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PARLIAMENT AND THE COUNCIL State of play and the possible ways
forward as regards the situation of non-reciprocity with certain third
countries in the area of visa policy

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**COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN
PARLIAMENT AND THE COUNCIL**

**State of play and the possible ways forward as regards the situation of non-reciprocity
with certain third countries in the area of visa policy**

I. INTRODUCTION

Visa waiver reciprocity is a principle of the EU's common visa policy and an objective which the Union should pursue in a proactive manner in its relations with third countries, thus contributing to improving the credibility and consistency of the Union's external relations. Such a principle means that the EU, when deciding on lifting the visa requirement for citizens of a third country, takes into consideration whether that third country reciprocally grants visa waiver to nationals of *all* Member States. In this respect, it should be noted that the United Kingdom and Ireland do not take part in the development of the common visa policy¹. Since 2001, different mechanisms have been established under EC/EU law with measures to be taken in non-reciprocity cases. With the active support of the Commission, the vast majority of the non-reciprocity cases notified with eight third countries, have been solved.

The latest report² assessing the situation of non-reciprocity with certain third countries in the area of visa policy adopted by the Commission last November identified four countries with which non-reciprocity still persisted: Brunei in relation to Croatia; Canada in relation to Bulgaria and Romania; Japan in relation to Romania; and the United States of America (US) in relation to Bulgaria, Croatia, Cyprus, Poland and Romania. This Communication takes stock of developments since November 2015.

If the third country concerned has not lifted the visa requirement by 12 April 2016, Council Regulation (EC) No 539/2001 of 15 March 2001 as amended by the European Parliament and Council by Regulation (EU) No 1289/2013 of 11 December 2013³ (hereinafter, the Regulation) obliges the Commission to adopt a delegated act suspending for 12 months the visa waiver for nationals of that third country. The Regulation also requires that the Commission takes into account the consequences of the suspension of the visa waiver for the external relations of the EU and its Member States. In the same vein, 21 Member States at the time of the adoption of the Regulation stated that *"the relevant Union institutions are obliged, prior to any proposal or decision, to extensively scrutinise and take into account potential adverse political consequences that might arise from such proposals or decisions"*.

In order to ensure the full involvement of the European Parliament and of the Council in the application of the reciprocity mechanism and given the particularly sensitive political nature of the suspension of the visa waiver, this Communication assesses the consequences and impacts of the suspension of the visa waiver for nationals of the third countries concerned.

II. THE CURRENT RECIPROCITY MECHANISM ESTABLISHED BY THE REGULATION

The reciprocity mechanism, agreed as a compromise by the legislators in 2013, is composed of various steps, commencing with the notification by a Member State in the event that a visa-

¹ Accordingly in this Communication "Member States", unless specified otherwise, are to be understood as all EU Member States - with the exception of the United Kingdom and Ireland - as well as the Schengen associated countries (Iceland, Liechtenstein, Norway and Switzerland).

² C(2015) 7455 final of 5.11.2015.

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 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 347 of 11.12.2013, p. 74

free third country maintains or introduces a visa requirement for the citizens of one or more Member States and the publication thereof in the Official Journal⁴.

According to the Regulation⁵, immediately following the date of the publication in the Official Journal, the Commission is to take steps with the authorities of the third country in question, in particular in the political, economic and commercial fields, in order to restore visa-free travel for the nationals of the Member State concerned. Contacts were undertaken with all third countries notified by Member States.

If the third country concerned has not lifted the visa requirement, the Commission shall, at the latest six months from the date of publication of Member States' notifications and then at regular intervals of up to six months, either adopt an implementing act, under which the visa waiver for certain categories of citizens of the third country concerned is temporarily suspended for up to six months, or submit a report assessing the situation and stating the reasons why it had decided not to suspend the visa waiver.

The Commission initiated a framework of regular “tripartite meetings” between the third country, the Member State(s) concerned and the Commission. Taking into account the engagement of the Member States and third countries in these meetings, the likely adverse consequences of suspending the visa waiver and the fact that none of the Member States concerned requested the Commission to adopt suspension measures, the Commission did not propose such measures and adopted three reports⁶ in the first phase of the mechanism.

