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VISA	**232**
AUS	**4**
AMLAT	**72**
ASIE	**105**
CDN	**18**
USA	**32**
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REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL

Seventh report
on certain third countries' maintenance of visa requirements in breach of the principle of reciprocity

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1. INTRODUCTION

Council Regulation (EC) No 539/2001 of 15 March 2001[1], listing the third countries whose nationals must be in possession of visas when crossing the external borders of the Member States (Annex I to the Regulation, the "negative list") and those whose nationals are exempt from that requirement (Annex II to the Regulation, the "positive list"), is the basic instrument of our common visa policy, providing a reciprocity mechanism for cases where a third country on the positive list maintains or introduces a visa requirement for the citizens of one or more Member States.

The current visa reciprocity mechanism was introduced by Council Regulation (EC) 851/2005 of 2 June 2005 amending Council Regulation (EC) 539/2001[2]. In the framework of this mechanism, in case a third country on the positive list introduces a visa requirement for citizens of one or more Member States, the Commission must take steps to obtain the restoration of the visa-free travel by the third country concerned and it must provide a report to the Council which may be accompanied by a proposal on the temporary restoration of the visa requirement for nationals of the third country concerned. In addition, the Commission must provide bi-annual reports to the European Parliament and the Council on the situation of non-reciprocity which may be accompanied by appropriate proposals, if necessary.

The six regular visa reciprocity reports adopted by the Commission so far[3] show that the current reciprocity mechanism has proven to be quite efficient: through the efforts made by the Commission and the Member States concerned, the number of cases of non-reciprocity which existed at the moment of its entry into force or at the moment of the entry into force of the Accession Treaty of 2005[4] - in total, nearly one hundred cases with 18 third countries - have been reduced considerably.

In addition to the six regular reports, the Commission adopted one ad-hoc report on the re-introduction by Canada of the visa requirement for Czech citizens in July 2009[5]. This represents the only case since the introduction of the current visa reciprocity mechanism in 2005 where a third country on the positive list has re-imposed a visa requirement for citizens of a Member State.

The visa reciprocity reports presented by the Commission so far show that only a very limited number of "non-reciprocity cases" continue to exist. In its sixth reciprocity report the Commission stated that:

"When addressing the other remaining cases of non-reciprocity, i.e. as regards the U.S. (visa requirement for Bulgaria, Cyprus, Romania and Poland) and Canada (visa requirement for Bulgaria and Romania), the EU is confronted with the limits of its reciprocity mechanism as set out in the current acquis. In these cases indeed Member States are considered by third countries not to meet objective criteria for visa waiver set out unilaterally by these third

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1 OJ L 81, 21.3.2001.
2 OJ L 141, 4.6. 2005.
3 COM(2006) 3 final of 10.1.2006, COM(2006) 568 final of 2.10.2006, COM(2007) 533 final of 13.9.2007, COM(2008) 486 final/2 of 9.9.2008, COM(2009) 560 final of 19.10.2009, COM (2010) 620 fnal of 5.11.2010.
4 OJ L 157, 21.6.2005.
5 COM(2009) 562 final of 19.10.2009.

countries in their domestic legislation (e.g. not issuing biometric passports, not meeting thresholds set for visa refusal and/or overstay rates)."

Consequently, the Commission invited the European Parliament, the Council and the Member States to reflect on how to further address these cases of non-reciprocity.

In March 2011, the European Parliament adopted a declaration in which it called *inter alia* for a revision of the existing reciprocity mechanism[6].

In its proposal of 24 May 2011 to amend Council Regulation (EC) No 539/2001[7], the Commission proposed to modify the existing reciprocity mechanism in light of the consequences of the entry into force of the Lisbon Treaty, by adding to it the co-decisive role of the European Parliament. Further to suggestions made by some Member States and taking into account the calls made by the European Parliament for a new reciprocity mechanism, negotiations with the European Parliament and the Council are ongoing with a view to revising the existing reciprocity mechanism in order to make it more efficient, while ensuring the full respect of the provisions of the Treaties. In particular, the new, revised reciprocity mechanism should aim for a quicker and more efficient reaction in case a third country on the positive list introduces a visa requirement for one or more Member States.

In accordance with the provisions of the existing reciprocity mechanism, the present, seventh, visa reciprocity report takes stock of the results of the efforts made since the adoption of the sixth report on 5 November 2010, with a view to achieving full visa reciprocity with all third countries on the positive list.

2. RESULTS ACHIEVED SINCE THE COMMISSION'S SIXTH REPORT ON RECIPROCITY

2.1. Australia

Situation at the time of the sixth reciprocity report

Citizens of all Member States and Schengen associated countries are entitled to use the eVisitor system since 27 October 2008.[8] The Commission considered that in principle, eVisitor provides equal treatment of the citizens of all Member States and Schengen associated countries. However, the quarterly reports on eVisitor application statistics showed that due to Australia's integrity concerns, applications by citizens of some Member States are mainly processed manually in order to allow for additional examination. The Commission therefore engaged to continue to closely monitor the processing of eVisitor applications. The Commission would submit its assessment of whether eVisitor is equivalent to the Schengen visa application process in a separate document.

Current situation

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6 Written Declaration 0089/2010 *"Restoration of reciprocity in the visa regime – solidarity with the unequal status of Czech citizens following the unilateral introduction of visas by Canada"*, 8 March 2011.

