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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 of Member States and those whose nationals are exempt from that requirement

EXPLANATORY MEMORANDUM

1. General context and grounds for the proposal

In accordance with Article 62 (2) (b) (i) of the Treaty Establishing the European Community, the Council adopted Council Regulation (EC) No 539/2001¹ listing the third countries whose nationals must be in possession of visas when crossing the external borders (the so-called negative list, Annex I) and those whose nationals are exempt from that requirement (the so-called positive list, Annex II). Article 61 of the EC Treaty cited those lists among the flanking measures which are directly linked to the free movement of persons in an area of freedom, security and justice. The relevant legal basis is now Article 77 (2) (a) of the Treaty on the Functioning of the European Union (TFEU).

The determination of those third countries whose nationals are subject to the visa requirement, and those exempt from it, is governed by a considered, case-by-case assessment of a variety of criteria relating *inter alia* to illegal immigration, public policy and security, and to the European Union's external relations with third countries, consideration also being given to the implications of regional coherence and reciprocity. In view of the criteria of public order and illegal immigration, particular attention should also be paid to the security of travel documents issued by the third countries concerned.

As the criteria set out in Regulation (EC) No 539/2001 can evolve over time in relation to third countries, the composition of the negative and positive lists should be reviewed at regular intervals. In the Stockholm Programme adopted in December 2009 the European Council specifically requested the Commission to keep the lists of third countries whose nationals are or are not subject to a visa requirement under regular review in accordance with appropriate criteria relating to illegal immigration, public policy and security, while taking account of the Unions internal and external policy objectives.

Hence, Regulation (EC) No 539/2001 has been amended eight times², since it was adopted, most recently in 2010 with regard to the transfer of Taiwan to the positive list and also to the outcome of visa liberalisation dialogues by transferring Albania and Bosnia and Herzegovina to the positive visa list.

The European Parliament and the Council are negotiating a number of amendments to the provisions of Regulation (EC) No 539/2001 proposed by the Commission³: to introduce a visa safeguard clause temporarily suspending the visa waiver for a third country on the positive list in the event of an emergency situation; to strengthen legal certainty by providing rules for certain situations not yet covered by the Regulation; and to adjust provisions in the light of the recent changes brought by the Lisbon Treaty and secondary legislation, for instance the Visa Code (Council Regulation (EC) No 810/2009).⁴

¹ OJ L 81, 21.3.2001, p.1

² Council Regulations (EC) No 2414/2001 of 7 December 2001 (OJ L 327, 12.12.2001, p. 1), (EC) No 453/2003 of 6 March 2003 (OJ L 69, 13.3.2003, p. 10), (EC) No 851/2005 of 2 June 2005 (OJ L 141 4.6.2005, p. 3), (EC) No 1791/2006 of 20 November 2006 (OJ L 363 20.12.2006, p. 1), (EC) No 1932/2006 of 21 December 2006 (OJ L 405 30.12.2006, p. 23), (EC) No 1244/2009 of 30 November 2009 (OJ L 336 18.12.2009, p. 1), (EU) No 1091/2010 of 24 November 2010 (OJ L 329 14.12.2010, p.1) and (EU) No 1211/2010 of 15 December 2010 (OJ L 339 22.12.2010, p.9)

³ COM (2011) 290 final

⁴ OJ L 243 15.9.2009, p. 1.

The lists annexed to Regulation (EC) No 539/2001 need to be regularly reassessed in general in the light of the appropriate, above mentioned criteria defined in the Regulation.

This review of the lists annexed to the Regulation therefore aims to ensure that:

- the composition of the lists of third countries complies with the criteria set out in recital 5 of the Regulation, in particular the illegal immigration and public policy criteria and the transfer of countries from one annex to another as appropriate;
- in accordance with Article 77 (2) (a) of the TFEU, the Regulation determines exhaustively whether a third-country national is to be subject to, or exempt from, the visa requirement.

2. Elements of the proposal

2.1 Transfer of third countries from the negative list (Annex I) to the positive list (Annex II)

In line with the approach adopted in relation to earlier changes to Regulation (EC) No 539/2001 for the purposes of the regular review of the lists, the Commission has asked the Member States whether, in their opinion, the annexes to the Regulation as they stand still correspond to the criteria determined by the Regulation. There were no suggestions from the Member States to transfer third countries from the positive to the negative list. The Commission did receive suggestions for transfers from the negative to the positive list with regard to a number of third countries. Some third countries approached the Commission directly with a request to be transferred to the positive list. The information transmitted by the Member States (the Commission received 20 replies) has been analysed, along with information from other sources, including from the EU Delegations responsible for the third countries concerned, and statistics supplied by Eurostat on immigration flows, asylum and enforcement measures against irregular migration.⁵ The analysis has led the Commission to conclude that, at this stage, the countries and British citizens listed in the subsections below should be transferred to the positive list.