According to the next stage of the procedure⁷, if the third country has not lifted the visa requirement within 24 months of the date of publication of the notifications, the Regulation requires the Commission to adopt a delegated act temporarily suspending for 12 months the visa waiver for nationals of that third country.

The Regulation defines in detail the parameters of the suspension. It is for 12 months and for all citizens of the third country concerned⁸. The suspension must take effect within 90 days of the entry into force of the delegated act.

The delegated act (i.e. the suspension of the visa exemption) only enters into force if no objection has been expressed by either the European Parliament or the Council within a period of four months of notification or if, before the expiry of that period, both institutions informed the Commission that they will not object. This four month period will be extended by two months if requested by the legislator. In other words, the decision would ultimately be taken by the European Parliament and/or the Council.

The Regulation⁹ provides that the European Parliament or the Council may revoke at any time the delegation of power to the Commission. This requires a decision taken by absolute majority in the European Parliament and/or a decision taken by qualified majority in the Council.

⁴ The Commission published the notifications of non-reciprocity on 12 April 2014 (OJ C 111, 12.4.2014, p.1). Five Member States (Bulgaria, Croatia, Cyprus, Poland and Romania) notified non-reciprocity cases in relation to five countries: Australia, Brunei Darussalam, Canada, Japan, and the United States of America.

⁵ Article 1(4)(b).

⁶ C(2014) 7218 final of 10.10.2014, C(2015) 2575 final of 22.4.2015 and C(2015) 7455 final of 5.11.2015.

⁷ Governed by Article 1(4)(f) of the Regulation.

⁸ Article 4 of the Regulation, which allows Member States to exempt from the visa requirement some categories of persons such as holders of diplomatic passports, civilian air and sea crew would still apply.

⁹ Article 4b(3).

III. DEVELOPMENTS SINCE THE ADOPTION OF THE THIRD REPORT ASSESSING THE SITUATION OF NON-RECIPROCITY WITH CERTAIN THIRD COUNTRIES

a. Japan (notified by Romania)

Japan officially informed the Ministry of Foreign Affairs of Romania on 17 December 2015 that the visa-free status for Romanian citizens, including holders of temporary passports, was extended until 31 December 2018. **The Commission thus notes that, until 31 December 2018, full visa waiver is ensured with Japan.**

b. Brunei (notified by Croatia)

The third report indicated that Brunei notified the Commission that Croatian nationals, as well as nationals from Liechtenstein, had been granted visa waiver for up to 90 days. However, these decisions had not been implemented yet at the time of the adoption of the report. Since then, the Commission and the European External Action Service requested several times to Brunei to put in place the visa waiver, update their respective websites and inform IATA about the change. The Commission received positive signals in these contacts. Most recently, on 6 April 2016 the Mission of Brunei to the EU informed the Commission in writing that the visa waiver will be put in practice in few weeks' time.

c. Canada (notified by Bulgaria and Romania)

A fourth tripartite meeting took place on 6 April 2016. At the meeting, Canada explained that the Electronic Travel Authorisation (eTA) became mandatory for all visa-free travellers on 15 March 2016. However, in order to facilitate a smooth transition, a "leniency" period, until 29 September 2016, has been introduced.

Canada re-confirmed its commitment to extend the eTA to Bulgarian and Romanian nationals who have travelled on a visa to Canada in the previous ten years or who hold a valid non-immigrant US visa, once the eTA is stable and fully functioning. There is still no date set for such expansion yet.

At the meeting Canada also provided an update regarding the immigration violation rate and the visa refusal rate, which are two key indicators for visa waiver set out in Canada's visa policy framework. For both Bulgaria and Romania, the visa refusal rate in particular remains well above the required 4% threshold over the last 3 years (the 2013-2015 average is around 16% for both countries). Regarding the immigration violation rate – for which the threshold is 3% averaged over 3 years – both Member States perform comparatively better (2013-15): Bulgaria: 4,3%; Romania: 2,5%. In addition, Canada announced that in order to collect more information regarding certain areas (such as issuing of travel documents and breeder documents; integration of the Roma; border management and fight against corruption), Canada proposed to carry out technical/expert visits in the coming months to both Member States. While this should not to be considered as a formal "visa review", such expert missions would help in building confidence and enable Canadian experts to identify specific risks associated with a visa waiver and options to mitigate those risks.

