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Proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

amending 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

(revision of the suspension mechanism)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

• Reasons for and objectives of the proposal

Following the visa liberalisation decisions for the Western Balkans countries, the Commission proposed in 2011 to establish a "visa safeguard clause" in Council Regulation (EC) No 539/2001¹ which would allow for the temporary suspension of the visa exemption for the nationals of a third country for a short period of time, as a matter of urgency and on the basis of well-defined criteria, to solve possible difficulties faced by one or several Member States in case of sudden and substantial increase of irregular migration, unfounded asylum applications or rejected readmission applications submitted by a Member States to the third country concerned².

On 11 December 2013, the European Parliament and Council adopted Regulation (EU) No 1289/2013³, which amended Regulation (EC) No 539/2001 by introducing the so-called "suspension mechanism" and modifying the existing reciprocity mechanism.

This suspension mechanism in Article 1a of Regulation (EC) No 539/2001 allows the temporary suspension of the visa exemption for nationals of a third country in certain emergency situations, as a last resort. It can be triggered by any Member State by notifying the Commission that it is confronted, over a six-month period, in comparison with the same period in the previous year or with the last six months prior to the visa liberalisation of that country, with circumstances leading to an emergency situation which the Member State in question cannot remedy on its own.

These circumstances are namely a substantial and sudden increase in the number of:

- nationals of that third country found to be illegally overstaying in the Member State in question;
- unfounded asylum applications from the nationals of that third country, where such increase is leading to specific pressures on the Member State's asylum system;
- rejected readmission applications submitted by the Member State to that third country for its own nationals.

When notifying the Commission, the Member State must state the reasons for triggering the mechanism, provide relevant data and statistics, as well as describe the preliminary measures that it has taken in order to remedy the situation. The Commission then informs both Council and the European Parliament and examines the situation and the scope of the problem (number of Member States affected, impact on the overall migratory situation in the Union).

The Commission may decide that action is needed, taking into account the consequences of the suspension of the visa exemption for the external relations of the Union and its Member States with the third country concerned, while working in close cooperation with that third

¹ Council Regulation (EC) No 539/2001 of 15 March 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, OJ L 81, 21.03.2001, p. 1.

² COM(2011) 290 final.

³ Regulation (EU) No 1289/2013 of the European Parliament and of the Council of 11 December 2013 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, OJ L 347, 20.12.2013, p. 74.

country to find alternative long-term solutions. In that case, the Commission has three months from the receipt of the notification to adopt an implementing act temporarily suspending the exemption from the visa requirement for the nationals of the third country concerned, for a period of six months.

Before the expiry of this six-month period, the Commission must submit a report to the European Parliament and the Council. This report may be accompanied by a legislative proposal to amend Regulation (EC) No 539/2001 to transfer the third country in question to the list of visa-required countries (Annex I), and thus to put its citizens permanently under the visa requirement. In such case, the temporary suspension of the visa waiver may be extended by a maximum period of 12 months.

In the context of the current migratory situation in the European Union and of the successful conclusion of several visa liberalisation dialogues with neighbouring countries (Georgia, Ukraine, Kosovo, Turkey), several Member States have questioned whether the existing visa suspension mechanism provides for the necessary flexibility to act in certain situations of urgency. In particular they have argued that:

- the possible grounds for suspension are too limited, and for instance do not include the failure of a third country to cooperate on readmission of third-country nationals having transited through that third country, where a readmission agreement concluded between the Union or a Member State and the third country concerned provides for such a readmission obligation;
- the initiative to trigger the suspension mechanism by means of a notification, which in the Regulation lies solely with Member States, should be extended to Commission;
- the reference periods and the deadlines are too long, which does not allow for a fast reaction in emergency situations.

Taking into account the Commission's recent proposals for visa liberalisation of Georgia⁴, Ukraine⁵, Turkey⁶ and Kosovo⁷ and the recent discussions with Member States, the Commission has decided to present a proposal to amend Regulation (EC) No 539/2001 to revise the current suspension mechanism.

The main objective is to strengthen the suspension mechanism by making it easier for Member States to notify circumstances leading to a possible suspension and by enabling the Commission to trigger the mechanism on its own initiative. In particular, the use of the mechanism should be facilitated by shortening reference periods and deadlines allowing for a faster procedure and by extending the possible grounds of suspension, which should include a substantial increase in the number of rejected readmission applications for third-country nationals having transited through that third country, where a readmission agreement concluded by the Union or a Member State and the third country concerned provides for such a readmission obligation. The Commission should also be able to trigger the mechanism in case the third country fails to cooperate on readmission, in particular where a readmission agreement has been concluded between that third country and the Union.

⁴ COM(2016) 142 final.

⁵ COM(2016) 236 final.

⁶ COM(2016) 279 final.

⁷ COM(2016) 277 final.

