2006 on the visa rules applicable for refugees and stateless persons do not apply to such persons when they are residing in the United Kingdom or in Ireland. The proposal aims at remedying this unsatisfactory situation by including a provision into the Regulation on refugees and stateless persons residing in the UK or Ireland.

(5) making progress towards a full harmonisation of the common visa policy by providing for new, more harmonised rules with regard to the visa requirement or exemption applicable to various categories of third country nationals. The proposal aims at limiting the freedom of Member States to grant visa waiver or to impose a visa requirement to various categories of persons covered by Article 4(1) of Regulation (EC) No 539/2001 by establishing further common rules on the visa requirement for some of these categories.

The following provisions are made:

- **further progress towards full harmonisation with regard to the categories of Article 4(1), for which a de facto harmonisation or quasi harmonisation already exists**. Civilian air crew members are exempted from the visa requirement by all Member States. As regards civilian sea crew, all Member States but two exempt such persons from the visa requirement in case of shore leave, while all Member States but two maintain the visa requirement for transit purposes. This amendment will therefore set out the general, harmonised visa exemption for the first category and visa requirement for the second one respectively. There is only one Member State exempting flight crew and attendants on emergency or rescue flights and other helpers in case of a disaster or accident from the visa requirement, therefore this Regulation would abolish this category;
- **procedure to exempt diplomatic and service passport holders of third countries from the visa requirement after the abolition of Council Regulation (EC) No 789/2001**: the current text of Article 4(1) of Regulation (EC) No 539/2001 refers to the procedure established by Regulation (EC) No 789/2001 to be followed when a Member State decides to exempt the diplomatic and/or service passport holders of a third country from the visa requirement. Pursuant to Regulation (EC) No 789 /2001, Member States, willing to exempt holders of diplomatic and service passports of third countries whose nationals are subject to prior consultation, should have submitted a legislative initiative, on which the Council decided by qualified majority (since 2006).

As regards the holders of such passports of third countries not subject to prior consultation, Regulation (EC) No 789/2001 obliged Member States simply to communicate to the Council any amendments to their visa rules (requirement or exemption). However, Regulation (EC) No 789/2001 has been repealed by Council Regulation (EC) No 810/2009 establishing a Community Code on visas (Visa Code). It was considered that after the repeal of the above Regulation, the appropriate place to cover these "procedural" aspects of national decisions on visa requirement or exemption for such passport holders would be Regulation (EC) No 539/2001, if need be.

Thus, in the framework of the present modification, it needs to be examined whether a specific decision-making procedure should be provided for the case when a Member State wants to abolish the visa requirement for the diplomatic and service passport holders of a third country subject to prior consultation. The Commission considers that there is no need to establish such a specific "common decision mechanism" for this issue, both for institutional and substantive reasons;

(6) clarifying the situation and establishing the legal basis of the visa requirement or exemption for other entities subject to international law which issue diplomatic or service passport or laissez-passers to its members: there are certain entities subject to international law, which do issue diplomatic or service passports or laissez-passers. These entities are not intergovernmental organisations, thus they are not covered at this moment by Article 4 of Regulation (EC) No 539/2001. On the other hand they are included in the Table of travel documents and Member States declared whether they recognise their travel documents or not (e.g. Sovereign Order of the Knights of Malta). It is necessary to have such entities also covered by Regulation (EC) No 539/2001 and Member States should decide and notify to the Commission;

(7) adopting new provision in respect of obligations for certain Member States flowing from prior EU /international agreements implying the need to derogate from the common visa rules. Prior to the establishment of the EU common visa policy, the European Union and its Member States have concluded international agreements, like association agreements, with third countries dealing i.a. with the movement of persons and services, which might have an impact on the visa requirement imposed on nationals of third countries. Such international agreements concluded by the Union take primacy over provisions of secondary EU legislation, including Regulation (EC) No 539/2001. In case such international agreements contain a so-called 'standstill clause', it might entail the obligation for certain Member States to derogate from the rules of the common visa policy in accordance with their respective legislations and practices applicable/in force on the date the standstill clause entered into force for them. Therefore, the Commission proposes the introduction in Article 4 of a provision allowing Member States to exempt service providers from the visa requirement, to the extent necessary to respect international obligations concluded by the Community before the entry into force of Regulation (EC) No 539/2001.

BUDGETARY IMPLICATIONS: the proposal has no implications for the budget of the EU.