7 COM (2011) 290 final.

8 An "eVisitor" is an authorisation to visit Australia for tourism or business purposes, for a maximum period of three months per entry. An eVisitor is valid for twelve months from the date it is granted.

Citizens of all Member States and Schengen associated countries continue to use the eVisitor system, although the applications from the citizens of certain Member States are mainly processed manually to allow for additional examination by the Australian authorities.

Processing of eVisitor applications

Australia provided the Commission with regular, quarterly reports on eVisitor application statistics covering the period from 1 July 2010 to 30 September 2011.

The quarterly reports show that the average autogrant rate remains very high (86,36 %). The autogrant is an automated process by which an eVisitor application is checked and, if the automated checks are satisfied, the eVisitor authorisation is granted, usually within minutes after lodging the application.

The autogrant rates for Bulgaria and Romania were the lowest among the Member States and showed a decrease in the reporting period (from 37 % for each of them in the quarterly report on the period 1/07/2010 to 30/09/2010, down to 18 % and 23 %, respectively, in the quarterly report on the period 1/07/2011 to 30/09/2011). Due to stated integrity concerns regarding applicants from Bulgaria and Romania, Australia had decided to process more of these applications manually. As a consequence, these applications are examined and the eVisitor authorisation is granted/refused within 2-10 working days.

Furthermore, the reports showed that the Member States with the highest Modified Non-Return Rate (MNRR) rates were Bulgaria, Latvia, Lithuania and Romania. The MNRR is a calculation of the percentage of visitors who have arrived and whose initial visas have expired within the reporting period and who have remained in Australia unlawfully, departed Australia on an expired visa or applied for a subsequent visa other than visas that are deemed to be of benefit to Australia. The highest MNRR rates varied considerably among the quarterly reporting periods (from 9,84% for Latvia during the quarterly period 1/10/2010 to 31/12/2010, down to 4,45% for Lithuania during the quarterly period 1/04/2011 to 30/06/2011 and for Romania during the quarterly period 1/07/2011 to 30/09/2011, while the average MNRR rates varied between 1,69% and 0,62%).

Further to the request by Australian authorities at the EU-Australia Senior Officials Dialogue on migration, asylum and diversity issues on 28 November 2011, it was agreed that Australia will in the future provide ad-hoc reports on the eVisitor application statistics at the request of the Commission, in order to enable the Commission to continue to monitor the processing of eVisitor applications.

As already stated in the sixth visa reciprocity report, the assessment of whether eVisitor is equivalent to the Schengen visa application process will be issued in a separate document, in parallel with the assessment of the Final Rule on ESTA ("electronic system for travel authorization") (see below under 2.6.), considering their similar characteristics.

Assessment

In principle, eVisitor continues to provide equal treatment of the citizens of all Member States and Schengen associated countries. In addition, the average autogrant percentage remains consistent and very high. The current situation does not lead to problems for EU citizens. However, the Commission will continue to monitor the processing of eVisitor applications with a view to completing its assessment whether or not eVisitor is equivalent to the Schengen visa application process.

2.2. Brazil

Situation at the time of the sixth reciprocity report

Agreements between the EU and Brazil on short-stay visa waiver for holders of diplomatic, service or official passports and for holders of ordinary passports were initialled by both parties in April 2010. The Commission endeavoured an early ratification of the two agreements by the European Union and engaged to monitor ratification by the Brazilian side, in order to ensure the visa-free travel to Brazil by the citizens of all Member States.

Current situation

The agreements between the European Union and Brazil on short-stay visa waiver for holders of diplomatic, service or official passports and for holders of ordinary passports were formally signed on 8 November 2010.

On 24 February 2011, the Council adopted the Decisions on conclusion of the two short stay visa waiver agreements with Brazil, and the Brazilian side was notified immediately.

The Brazilian Government approved the short stay visa waiver agreement for holders of diplomatic, service or official passports on 7 December 2010. Consequently, this Agreement entered into force on 1 April 2011 and full visa reciprocity has thus been achieved for these categories of passport holders.

In June 2011, the Commission sent a letter to the Brazilian Minister of Foreign Affairs, enquiring about the state of play of Brazil's internal ratification procedures of the short stay visa waiver agreement for ordinary passport holders and urging the Brazilian authorities to demonstrate the country's commitment to grant visa waiver to all EU citizens – including the citizens of four Member States (Cyprus, Estonia, Latvia and Malta) still requiring a visa to enter Brazil - by ratifying it as early as possible.

The short-stay visa waiver agreement for ordinary passport holders was submitted to the Brazilian Congress for ratification only on 3 October 2011. At the EU - Brazil Summit on 4 October 2011 in Brussels, both parties stressed the importance of the entry into force of this agreement at the earliest.

Following the approval of this agreement by the Chamber of Deputies on 19 April 2012 and by the Senate on 27 June 2012, the process of ratification by Brazil is completed. Further to the notification sent by the Brazilian side, the EU-Brazil agreement on short-stay visa waiver for holders of ordinary passport holders entered into force on 1 October 2012.