Full visa waiver reciprocity with Canada has thus not been achieved for Bulgarian and Romanian nationals. The Commission will continue to monitor developments, notably as regards Canada implementing as soon as possible the envisaged eTA expansion to

certain categories of travellers, and as a further step, broadening its scope to some categories of “low risk”, first time travellers.

d. United States (notified by Bulgaria, Croatia, Cyprus, Poland and Romania)

A fourth tripartite meeting with the US took place on 23 February 2016. The US emphasised its commitment to the expansion of the US Visa Waiver Program once Member States meet all requirements. Efforts taken by the Member States were recognised by the US.

At the meeting, the US presented visa refusal statistics for 2015: Bulgaria: 17,26%; Croatia 5,29%; Cyprus: 3,53%; Poland: 6,37%; Romania: 11,16%. None of the five Member States met the 3% threshold required by the US Immigration and Nationality Act.

With regard to the agreements requested by the US in the area of law enforcement¹⁰, all Member States are in a very advanced stage; almost all agreements have been signed. The reporting of lost/stolen passports to Interpol was not considered to be an obstacle. However, the US only starts on the spot visits to Visa Waiver Program candidate countries – a prerequisite before the admission to the Visa Waiver Program – when all requirements set out in the Immigration and Nationality Act have been considered to be met by the Department of State and the Department of Homeland Security.

The US Congress amended the Visa Waiver Program legislation on 18 December 2015. According to the new provisions, as a general rule, as from 21 January 2016¹¹ travellers of Visa Waiver Program countries who hold the nationality of Iraq, Iran, Syria or Sudan (i.e. dual citizens) or who have been present in these countries or in Libya, Somalia or Yemen at any time on or after 1 March 2011, are required to apply for a visa and can no longer travel with an electronic authorisation (ESTA) under the Visa Waiver Program. This law has a potential impact on all Member States admitted to the Visa Waiver Program. None of the Member States admitted to the Visa Waiver Program notified these changes to the Visa Waiver Program to the Commission within 30 days of its implementation in accordance with Article 1(4)(a) of the Regulation. The new law also brought changes in relation to travel documents: as from 1 April 2016, only travellers with *biometric* passports are eligible to travel without a visa.

These changes to the Visa Waiver Program have brought new travel restrictions for nationals of Visa Waiver Program countries. The Commission and the European External Action Service conveyed the EU's concerns regarding the new measures in US legislation at several occasions to Congress and to the US Administration, and urged the US to implement the law in a flexible manner in order to limiting the negative consequences for *bona fide* EU travellers¹². In response to those concerns and making use of the provisions of the legislation¹³, the US Government decided to waive the application of the legislation, on a case

¹⁰ Agreement on the exchange of screening information on known or suspected terrorists; Agreement on enhancing cooperation and preventing and combating serious crime.

¹¹ Travellers to Libya, Somalia and Yemen can have their ESTA revoked at the port of entry while still being allowed to enter the US. From April onwards, information about previous travels to those countries will be included in the ESTA questionnaire. Dual nationals of Visa Waiver Program countries holding citizenship of Libya, Somalia and Yemen are currently still eligible to travel with an ESTA.

¹² E.g. an op-ed, signed by the Head of the EU Delegation in Washington and Ambassadors of all EU Member States to the US was published in the Congress Blog of the Hill on 14 December 2015 (<http://thehill.com/blogs/congress-blog/foreign-policy/262999-what-the-visa-waiver-program-means-to-europe>).