2.1.1 Caribbean Island Nations

The Commission analysed the available information, including statistics, on each of the third countries proposed by Member States. Particular attention was paid to: the country's level of economic and social development, the risk it poses of irregular immigration to the European Union, external relations issues and regional coherence.

The Commission came to the conclusion that there was no longer any justification for imposing a visa requirement on nationals of Dominica, Grenada, Saint Lucia, Saint Vincent and the Grenadines or Trinidad and Tobago. A significant number of Member States suggested that these countries be moved from the negative list to the positive list. These five countries do not represent any risk of irregular immigration or public order and security to the Member States of the Union in accordance with the criteria set out in recital 5 of the Regulation. Furthermore, these third countries are well-established democracies. They have a good standard of living and a stable, growing economy in the region. They have proved that

⁵ In accordance with European Parliament and Council Regulation (EC) 862/2007 of 11 July 2007 (OJ, L 199 31.07.2007, p. 23

they are able to face the current global economic crisis and improve their already good relationships with both the Union and the international financial institutions. The 2006 revision of Regulation (EC) No 539/2001⁶ has already transferred four countries located in the same region to the positive list and the waiving of the visa for the citizens of these four countries has not had any negative effect with respect to irregular migration or security. It is accordingly proposed that Dominica, Grenada, Saint Lucia, Saint Vincent and the Grenadines and Trinidad and Tobago be transferred from the negative list to the positive list.

It is also worth mentioning that four Member States are represented in Trinidad and Tobago (France, Germany, the Netherlands and Spain). Only one Member State (France) has a consulate in Saint Lucia, which is a popular tourist destination. Since there is no representation of any Member State in Grenada, Dominica or Saint Vincent and the Grenadines, their citizens need to request Schengen visas abroad, involving significant costs. Both Grenada and Saint Lucia have only one representation in the Schengen Member States and a High Commission in the United Kingdom.

In Trinidad and Tobago all EU citizens are currently exempt from the visa obligation, albeit under different conditions and for different periods of stay (only one month for citizens of Slovakia, Slovenia, the Czech Republic, Poland, Bulgaria, Romania, Hungary, Lithuania, Latvia and Estonia). In the other four Caribbean countries nationals of all Union Member States are exempt from the visa requirement for stays of up to 180 days.

As regards the criteria of public order and irregular immigration, particular attention should also be paid to the security of travel documents issued by the third countries concerned. When the Regulation was last modified, the Commission announced that future transfers to the positive list might depend on meeting specific conditions relating to the security of travel documents. As a result, the issuing of biometric passports was set as a condition for transferring of Western Balkan countries from the negative to the positive visa list, given the weaknesses of the former passport systems in the region concerned and the ensuing problems. However, taking into account the high level of security of the CARICOM travel documents of the countries concerned by this amendment, as well as the regional coherence with another set of countries transferred to the positive list by a recent amendment of Regulation (EC) No 539/2001 (Regulation (EC) No 1932/2006) in the same region, the issuing of biometric passports should not be a requirement for transferring Dominica, Grenada, Saint Lucia, Saint Vincent and the Grenadines or Trinidad and Tobago. These third countries have highly secure CARICOM machine-readable passports and they intend to replace their passports by biometric ones in the near future.

In order to ensure consistency with previous visa exemptions for countries in the same Caribbean region, considering that these visa exemptions had no negative consequences, and in order to guarantee full reciprocity in the future for visa-free short stays of three months in a six-month period with those countries (which is not entirely the case at present, namely in Trinidad and Tobago), the visa exemption for the nationals of those countries should not apply until a visa waiver agreement between the European Union and the countries concerned has been concluded and has entered into force.

⁶ Regulation (EC) No 1932/2006 of 21 December 2006 (OJ L 405 30.12.2006, p. 23)

2.1.2. Pacific Island Nations

After examining the criteria relating to illegal immigration, public policy and security and the Union's external relations, the Commission considers that Kiribati, the Marshall Islands, Micronesia, Nauru, Palau, Samoa, the Solomon Islands, Timor-Leste, Tonga, Tuvalu and Vanuatu should be transferred to the positive list of Regulation (EC) No 539/2001.

Recent statistics show that none of those countries is a source of irregular migration to the EU.

The passports issued by these countries are machine-readable⁷ and contain a sufficient number of security features. As explained above for the Caribbean Island Nations, the issuing of biometric passports by the Pacific Island Nations should not be a pre-condition for exempting their nationals from the visa obligation.