Assessment

The Commission welcomes the entry into force of the EU-Brazil short-stay visa waiver agreement for holders of diplomatic, service or official passports on 1 April 2011. The Commission welcomes the completion of the ratification process by the Brazilian side, albeit with a significant delay, of the short stay visa waiver agreement for ordinary passport holders, following the approval given by the Chamber of Deputies on 19 April 2012 and by the Senate on 27 June 2012. The Commission welcomes the full implementation of the agreement since 1 October 2012, which will ensure full visa waiver reciprocity with Brazil, including for the citizens of the four Member States who still required a visa in order to travel to Brazil for a short stay.

2.3. Brunei Darussalam

Situation at the time of the sixth reciprocity report

The citizens of all Member States benefited from a 30-day visa waiver, which could be extended locally for two periods of 30 days each, up to a maximum visa-free stay of 90 days. On 24 June 2010, the Commission formally requested the authorities of Brunei Darussalam to grant EU citizens a 90 days visa waiver in order to ensure full visa waiver reciprocity.

Current situation

In reply to the letter from the Commission of 24 June 2010, the authorities of Brunei Darussalam informed the Commission by letter of 30 September 2011 that the citizens of all EU Member States now enjoy a 90-day visa-free stay in Brunei Darussalam, thus ensuring full visa waiver reciprocity.

On 5 January 2012 the Commission formally requested the authorities of Brunei Darussalam to extend the period of visa-free stay to 90 days also for the citizens of the Schengen associated countries, which already benefit from a visa waiver of up to 30 days in the case of Iceland and Norway and up to 14 days in the case of Liechtenstein and Switzerland. By letter of 15 October 2012, the authorities of Brunei Darussalam informed the Commission that the citizens of Iceland, Norway and Switzerland now also enjoy a 90-day visa-free stay in Brunei Darussalam.

Assessment

The Commission welcomes the extension by Brunei Darussalam of the visa waiver to 90 days for the citizens of all Member States as from 30 September 2011, thus ensuring full visa waiver reciprocity. It also welcomes the extension of the visa waiver to 90 days for the citizens of Iceland, Norway and Switzerland as of 15 October 2012. The Commission now intends to formally request the authorities of Brunei Darussalam to extend the period of visa-free stay to 90 days also for the citizens of Liechtenstein.

2.4. Canada

Situation at the time of the sixth reciprocity report

In the context of implementing the "path of measures", agreed by the Czech Republic and Canada in the framework of the Czech Republic – Canada Experts Working Group (EWG), Canada committed to carry out a data-gathering visit to the Czech Republic before the end of 2010, which could open concrete prospects for a decision by Canada on the return to a visa waiver for Czech citizens. Furthermore, Canada informed that the implementing regulations for the "Balanced Refugee Reform Act" should be adopted and the Act should enter into force before the end of 2011.

The Commission undertook to closely monitor the progress of the implementation of the outlined steps by Canada, in particular, the prompt and appropriate follow-up by Canada of its data-gathering mission to the Czech Republic. In case of a positive assessment resulting from that mission, the Commission expected Canada to promptly lift the visa obligation for Czech citizens in line with its previously made commitments in the context of the "path of measures". The Commission noted that, in accordance with the minutes of the second Czech Republic – Canada Experts Working Group (EWG) meeting of 15 March 2010, agreed

between the Czech Republic, Canada and the Commission, "the adoption of the new Canadian asylum legislation – which may not be implemented before 2013 – should not condition the lifting of the visa requirement; the implementation of the path of other measures would allow Canada to decide to lift the visa requirement before the date of implementation of this new Canadian asylum legislation".

Bulgaria and Romania did not yet meet all the criteria for visa exemption set by Canada. The Commission undertook to closely monitor the situation and continue to pursue discussions with Canada in order to achieve progress towards the lifting of the visa requirements for citizens of Bulgaria and Romania.

Current situation

Canada carried out a data-gathering visit to the Czech Republic on 31 January – 4 February 2011. The Commission requested Canada to provide it with the report of the data-gathering visit on every occasion and at all levels, including at a meeting between Commissioner Malmström and Canada's Minister for Immigration, Citizenship and Multiculturalism Kenney on 30 August 2011, by means of a demarche carried out by the EU Delegation in Canada on 23 November 2011 and at a meeting of the European External Action Service with Deputy Minister Yeates on 17 January 2012.

On 30 August 2011, the Canadian authorities informed the Commission that the implementation of the *"Balanced Refugee Reform Act"* was postponed from December 2011 until June 2012.

On 16 February 2012, the Canadian government – now a majority government after the general elections held in May 2011 - introduced a new draft law *"Protecting Canada's Immigration System Act"* in order to, among others, address the issue of unfounded asylum applications from EU citizens. The objective of the new draft Act is to prevent the abuse of Canada's immigration and refugee system, remove pressure imposed on the system by bogus or illegitimate refugee claims and reduce the processing times and backlog. The draft Act provides *inter alia* for a significant reduction of the time for examination of asylum applications from Designated Countries of Origin (DCOs). It is expected that most of the EU Member States will become DCOs.

On 8 March 2012, Canada provided the Commission with a concept paper on a possible EU-Canada agreement on managing asylum claimant flows, the conclusion of which Canada sees as a step in addressing its concerns related to the high number of unfounded asylum applications by EU nationals and which would permit the lifting by Canada of the visa requirement for Bulgaria, the Czech Republic and Romania. Since then, the Commission held preliminary discussions with senior Canadian officials on the concept paper, indicating that the mechanism proposed by Canada is not feasible due to a number of legal and political reasons. In particular, such an agreement would conflict with the fundamental principle enshrined in the EU Treaty of mutual recognition of the Member States as safe countries of origin in respect of each other, and with the good functioning of the Common European Asylum System. Moreover, there is no legal basis in the Treaties for concluding agreements between the EU and a third country concerning EU citizens applying for asylum in that third country.