- **Consistency with existing policy provisions in the policy area**

Council Regulation (EC) No 539/2001 lists the third countries whose nationals must be in possession of a visa when crossing the external borders of the Member States and those whose nationals are exempt from that requirement. Regulation (EC) No 539/2001 is applied by all Member States – with the exception of Ireland and the United Kingdom – and also by Iceland, Liechtenstein, Norway and Switzerland. The Regulation is part of the EU's common visa policy for short stays of up to 90 days in any 180-day period.

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

- **Legal basis**

As the proposal will amend the EU's common visa policy, the legal basis for the proposal is point (a) of Article 77(2) of the Treaty on the Functioning of the European Union (TFEU). The proposed regulation will constitute a development of the Schengen *acquis*.

- **Subsidiarity, proportionality and choice of the instrument**

The suspension mechanism laid down in Regulation (EC) No 539/2001 is an integral part of the EU's common visa policy. The objective of strengthening that mechanism in order to make it more effective, by enlarging its scope of application and by enabling the Commission to trigger it on its own initiative, can only be achieved by action at Union level, namely by an amendment to the Regulation. Member States cannot act individually to achieve the policy objective. No other (non-legislative) options to achieve the policy objective are available.

3. RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS

- **Ex-post evaluations/fitness checks of existing legislation**

The existing suspension mechanism, introduced in December 2013, has never been used so far; therefore no practical experience with the current mechanism is available. However, several Member States have argued that the mechanism has never been used as the hurdles to trigger it have been put too high and that deadlines are too long.

- **Stakeholder consultations**

The need for additional safeguards in the wake of visa liberalisation for countries in the Union's neighbourhood was discussed with Member States in COREPER and in the Visa Working Party. Informal suggestions by Member States to revise the suspension mechanism have been taken into account in the drafting of this proposal.

- **Impact assessment**

The revision of the suspension mechanism as such does not have any direct economic or other impacts. The political and economic impact of the possible suspension of the visa exemption for nationals of a certain third country will have to be assessed in detail by the Commission in each individual case when it examines a notification by a Member State and before it decides whether action is needed. Therefore no impact assessment is necessary for this proposal.

- **Fundamental rights**

This proposal has no negative consequences for the protection of fundamental rights in the European Union.

4. BUDGETARY IMPLICATIONS

n/a

5. OTHER ELEMENTS

- **Implementation plans and monitoring, evaluation and reporting arrangements**

The Commission will step up its monitoring of the migratory and security situation resulting from recent visa liberalisation decisions which will enable it to make full use of the possibilities provided by the revised suspension mechanism where necessary.

- **Detailed explanation of the specific provisions of the proposal**

This proposal for the revision of the suspension mechanism in Article 1a of Regulation (EC) No 539/2001 includes the following elements:

- The definition of the circumstances which Member States can notify to the Commission has been amended to clarify that the suspension mechanism cannot only be used in "emergency situations, as a last resort", but more generally in case the visa liberalisation leads to a serious increase of irregular migration, unfounded asylum applications or rejected readmission applications.
- The reference period for comparing this situation with the situation of the previous year or before visa liberalisation, is shortened from six to two months.
- It is sufficient for the increase of irregular migration, unfounded asylum applications or rejected readmission applications to be "substantial", whereas the increase must currently be "sudden and substantial".
- The grounds for possible suspension which can be notified should include rejected readmission applications for nationals of another third country having transited through that third country, where a readmission agreement concluded between the Union or a Member State and the third country concerned provides for such a readmission obligation.
- The limitation in time (to seven years) of the possibility to compare the current situation with the situation before visa liberalisation is abolished.
- The Commission is given the possibility to trigger the suspension mechanism on its own initiative if it has concrete and reliable information of any of the circumstances which Member States can notify or that the third country is – in a more general manner – not cooperating on readmission, in particular where an EU-level readmission agreement has been concluded with that third country. This failure to cooperate can, for instance, consist in:
 - rejecting or not replying to readmission applications,
 - failing to issue travel documents for the purposes of return within deadlines specified in the agreement or not accepting European travel documents issued following the lapse of deadlines specified in the agreement,
 - terminating or suspending the agreement.
- Where the Commission, after having examined the circumstances notified (or of which it has received concrete and reliable information), decides that action is needed, the deadline for the adoption of the implementing act temporarily

suspending the visa exemption for the third country concerned is reduced from three to one month.

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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 point (a) Article 77(2) thereof,

Having regard to the proposal from the European Commission,

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

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) Council Regulation (EC) No 539/2001⁸ lists the third countries whose nationals must be in possession of a visa when crossing the external borders of the Member States and those whose nationals are exempt from that requirement.
- (2) The mechanism for the temporary suspension of the exemption from the visa requirement for the nationals of a third country listed in Annex II of that regulation ("the suspension mechanism") should be strengthened by making it easier for Member States to notify circumstances leading to a possible suspension and by enabling the Commission to trigger the mechanism on its own initiative.
- (3) In particular, the use of the mechanism should be facilitated by shortening reference periods and deadlines allowing for a faster procedure and by extending the possible grounds of suspension, which should include a substantial increase in the number of rejected readmission applications for third-country nationals having transited through the third country concerned, where a readmission agreement concluded between the Union or a Member State and that third country provides for such a readmission obligation. The Commission should also be able to trigger the mechanism in case the third country fails to cooperate on readmission, in particular where a readmission agreement has been concluded between the third country concerned and the Union.
- (4) 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

⁸ Council Regulation (EC) No 539/2001 of 15 March 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, OJ L 81, 21.03.2001, p. 1.