Only two Member States are present in any of these countries: Portugal in Timor-Leste and France in Vanuatu. The limited presence of Member States in the region may entail significant costs for applicants for a Schengen visa.

Fiji belongs to this region but in the light of the current political situation in the country and the lack of progress in complying with the essential elements of the Cotonou Agreement, it is not considered appropriate to propose transferring it to the positive list.

Papua New Guinea is also located in the region, but it is very different in terms of the size of its population and its area. Moreover, it is currently experiencing difficult political conditions, which prevents it from being included on the visa-free list at this stage.

Most of those Pacific Island Nations waive the visa obligation for the nationals of most of the Member States. However, in order to guarantee full reciprocity in the future with these Pacific Island Nations for short stays of three months in a six-month period for the future, and ensure consistency with previous visa exemptions, nationals of these countries should not benefit from the visa exemption until a visa waiver agreement between the Union and the countries concerned has been concluded and has entered into force.

2.1.3. Specific categories of British nationals

The 2006 revision of Regulation (EC) No 539/2001⁸ tried to clarify the situation of British citizens who are not nationals of the United Kingdom of Great Britain and Northern Ireland for the purposes of Union law. Some of them (the group of British nationals (overseas)) were listed under a new section of Annex II, while the remainder (British overseas territories citizens who do not have the right of abode in the United Kingdom, British overseas citizens, British subjects who do not have the right of abode in the United Kingdom and British protected persons) were listed under a new section of Annex I. This differentiation was judged necessary at the time because, among other reasons, there was believed to be a risk of irregular immigration.

⁷ Kiribati is in the process of upgrading its passports to machine-readable ones, with the support of the Australian Department of Immigration.

⁸ Regulation (EC) No 1932/2006 of 21 December 2006 (OJ L 405 30.12.2006, p. 23)

However, statistics for the past three years on refusals at borders and apprehensions of irregular migrants show that British citizens under the visa obligation do not pose a risk in terms of irregular migration to the Schengen area, as the figures are negligible. Some of them have the right of abode in the United Kingdom. Moreover, most of them reside in islands of the Caribbean region (Bermuda, Turks and Caicos, Montserrat, etc.), which have strong similarities with countries of the same region which are gradually being transferred to Annex II (see 2.1.1. above). Regional coherence would therefore require these persons to be treated in a similar way. The number of people included within the four groups of British nationals currently mentioned in Annex I is estimated to be below 300 000.

The security of the British nationals' travel documents is ensured, as such documents are made in the United Kingdom according to strict technical specifications. They are machine readable and contain a number of security features.

2.2. Update of the negative list (Annex I) : inclusion of South Sudan

On 9 July 2011 South Sudan declared its formal independence from Sudan, which is included on the negative list. On 14 July 2011 it became a member of the United Nations. Annex I must therefore be amended to include a reference to South Sudan.

3. Main organisations/experts consulted

Member States were consulted.

4. Impact assessment

Not necessary.

5. Legal basis

Regulation (EC) 539/2001 was originally based on Article 62(2)(b)(i) of the Treaty establishing the European Community. Now, however, in view of the Treaty on the Functioning of the European Union (TFEU), this proposal constitutes a development of the common visa policy in accordance with Article 77(2)(a) TFEU.

6. Proportionality and subsidiarity principles:

Regulation (EC) No 539/2001 lists the third countries whose nationals must be in possession of visas when crossing the external borders (the negative list) and those whose nationals are exempt from that requirement (the positive list).

Any decision to change the lists, to transfer countries from the negative to the positive list or vice versa, falls within the exclusive competence of the Union in accordance with Article 77(2)(a) TFEU.

7. Choice of instruments

Regulation (EC) No 539/2001 is to be amended by a Regulation.

8. Budgetary implications

The proposed amendment has no implications for the Union budget.

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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 Article 77(2)(a) thereof,