The *"Protecting Canada's Immigration System Act"* was adopted on 28 June 2012. The Act will be fully implemented once additional regulations and operational guidelines have been

drafted and additional staff has been recruited and trained. Some measures of the new law came into effect immediately after adoption, while others will come into effect later this year at a date that will be determined by the Canadian government[9]. The *"Balanced Refugee Reform Act"*, which was scheduled to enter into force on 29 June 2012, was abandoned.

Canadian authorities have underlined that the new law will help to reduce the pull factors, while the push factors leading to the current unsatisfactory situation remain. Therefore, they consider that additional measures to be taken together with the EU are required in order to address the problem. The Commission and Canada decided to hold informal technical consultations at expert level to explore alternative solutions that could contribute to solving the issue of the unfounded asylum applications from the EU. The first technical consultations took place on 25 June 2012. The Commission provided the Canadian authorities with detailed information on the main principles governing the relevant EU policies, with a view to identifying possible ideas for further follow-up. The Canadian authorities informed that the process of implementation of the *"Protecting Canada's Immigration System Act"* will be completed before the end of 2012.

Assessment

As regards the Czech Republic – Canada visa issue, the Commission regrets that Canada has not provided to the Commission its report on the data-gathering visit to the Czech Republic until now nor any other adequate base for cooperation between the Czech Republic, Canada and the Commission in the framework of the agreed "path of measures".

The continuing lack of solution for this issue could also have an unfortunate impact on the approval and ratification process of several important EU-Canada agreements which are currently under negotiation. In this regard, the Commission notes the Declaration of the European Parliament on the *"Restoration of reciprocity in the visa regime – solidarity with the unequal status of Czech citizens following the unilateral introduction of visas by Canada"* of March 2011[10] where the EP calls for the lifting by Canada of the visa requirement for the three Member States concerned as soon as possible and - unless this breach of reciprocity is resolved soon - for equivalent retaliatory measures to be adopted by the EU, mentioning the risks for the future ratification of the EU-Canada Comprehensive Economic and Trade Agreement (CETA).

The Commission considers that the provisions of Canada's new law on "Protecting Canada's Immigration System Act", adopted on 28 June 2012, and in particular the decision to designate EU Member States as safe countries of origin and to treat applications made by their nationals in an accelerated procedure, should be able to function as a deterrent to future unfounded asylum applications from the EU. Consequently, the Commission expects Canada to lift the visa obligation for Czech citizens from the moment when the relevant provisions of the new law come into effect.

In the framework of the informal technical consultations at expert level between the Commission and Canada which took place on 25 June 2012, the Commission committed to look for ways of closer cooperation and explore possible alternative suggestions together with Canada and in full coordination with the Member States concerned, with a view to addressing the issue of the increasing numbers of asylum seekers in Canada originating from the EU.

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9 Some new measures related to biometric data will enter into force in 2013.

10 O.J. C 199 E, 7.7.2012, p. 89.

However, such measures of closer cooperation should not constitute pre-conditions for the lifting of the visa requirement by Canada.

The Commission will continue to raise the issue of non-reciprocity in its contacts with Canada in order to have full visa reciprocity in place as soon as possible.

2.5. Japan

Situation at the time of the sixth reciprocity report

All Member States enjoyed visa-free travel to Japan. However, visa-free travel for citizens of Romania was granted on a temporary basis only, from 1 September 2009 to 31 December 2011.

The Commission expressed hope that the evaluation of the first year of the temporary visa waiver for Romanian citizens by the Japanese Immigration Bureau covering the period of September 2009 – August 2010 would lead Japan to convert the temporary visa waiver into a permanent one.

Current situation

All Member States continue to enjoy visa-free travel to Japan. However, citizens of Romania still only benefit from a temporary visa waiver. On the basis of the results of the evaluation of the first period of the temporary visa waiver for Romanian citizens (September 2009 – August 2010), Japan decided to continue the implementation of the temporary visa waiver for the second period (September 2010 – December 2011). Japan noted certain concerns regarding the fulfilment of the conditions of entry and/or stay by Romanian citizens.

In response to the concerns expressed by Japan, the Ministry of Administration and Interior of Romania dispatched an attaché to the Embassy of Romania in Japan and Romanian authorities carried out a public awareness raising campaign regarding the conditions for entry and stay in Japan, in accordance with the conditions for temporarily lifting the visa requirement.

The Commission held bilateral meetings with the Japanese authorities on 26 July 2011 and 7 December 2011, and a technical tripartite meeting with the Romanian and Japanese authorities on 10 November 2011, in order to discuss the concerns raised by Japan regarding the number of irregular entries and/or stays by Romanian citizens in Japan. The Commission called on the Japanese authorities, when carrying out their assessment of the temporary visa waiver, to take into account the very limited number of irregular entries and/or stays by Romanian citizens in Japan. The Commission proposed to organise a further tripartite meeting with the Romanian and Japanese authorities in order to identify specific measures which could diminish the number of irregular stays.