¹³ <http://www.state.gov/r/pa/prs/ps/2016/01/251577.htm>

by case basis, for certain categories of persons¹⁴ in addition to the exemptions provided explicitly by the legislation (i.e. military staff and government personnel travelled on duty). The ESTA form was revised accordingly and now allows applicants who consider that they belong to those categories to provide additional information, and US authorities to take a decision, on a case by case basis, on their eligibility for the ESTA.

Bulgarian, Croatian, Cypriot, Polish and Romanian nationals remain subject to the visa requirement. In the context of achieving the full visa reciprocity regarding the five Member States concerned, it is the Commission's long standing opinion that granting visa waiver to the nationals of these five countries would not pose an increased migratory or security threat to the US. Therefore, the Commission will invite the US to consider, as a first and immediate step, a measure similar to the Canadian expansion of the eTA to "low risk" Bulgarian and Romanian travellers – i.e. ESTA eligibility for nationals of these five countries who have lawfully used a US visa in the past e.g. 10 years – and, if necessary, initiate legislation in this regard. In addition, the Commission will invite the US to consider the legislative initiatives brought forward, notably the "Jobs Originating through Launching Travel Act of 2015"¹⁵.

In parallel to discussing full visa reciprocity, the Commission will continue to monitor the implementation of the changes in the Visa Waiver Program which introduce additional travel restrictions for nationals of Visa Waiver Program countries and engage with the US to ensure that these changes are implemented in a manner which limits negative consequences for *bona fide* EU travellers. In this context, the Commission will invite the US to consider the legislative initiatives brought forward (e.g. the "Equal Protection in Travel Act of 2016"¹⁶) in order to mitigate restrictions imposed on dual nationals.

IV. ASSESSMENT OF THE CONSEQUENCES OF THE SUSPENSION OF THE VISA WAIVER

According to the Better Regulation guidelines¹⁷, even where no different policy choices are available for the Commission (which applies in the current situation), but directly identifiable impacts of the act are expected to be significant, these impacts should be explained by the Commission to the legislators so that they can take a fully informed and evidence based decision.

a. Possible impact on EU citizens

The US in the recent tripartite meeting took the position that the suspension of the visa waiver would lead to re-introducing a visa requirement for the nationals of *all* Member States¹⁸. The principle of reciprocity is set out in U.S. Immigration and Nationality Act (Sec. 217 (2)(A))¹⁹. As a consequence, the situation would very likely not improve for the five Member States concerned and would worsen for all Member States currently enjoying visa-free travel to the US.

¹⁴ Representatives of international organisations, humanitarian NGOs travelling on official duty, journalists and certain groups of business people.

¹⁵ <https://www.congress.gov/bill/114th-congress/house-bill/1401>

¹⁶ <https://www.congress.gov/bill/114th-congress/house-bill/4380/text>

¹⁷ http://ec.europa.eu/smart-regulation/guidelines/tool_5_en.htm

¹⁸ See footnote 1.

¹⁹ <https://www.uscis.gov/iframe/iframe/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-29/0-0-0-4391.html>.

Based on the statistics of the World Tourism Organisation (UNWTO)²⁰ and the US Department of Commerce²¹, the Commission estimates that EU citizens currently benefitting from visa-free travel would need to apply (per year) for at least 8 million visas to travel to the US. Considering the USD 160 visa fee and the related costs of the application (which is around USD 200²²), this amounts to approximately EUR 2,5 billion in terms of extra costs for EU citizens/companies²³.

Although the principle of reciprocity is not an element in Canada's visa policy framework, it cannot be excluded that Canada would also respond to a possible suspension of the visa waiver for their citizens in a similar way. Should that be the case, the Commission estimates that at least 1,5 million visas would be applied by EU citizens leading to EUR 375 million²⁴ in terms of extra costs for them/EU companies²⁵.

b. Feasibility of processing visas in case of suspension of the visa waiver

North America is the most important source of international travellers coming to the EU. Based on UNWTO and US Department of Commerce statistics, the Commission estimates that Member States' consulates would need to be prepared to process approximately 10 million visa applications per year just in the US. Although Member States have an extensive consular network in the US (approximately 100 consulates), they currently process only around 120.000 Schengen visa applications per year.