Having regard to the proposal from the Commission,

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

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) The composition of the lists of third countries in Annexes I and II to Council Regulation (EC) N° 539/2001 of 15 March 2001⁹ should be, and should remain, consistent with the criteria laid down in recital 5 thereto. References to third countries for which the situation has changed as regards these criteria, should be transferred from one Annex to the other.
- (2) The imposition of the visa requirement on the nationals of Dominica, Grenada, Kiribati, Marshall Islands, Micronesia, Nauru, Palau, Saint Lucia, Saint Vincent and the Grenadines, Samoa, Solomon Islands, Timor-Leste, Tonga, Trinidad and Tobago, Tuvalu and Vanuatu is no longer justified. These countries do not present any risk of illegal immigration or a threat to public policy for the Union in accordance with the criteria set out in recital 5 of Regulation (EC) N° 539/2001. Consequently, nationals of those countries should be exempt from the visa requirement for stays of no more than three months in all and references to those countries should be transferred to Annex II.
- (3) Exemption from the visa requirement for nationals of Dominica, Grenada, Kiribati, Marshall Islands, Micronesia, Nauru, Palau, Saint Lucia, Saint Vincent and the Grenadines, Samoa, Solomon Islands, Timor-Leste, Tonga, Trinidad and Tobago, Tuvalu and Vanuatu should not come into force until bilateral agreements on visa waiver between the Union and the countries concerned have been concluded in order to ensure full reciprocity.
- (4) Statistical data show that the groups of British Nationals currently listed in point 3 of Annex I do not pose a risk in terms of irregular migration to the Schengen Area and that most of them live in islands of the Caribbean region which have strong links and

⁹ OJ L 81, 21.3.2001, p. 1.

similarities with neighbouring countries which are exempt from the visa obligation. These groups of British Nationals should therefore be exempt from the visa requirement for stays of no more than three months in all and references to those groups should be transferred to Annex II.

- (5) Developments in international law entailing changes in the status or designation of certain states or entities should be reflected in the Annexes to Regulation (EC) No 539/2001. Reference to South Sudan should be added to Annex I to that Regulation, as the country declared its independence on 9 July 2011 and was granted membership of the United Nations on 14 July 2011.
- (6) 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 *acquis*¹⁰, which fall 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 Agreement.¹¹
- (7) As regards Switzerland, this Regulation constitutes a development of the provisions of the Schengen *acquis* within the meaning of the Agreement signed by 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*¹², which falls within the area referred to in Article 1, points (B) and (C), of Council Decision 1999/437/EC, read in conjunction with Article 3 of Council Decision 2008/146/EC.¹³
- (8) 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, points (B) and (C), of Council Decision 1999/437/EC, read in conjunction with Article 3 of Council Decision 2008/261/EC.¹⁴
- (9) 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 *acquis*.¹⁵ The United Kingdom is therefore not taking part in its adoption and is not bound by it or subject to its application.

¹⁰ OJ L 176, 10.7.1999, p. 36.

¹¹ OJ L 176, 10.7.1999, p. 31.

¹² OJ L 53, 27.2.2008, p. 52.

¹³ OJ L 53, 27.2.2008, p. 1.

¹⁴ OJ L 83, 26.3.2008, p. 3.

¹⁵ OJ L 131, 1.6.2000, p. 43.

- (10) 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 *acquis*.¹⁶ Ireland is therefore not taking part in its adoption and is not bound by it or subject to its application.
- (11) As regards Cyprus, this Regulation constitutes an act building upon, or otherwise related to, the Schengen *acquis* within the meaning of Article 3(1) of the 2003 Act of Accession.
- (12) This Regulation constitutes an act building upon, or otherwise related to, the Schengen *acquis* within the meaning of Article 4(1) of the 2005 Act of Accession,

HAVE ADOPTED THIS REGULATION:

Article 1

Regulation (EC) No 539/2001 is hereby amended as follows:

1. Annex I is amended as follows:

- (a) in point 1, the references to Dominica, Grenada, Kiribati, Marshall Islands, Micronesia, Nauru, Palau, Saint Lucia, Saint Vincent and the Grenadines, Samoa, Solomon Islands, Timor-Leste, Tonga, Trinidad and Tobago, Tuvalu and Vanuatu are deleted and a reference to South-Sudan is inserted;
- (b) point 3 is deleted;

2. Annex II is amended as follows:

(a) in point 1, the following references are inserted:

"Dominica*",

"Grenada*",

"Kiribati*",

"Marshall Islands*",

"Micronesia*",

"Nauru*",

"Palau*",

"Saint Lucia*",

"Saint Vincent and the Grenadines*",

¹⁶ OJ L 64, 7.3.2002, p. 20.

"Samoa*",
"Solomon Islands*",
"Timor-Leste*",
"Tonga*",
"Trinidad and Tobago*",
"Tuvalu*" and
"Vanuatu*".

* "The exemption from the visa requirement shall apply from the date of entry into force of an agreement on visa exemption to be concluded with the European Union".

(b) point 3 is replaced by the following

"3. British citizens who are not nationals of the United Kingdom of Great Britain and Northern Ireland for the purposes of Union law:

British nationals (Overseas)

British overseas territories citizens (BOTC)

British overseas citizen (BOC)

British protected persons (BPP)

British subjects (BS)"

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 Council

The President

For the European Parliament

The President