On 28 December 2011, Japan decided to extend the implementation of the temporary visa waiver until 31 December 2012, on the condition that an attaché of the Ministry of Administration and Interior continues to be dispatched to the Embassy of Romania in Japan and that the Romanian authorities continue to carry out awareness raising activities regarding the conditions for entry and stay in Japan and risks of human trafficking.

Assessment

The Commission welcomes the decision by the Japanese authorities to extend the temporary visa waiver for Romanian citizens until 31 December 2012. The Commission is committed to identify, in close cooperation with the Romanian authorities, the appropriate solutions in order to address the concerns raised by the Japanese authorities. The Commission hopes that the implementation of appropriate measures by Romania will lead Japan to convert the temporary visa waiver into a permanent one.

2.6. United States of America (U.S.)

Situation at the time of the sixth reciprocity report

The Commission was pleased that Greece joined the Visa Waiver Program (VWP) on 5 April 2010, and committed to continue to raise in its contacts with the U.S. the issue of non-reciprocity for citizens of Bulgaria, Cyprus, Poland and Romania, in order to have full visa reciprocity in place as soon as possible.

The Commission regretted very much the adoption by the U.S. of the interim final rule on the ESTA ("electronic system for travel authorization") fee, while understanding that this decision was taken in accordance with the Travel Promotion Act's obligations. The Commission had sent written comments on the interim final rule on the ESTA fee to the U.S. on 7 October 2010 in the framework of the public consultation procedure set up by them.

The Commission awaited the publication by the U.S. authorities of the Final Rule on ESTA in order to complete its assessment of the ESTA with a view to determining whether or not it is equivalent to the Schengen visa application process; there was no doubt that charging a fee would be an important element in this assessment.

The Commission also committed to look more closely into the "twin track approach", as agreed by the Committee of Permanent Representatives (Coreper) on 12 March 2008, in relation to the execution of external competences further to the entry into force of the Lisbon Treaty.

Current situation

The U.S. authorities have not yet published the Final Rule on ESTA, nor provided a reply to the Commission's comments on the interim Final Rule on ESTA fee.

Once the Final Rule on ESTA is published, the Commission will issue a final assessment taking into account any possible changes, including the introduction of a fee for the ESTA.

The Commission has continued to raise the issue of non-reciprocity and the concerns related to the introduction of the ESTA fee with the U.S. authorities at political and technical levels.[11]

In a statement made during the visit of the Polish President Komorowski in December 2010 to Washington D.C., President Obama committed to make the accession of Member States to the VWP a priority, to be solved during his presidency.

[11] Notably at the EU-U.S. Summits on 20 November 2010 and 28 November 2011, during the visit of the Director General of Directorate-General Home Affairs to Washington D.C. in November 2010, at the EU-US Justice and Home Affairs Ministerial meetings in December 2010, April 2011, November 2011 and June 2012, and at the EU-US Justice and Home Affairs Senior Officials' Meetings in January 2011, July 2011, January 2012 and July 2012.

In March 2011, a new draft bill *"Secure Travel and Counterterrorism Partnership Program Act of 2011"* (S. 497 and H.R. 959) was introduced in Congress and received the support from President Obama. Among others, it aimed at updating the eligibility criteria for joining the VWP by replacing the visa refusal rate with the overstay rate which should not exceed three percent. The draft bill also provided for a possibility to waive the overstay rate requirement under certain conditions.

In January 2012, a new draft legislation *"Visa Waiver Program Enhanced Security and Reform Act"* (S. 2046 and H.R. 3855) was introduced in Congress, which substitutes the previous draft bill *"Secure Travel and Counterterrorism Partnership Program Act of 2011"*. The new draft legislation requires applicant countries to maintain an overstay rate not exceeding three percent, in addition to the existing requirement to maintain an average visa refusal rate of not more than three percent. Furthermore, it reinstates the waiver authority for the Secretary of Homeland Security to enable a country to be designated in the VWP under certain conditions, including having a visa refusal rate below 10%, and creates a probationary period for VWP countries if they do not maintain an overstay rate under 3 % or fail to comply with any other VWP requirements. In addition, the new draft legislation changes the method for calculating visa refusal rates.

In January 2012, President Obama issued an Executive Order to improve visa and foreign visitor processing and travel promotion in order to create jobs and spur economic growth in the United States, while continuing to protect national security. Among others, it calls for increased efforts to expand the VWP.

Another draft legislation *"Jobs Originated through Launching Travel Act"* (JOLT Act) (S. 2233) was introduced by a bipartisan group in the Senate in March 2012, which aims at expanding the VWP and includes certain language from the "*Visa Waiver Program Enhanced Security and Reform Act"*. The draft JOLT Act reflects the approach followed in the Executive Order to improve visa and foreign visitor processing and travel promotion.

The new draft VWP legislation is still under consideration by the U.S. Congress[12].

As of 13 April 2012, the U.S. Department of State increased the visa processing fees for most non-immigrant visa applications, including an increase for the visas applied for business or tourism purposes from 140 USD to 160 USD.