2000/365/EC⁹. The United Kingdom is therefore not taking part in the adoption of this Regulation and is not bound by it or subject to its application.

- (5) 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/EC¹⁰. Ireland is therefore not taking part in the adoption of this Regulation and is not bound by it or subject to its application.
- (6) As regards Iceland and Norway, this Regulation constitutes a development of 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 association of those two States with the implementation, application and development of the Schengen *acquis*, which fall within the area referred to in point B of Article 1, of Council Decision 1999/437/EC¹¹.
- (7) As regards Switzerland, this Regulation constitutes a development of the provisions of the Schengen *acquis* within the meaning of 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 point B of Article 1, of Decision 1999/437/EC, read in conjunction with Article 3 of Council Decision 2008/146/EC¹².
- (8) As regards Liechtenstein, this Regulation constitutes a development of the provisions of the Schengen *acquis* within the meaning of the Protocol signed 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 point B of Article 1, of Decision 1999/437/EC read in conjunction with Article 3 of Council Decision 2011/350/EU¹³.

⁹ 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 *acquis*, OJ L 131, 1.6.2000, p. 43.

¹⁰ Council Decision 2002/192/EC of 28 February 2002 concerning Ireland's request to take part in some of the provisions of the Schengen *acquis*, OJ L 64, 7.3.2002, p. 20.

¹¹ Council Decision 1999/437/EC of 17 May 1999 on certain arrangements for the application of the Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the association of those two States with the implementation, application and development of the Schengen *acquis*, OJ L 176, 10.7.1999, p. 31.

¹² Council Decision 2008/146/EC of 28 January 2008 on the conclusion, on behalf of the European Community, of 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*, OJ L 53, 27.2.2008, p. 1.

¹³ Council Decision 2011/350/EU of 7 March 2011 on the conclusion, on behalf of the European Union, 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*, relating to the abolition of checks at internal borders and movement of persons, OJ L 160, 18.6.2011, p. 19.

HAVE ADOPTED THIS REGULATION:

Article 1

Article 1a of Regulation (EC) No 539/2001 is amended as follows:

(1) in paragraph 1 the following is deleted:

"in emergency situations, as a last resort,"

(2) paragraph 2 is replaced by the following:

"2. A Member State may notify the Commission if it is confronted, over a two-month period, in comparison with the same period in the previous year or with the last two months prior to the implementation of the exemption from the visa requirement for nationals of a third country listed in Annex II, with one or more of the following circumstances which it is unable to remedy on its own, namely:

(a) a substantial increase in the number of nationals of that third country found to be staying in the Member State's territory without a right thereto;

(b) a substantial increase in the number of asylum applications from the nationals of that third country for which the recognition rate is low;

(c) a substantial increase in the number of rejected readmission applications submitted by the Member State to that third country for its own nationals or, where a readmission agreement concluded between the Union or that Member State and that third country provides for such obligation, for third country nationals having transited through that third country.

The notification referred to in the first subparagraph shall state the reasons on which it is based 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. The Commission shall inform the European Parliament and the Council immediately of such notification."

(3) the following paragraph is inserted:

"2a. Where the Commission has concrete and reliable information of circumstances referred to in points (a), (b) or (c) of paragraph 2, or that the third country is not cooperating on readmission, in particular where a readmission agreement has been concluded between that third country and the Union, for instance:

- by rejecting or not replying to readmission applications,
- by failing to issue travel documents for the purposes of return within deadlines specified in the agreement or not accepting European travel documents issued following the lapse of deadlines specified in the agreement,
- or by terminating or suspending the agreement,

the Commission may, on its own initiative, inform the European Parliament and the Council. This information shall be equivalent to a notification made pursuant to paragraph 2."

(4) paragraph 3 is replaced by the following:

"3. The Commission shall examine any notification made pursuant to paragraph 2, taking into account:

(a) whether any of the situations described in paragraphs 2 and 2a are present;

- (b) the number of Member States affected by any of the situations described in paragraphs 2 and 2a;
- (c) the overall impact of the increases referred to in paragraph 2 on the migratory situation in the Union as it appears from the data provided by the Member States or available to the Commission;
- (d) the reports prepared by the [European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union], the European Asylum Support Office or the European Police Office (Europol) if circumstances so require in the specific case;
- (e) the overall question of public policy and internal security, in consultations with the Member State concerned.

The Commission shall inform the European Parliament and the Council of the results of its examination."

- (5) in paragraph 4, "three months" is replaced by "one month".

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 Brussels,

For the European Parliament
The President

For the Council
The President