Establishing cooperation with external service providers, equipping and staffing consulates, buying and/or renting new premises would take serious efforts and cost millions of euros. The visa fee (EUR 60/visa, as a general rule) might not cover the operational costs, let alone the costs related to the preparations. Several Member States would probably have to issue as many visas in the US as they do in the whole of the rest of the world.

In the case of Canada, Member States would also face serious challenges, although to a lesser extent. Currently some 45 consulates process 30.000 applications a year, while in case of the suspension of the visa waiver, a minimum of 2 million applications could be expected.

According to the Regulation, the visa waiver suspension has to take effect within 90 days at the latest from the date of the entry into force of the delegated act. This is the maximum period for preparations. This period of time seems insufficient to take all the necessary steps (including covering the costs) to process a massive increase in visa applications, in compliance with the provisions of EU law (e.g. deadlines for appointment, processing time). In addition to the lack of adequate premises to receive that many visa applicants, the lack of the necessary level of cooperation with external service providers and of adequate number of trained consular officials and local staff, the increase in applications would also affect the IT support of the visa processing.

In this respect, the central component of the Visa Information System (VIS) and its biometric matching system might be able to support the additional load in the short term (up to one

²⁰ <http://www.e-unwto.org/toc/unwtotfb/current>

²¹ http://travel.trade.gov/outreachpages/inbound.general_information.inbound_overview.asp

²² Exhibit 6 of the Final Rule of the ESTA, p. 32289 (available at: <https://www.gpo.gov/fdsys/pkg/FR-2015-06-08/pdf/2015-13919.pdf>).

²³ In comparison, visa-free travellers to the US currently pay USD 14 for the ESTA (valid for two years).

²⁴ Taking into account CAD 100 visa fee and assuming that the amount of the indirect costs can be considered similar to the ones of US visa applications.

²⁵ In comparison, visa-free travellers to Canada pay CAD 7 for the eTA (valid up to five years).

year) but it would need to be extended swiftly. Excluding infrastructure aspects, the estimated costs have been assessed internally as being in the order of at least EUR 20-25 million. Several Member States would also need to upgrade their national systems and increase the capacity of the communication infrastructure between the central and the national systems. In the short term, due to the increased number of applications and queries at the border, longer response times could be expected (searches, biometric matching).

The suspension of the visa waiver would also have a major impact on border guards and infrastructure at external borders due to the increase of travellers, whose visas would need to be verified, including their fingerprints. This would require additional staff, reorganisation/restructuring of workflow and upgrading infrastructure, especially at major airports, which would entail considerable costs.

Even for Brunei, for which the Commission expects that the number of visa applications from Brunei nationals would be very low, implementation problems cannot be excluded. Only two Member States are present and issue visas in the country. Therefore other Member States would need to conclude representation agreements with them so that visa applicants would not need to travel to Singapore and/or Kuala Lumpur to apply for a visa. Upgrading the consulates of these Member States (premises, staff, IT equipment) might be necessary even for issuing a limited number of visas.

In conclusion, the Commission considers that **it is highly unlikely that Member States would be able to process the increased number of visa applications in accordance with the Visa Code within 90 days following the entry into force of the delegated act.** Consequently, applicants would face long waiting times for receiving appointments and for the processing of their visa applications. Moreover, an important factor, which could lead many applicants to choosing a non-EU travel destination, would be the effort and additional costs related to travelling to the nearest consulate/external service provider of the competent Member State to lodge the application. In the US for instance, consulates are concentrated in the East Coast and California. Against this backdrop, it is reasonable to expect that the suspension of the visa waiver would result in a **decrease in the number of travellers from Canada and the US** (and also from Brunei), which would lead to a **considerable economic loss** for the EU.

c. Economic impacts

In addition to the impact on EU citizens and the difficulties in implementation, significant impacts in a wide range of policy areas/sectors should also be considered.