The Commission carried out a legal analysis of the consequences of the entry into force of the Lisbon Treaty on the "twin-track approach", agreed by Coreper on 12 March 2008 for the negotiations with the U.S. in the context of the VWP negotiations[13]. As a result of the entry into force of the Lisbon Treaty Member States can, in principle, continue negotiating and concluding agreements with third countries in the areas of police cooperation and judicial

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[12] At the last EU-US Senior Official meeting (25-26 July 2012) the US Department of Homeland Security (DHS) stressed that Congress linked the adoption of new eligibility criteria to the implementation of an effective 'entry-exit system' – necessary to calculate a reliable overstay rate per country of origin. Despite important efforts, the DHS has experienced difficulties implementing a reliable 'exit system' and it anticipates that achieving this objective will take months.

[13] For further information on the "twin-track approach", see the Commission's fourth reciprocity report (COM(2008) 486 final/2 of 9.9.2008) and the fifth reciprocity report (COM(2009)560 final). The negotiations on the exchange of letters between the EU and the U.S. regarding certain conditions for access to the VWP which fell under EC competence for entry or continued participation in the VWP have not been pursued actively with the U.S. since 2009: the U.S. does not require that Member States enter into bilateral agreements with the U.S. regarding these requirements.

cooperation in criminal matters – which are now areas of shared competence - as long as the EU has not concluded such agreements with these third countries. However, this competence of the Member States is not unlimited: Member States cannot conclude agreements that would either affect the EU *acquis*, including instruments in the areas of police cooperation and judicial cooperation in criminal matters, or alter its scope.

Given the exhaustive exercise by the Union of its competence in the field of visa policy, and the fact that the bilateral agreements constitute *de facto* a pre-condition for getting access to the VWP, in principle, an overarching EU-U.S. agreement covering all conditions related to the access to the VWP should be negotiated and concluded. However, in view of the present situation, in which a significant number of Member States have already concluded with the U.S. agreements on terrorist screening and agreements on enhancing cooperation in preventing and combating serious crime, Member States may continue to negotiate and apply such bilateral agreements, on condition that these agreements do not affect or alter the scope of the Union's common rules in the area of police cooperation and judicial cooperation in criminal matters, in particular with regard to the exchange of law enforcement information, and in the area of data protection in this context.

The Commission requested Member States to provide the texts of their bilateral agreements with the U.S. concluded under the VWP, or to provide information on ongoing negotiations, in order to verify compliance with the Union's common rules.

The outcome of the Commission's scrutiny regarding law enforcement cooperation is that the bilaterally concluded 'Agreements on Enhancing Cooperation in Preventing and Combating Serious Crime' and the 'Agreements on the Exchange of Screening Information Concerning Known or Suspected Terrorists' which were provided by Member States are compatible with the Union's common rules in the field of police cooperation and judicial cooperation in criminal matters and do not alter their scope (see Annex for an overview of the notifications received from Member States and a detailed assessment).

As regards the compliance with the EU *acquis* in the area of data protection, the Commission notes that a general reference to the applicability of each Party's national law, which can be found in most of the bilateral agreements concluded under the VWP, may not always be sufficient to ensure the level of protection required by Council Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial co-operation in criminal matters[14] ("Framework Decision"). Furthermore, some of the bilateral agreements between Member States and the U.S. lack a clear purpose limitation and strict criteria qualifying the cases for further processing of the transferred data. This might raise issues of the compliance of these agreements with the EU *acquis* and, in particular, its rules limiting further processing for purposes different to that for which the data were collected[15].

The Commission is currently negotiating with the U.S. an agreement for the exchange of personal data processed in the framework of police and judicial cooperation in criminal matters. This agreement will eventually complement the existing and future agreements in the field of police and judicial co-operation in criminal matters with the necessary safeguards from a data protection point of view.

Assessment

[14] OJ L 350, 30.12.2008

[15] Art. 3, par. 2, of the Framework Decision.

The Commission regrets that the U.S. authorities did not reply to its written comments on the interim final rule on the ESTA fee, sent to them in October 2010.

The Commission has not yet completed its assessment of the ESTA with a view to determining whether or not it is equivalent to the Schengen visa application process as the Final Rule on ESTA has yet to be published in the U.S. Federal Register.

The Commission will continue to raise the issue of non-reciprocity in its contacts with the U.S. in order to have full visa reciprocity in place as soon as possible.

Currently the maximum visa refusal rate threshold allowed for applicant countries to the VWP is three per cent. Based on the figures for 2011 of the four Member States not yet participating in the VWP, only Cyprus meets this threshold; the visa refusal rates in 2011 were 15,7% for Bulgaria, 10,2% for Poland and 22,4% for Romania. The setting up by the US authorities of a biometric airport exit system would allow them, in accordance with US legislation, to increase the maximum visa refusal rate threshold to 10 per cent.

The Commission will continue to closely monitor the developments related to the setting up by the U.S. authorities of the airport exit system, in order to ensure, among others, that overstays are accurately monitored and calculated and to make possible the increase of the visa refusal rate threshold to 10 percent.

The Commission regrets the increase of the visa processing fees by the U.S. authorities, which has further negative consequences, in particular, for the citizens of the four Member States not yet participating in the VWP wishing to travel to the U.S.

The Commission welcomes the Administration-supported new draft VWP legislation. The Commission considers that the new draft legislation could open the way for additional Member States to join the VWP and it looks forward to its adoption as soon as possible.

3. CONCLUSION

The Commission is pleased that in the context of the implementation of the current visa reciprocity mechanism, full visa reciprocity was achieved or is within reach with further third countries:

– full visa reciprocity was achieved for all Member States with Brunei Darussalam, further to the decision adopted by the authorities of Brunei Darussalam to extend the visa waiver to 90 days; since 15 October 2012, citizens of Iceland, Norway and Switzerland also enjoy a 90-day visa-free stay in Brunei Darussalam. The Commission will now request the authorities of Brunei Darussalam to extend the visa waiver to 90 days also for citizens of Liechtenstein;

– the EU-Brazil short stay visa waiver agreement for ordinary passport holders entered into force on 1 October 2012, enabling the citizens of all Member States to travel visa-free to Brazil;

– the Commission welcomes the decision by the Japanese authorities to extend the temporary visa waiver granted for Romanian citizens until 31 December 2012 and expects that, further to the implementation of specific measures to be agreed between

Romania and Japan, the temporary visa waiver will be converted by Japan into a permanent one.

As regards the U.S., the proposed new draft VWP legislation, if adopted, could open the way for additional Member States to join the VWP and thus achieve further substantial progress towards full visa reciprocity with the U.S.

As regards the re-introduction by Canada of a visa requirement for Czech citizens, the Commission regrets that Canada did not provide to the Commission its report on the data-gathering visit to the Czech Republic until now and thus it has *de facto* hindered the cooperation in the framework of the Czech-Canada experts' working group. The Commission is looking forward to the full implementation before the end of 2012 of Canada's new asylum legislation which should do away with important pull factors and thereby significantly reduce the number of unfounded asylum applications from the EU. Once these provisions of the new law would come into effect, they should allow the Canadian authorities to decide to lift again the visa requirement for Czech citizens. The Commission is committed to exploring with Canada and in full coordination with the Member States concerned, politically and legally feasible ways of cooperation with regard to the issue of the unfounded asylum applications originating in the EU; such forms of cooperation should not, however, be a pre-condition for the lifting by Canada of the visa requirement for the citizens of the three Member States concerned.

The Commission is looking forward to the adoption by the European Parliament and the Council of the draft Regulation amending Regulation 539/2001, which aims, *inter alia*, to establish a new, more efficient reciprocity mechanism. Once adopted, both the few remaining and any new cases of non-reciprocity will be examined and acted upon by the Commission in accordance with this revised reciprocity mechanism.

ANNEX

Overview and assessment of Member States' bilateral agreements with the U.S. in the context of the legal analysis of the consequences of the entry into force of the Lisbon Treaty for the "twin-track approach" to the VWP negotiations with the U.S.

– **Overview of the bilateral agreements**

The Commission has requested Member States to provide the texts of the 'Agreements on Enhancing Cooperation in Preventing and Combating Serious Crime' and the 'Agreements on the Exchange of Screening Information Concerning Known or Suspected Terrorists', concluded with the U.S. in the context of the Visa Waiver Program (VWP), or information on ongoing negotiations, in order to assess if these agreements affect the EU *acquis* or alter its scope.

Fifteen Member States (Czech Republic, Denmark, Germany, Estonia, Greece, Italy, Latvia, Lithuania, Hungary, Malta, the Netherlands, Austria, Portugal, Slovakia and Finland) submitted texts of their bilateral agreements with the U.S. concerning the *Agreements on Enhancing Cooperation in Preventing and Combating Serious Crime*. Regarding the *Agreements on the Exchange of Screening Information Concerning Known or Suspected Terrorists,* six Member States (Estonia, Greece, Latvia, Hungary, Slovakia and Slovenia) provided texts of these bilateral agreements with the U.S. The table below gives an overview of the replies received from Member States[16]:

[16] Explanatory note: "X" means "agreement concluded" and "-" means "no agreement concluded".

MS	MoU[17]	Declaration[18]	TSC agreement[19]	Prüm-like agreement (PCSC agreement)[20]
BE			-	Negotiations ongoing
BG	-	X	- (initial comments on the draft agreement sent to US)	- (initial comments on the draft agreement sent to US)
CZ	X		X (classified text; **not provided**)	X
DK	-		- (awaits draft agreement from US)	X
DE	-		-	X
EE	X		X	X
EL	X		X	X
ES			**No information provided**	**No information provided**
FR			In negotiations with the US (text not provided)	In negotiations with the US (text not provided)
IT			Memorandum for the exchange of information with US TSC of 2007 and the text of implementing arrangements from 2009 **not provided**; 1986 bilateral agreement provided	X
CY	-		- (negotiations not yet started; authorities scrutinize text of agreement)	- (negotiations not yet started; authorities scrutinize text of agreement)
LV	X		X	X
LT	No information provided.		**No information provided**	X
LU			**No information provided**	**No information provided**
HU	No information provided.		X	X
MT	X		-	X[21]
NL	No information provided.		**No information provided**	X
AT	-		-	X
PL			X (classified text; **not provided**)	-
PT	-		Negotiations ongoing	X[22]
RO		X	initial phase of consultations with US	initial phase of consultations with US
SI	-		X	Preparing to launch negotiations
SK	X		X	X
FI			-	X[23]

17 Memorandum of Understanding regarding the United States Visa Waiver Program (VWP) and related enhanced security measures

18 Declaration regarding principles of cooperation on enhanced bilateral security measures for international travel and the requirements of the US VWP