In the area of **tourism**, North American visitors could easily switch from the European Union to other destinations. Bookings are often arranged shortly before the intended journey, so potential visitors would be unlikely to book trips to Europe due to their concern that the visa might not be issued in time. A potential decrease **of 5%** – considered to be a **conservative estimate** – in the number of US/Canadian tourists to the EU, would represent a **loss of EUR 1,8 billion** for the EU tourism sector²⁶. The suspension of the visa waiver would obviously lead to an important **loss for the aviation industry**, including for major European airlines and

²⁶ This estimate is based on a 2013 survey about the potential impact of visa facilitations in six other major target markets. According to that survey, travel agents estimated that they would sell at least 20% more trips if travelling to the Schengen area was visa-free. Requiring a visa from Canadian/US citizens would have the reverse effect but on a smaller scale.

(http://ec.europa.eu/growth/tools-databases/newsroom/cf/itemdetail.cfm?item_id=7005&lang=en)

major European airport hubs. In terms of tourism revenue, it can be assumed that the most affected Member States, where the majority of the economic loss (and also implementation costs) might occur, would be France, Germany, Italy, Spain, Greece and the Netherlands. Moreover the tourism sector of the five Member States whose nationals still need a visa to visit Canada and/or the US, would also feel the negative impacts.

Brunei has been a constructive partner in international *fora*. Negotiations of a Partnership and Cooperation Agreement have seen good progress. While the population is small, Brunei features amongst the wealthiest countries in the world. The economy is open and highly dependent on international trade, with the EU-Brunei trade balance strongly in the EU's favour. The suspension of the visa waiver would be likely to have a negative impact on tourism and business links with Brunei as well.

d. Impacts on external relations

As regards **external relations (including trade)**, the impact would also be substantial. 2016 is a very important year for **EU-Canada relations** as it marks the 40th anniversary of our formal cooperation. The EU is eager to strengthen further the already excellent cooperation with Canada, notably in foreign policy and security issues and through the rapid signature and implementation of the Strategic Partnership Agreement (SPA) and the Comprehensive Economic and Trade Agreement (CETA). The next EU-Canada Summit in autumn 2016 should mark the beginning of a new and more active chapter in EU-Canada relations with the signature of both agreements. The temporary suspension of the visa waiver for Canadian citizens would have a very negative impact on the overall positive climate of cooperation and could put at risk the smooth finalisation of these important agreements.

The depth and breadth of the **strategic partnership** between the EU and the **United States** is unparalleled. It has prospered for more than six decades, constructed on a solid foundation of common values. Together, the EU and the US have the largest bilateral trade and investment relationship in the world and the negotiating process for a Transatlantic Trade and Investment Partnership (TTIP) has reached a crucial stage which could be jeopardised by the temporary suspension of the visa waiver. Every day the EU and the US work side-by-side to build a more secure, democratic and prosperous world. Cooperation in the field of Justice and Home Affairs, ensuring security of citizens while facilitating mobility has always been a top priority on both sides of the Atlantic. In general, the suspension could be expected to adversely affect trans-Atlantic cooperation which is crucial for the well-being and security of people on both continents, at a time when it is more important than ever to step up our common efforts.

The impact on our external relations with two strategic partners in a year where important agreements in the trade area are at a crucial stage or should be finalised would thus be substantial.

V. CONCLUSION

The Commission welcomes the achievement of full visa waiver reciprocity with Japan.

The Commission notes that full visa waiver reciprocity has not yet been achieved with Brunei but based on recent contacts, the Commission expects that this will be achieved with the official notification by the end of April 2016.

As regards Canada and the United States, the Commission notes that full visa reciprocity has not yet been achieved. The Commission will therefore push for full visa reciprocity with these two countries. The Commission urges Canada and the United States to demonstrate their commitment by introducing tangible measures to achieve full visa reciprocity for all 28 Member States of the European Union.

As regards the current reciprocity mechanism, the Commission invites the European Parliament and the Council to urgently launch discussions and to take a position on the most appropriate way forward, in light of the assessment provided by this Communication. The European Parliament and the Council are invited to inform the Commission on their respective positions not later than 12 July 2016.