19 Agreement on the Exchange of Screening Information Concerning Known or Suspected Terrorists

20 Agreement on Enhancing Cooperation in Preventing and Combating Serious Crime

21 Not yet ratified.

22 Under ratification procedure.

23 Pending Parliamentary approval process.

MS	MoU[17]	Declaration[18]	TSC agreement[19]	Prüm-like agreement (PCSC agreement)[20]
SE	-		-	-

– **Results of the Commission's scrutiny of Member States' bilateral agreements with the U.S. concluded under the VWP**

The aim of the Commission's request was to verify that Member States' bilateral agreements with the U.S. concluded under the VWP comply with the existing EU rules in the areas of police cooperation and judicial cooperation in criminal matters, in particular with regard to the exchange of law enforcement information, including:

– Council Decision 2005/671/JHA of 20 September 2005 on the exchange of information and cooperation concerning terrorist offences;

– Council Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union (the "Swedish Initiative");

– Council Decision 2008/615/JHA of 23 June 2008 on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime (the "Prüm" Decision);

– Council Framework Decision 2008/977/JAI of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters.

According to the results of the Commission's scrutiny, the bilaterally concluded 'Agreements on Enhancing Cooperation in Preventing and Combating Serious Crime' and the 'Agreements on the Exchange of Screening Information Concerning Known or Suspected Terrorists' are compatible with the EU *acquis* in the field of police cooperation and judicial cooperation in criminal matters and do not alter its scope. The "Prüm" Decision (Council Decision 2008/615/JHA) does not affect bilateral or multilateral agreements between Member States and third countries, as stipulated in Article 35(6) of the Decision. Likewise, the so-called "Swedish Initiative" (Council Framework Decision 2006/960/JHA) is without prejudice to bilateral or multilateral agreements between Member States and third countries, as stipulated in Article 1(2) of the Framework Decision. The Agreements are also compatible with Council Decision 2005/671/JHA and do not alter its scope, as the Council Decision is limited to the transfer of information from Member States to Europol, Eurojust and other Member States. More precisely, the Council Decision is limited to the transfer of all relevant information to Europol and interested Member States concerning and resulting from criminal investigations with respect to terrorist offences, as stipulated in Articles 2(1) and 2(6) of the Council Decision, and to the transfer of all relevant information to Eurojust and interested Member States concerning prosecutions and convictions for terrorist offences, as stipulated in Articles 2(2) and 2(6) of the Council Decision. Council Decision 2005/671/JHA does not regulate the transfer of information to third countries.

Regarding the exchange of passenger name record (PNR) data, the Commission ensured already at the start of the "twin-track approach" that the bilateral agreements between Member

States and the U.S. would not include PNR data. None of the bilateral agreements communicated to the Commission provides for the exchange of PNR data.

Closer police and judicial cooperation in criminal matters must go hand in hand with respect for fundamental rights, in particular, the right to respect for privacy and to protection of personal data. This right has to be guaranteed by special data protection arrangements[24]. Improved information exchange in the European Union often implies collaboration between Member States, given the cross-border nature of crime fighting and security issues. In cases where personal data is transmitted or made available between Member States' authorities or by such authorities to authorities or information systems established on the basis of Title VI of the pre-Lisbon Treaty on European Union (such as Eurojust, Europol etc.), the Council Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial co-operation in criminal matters[25] ("Framework Decision") applies. The Framework Decision also applies where personal data is transmitted or made available to Member States' authorities by authorities or information systems established on the basis of Title VI of the (pre-Lisbon) Treaty on European Union[26].

Article 13 of Council Framework Decision 2008/977/JHA lays down the applicable rules when competent authorities transfer personal data to third countries, among which is the requirement for the third State to ensure an adequate level of protection for the intended data processing[27]. According to Article 13, paragraph 4, of the Framework Decision, the adequacy of the level of protection is assessed in the light of all the circumstances surrounding the data transfer operation(s). In particular, the nature of the data, the purpose and duration of the processing, as well as the legal framework of the third State should be evaluated. By way of derogation from this requirement, personal data can be transferred only under strict conditions such as, inter alia, the fact that the third country offers appropriate and effective safeguards[28].

The bilateral agreements between Member States and the U.S. concerning data transfers falling within the scope of the Framework Decision should therefore fulfill these criteria.

Against this background, a general reference to the applicability of each Party's national law, which can be found in most of the bilateral agreements concluded under the VWP, may not always be sufficient to ensure the level of protection required by the Framework Decision. Furthermore, some of the bilateral agreements between Member States and the U.S. are missing a clear purpose limitation and strict criteria qualifying the cases for further processing of the transferred data. This might raise issues of the compliance of these agreements with the EU *acquis* and, in particular, its rules limiting further processing for purposes different to that for which the data were collected[29].

The Commission is currently negotiating with the U.S. an agreement for the exchange of personal data processed in the framework of police and judicial cooperation in criminal matters. This agreement will eventually complement the existing and future agreements in the field of police and judicial co-operation in criminal matters with the necessary safeguards from a data protection point of view.

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24 Recital 17 of Council decision 2008/615/JHA of 23 June 2008 on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime.

25 OJ L 350, 30.12.2008.

26 Art. 1, par. 2, of the Framework Decision.

27 Art. 13, par. 1(d), of the Framework Decision.

28 Art. 13, par. 3, of the Framework Decision.

29 Art. 3, par. 2, of the Framework Decision.