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Proposal for a

COUNCIL DECISION

on the conclusion of the Agreement between the European Union and the Federative Republic of Brazil amending the Agreement between the European Union and the Federative Republic of Brazil on short-stay visa waiver for holders of ordinary passports

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

Regulation (EU) No 610/2013 of 26 June 2013¹ (hereinafter: the SBC amendment) amended the Convention implementing the Schengen Agreement² (CISA), **Regulation (EC) No 562/2006**³ (Schengen Borders Code [SBC]) and Regulation (EC) No 810/2009⁴ (the Visa Code) and – among others – re-defined the concept of 'short-stay' for third-country nationals in the Schengen area. As from 18 October 2013, for third-country nationals – irrespective of being visa required or exempt – who intend to travel to the Schengen area for a short-stay, the maximum duration of authorised stay is defined as '90 days in any 180-day period'. Contrary to the definition in force until 18 October 2013 (three months during a six-month period from the date of first entry), the new concept is more precise by setting the duration in days, instead of months. Moreover, the term 'from the date of first entry' which gave rise to many uncertainties and questions has been dropped from the definition.

The SBC amendment has introduced all the necessary changes in the EU's visa and borders *acquis*, i.e. the CISA, the SBC, the Visa Code and Regulation (EC) No 539/2001⁵. However, the concept of short-stay is also enshrined in international agreements concluded by the European Union. The visa waiver agreements concluded with Antigua and Barbuda⁶, the Bahamas⁷, Barbados⁸, Brazil⁹, Mauritius¹⁰, Saint Kitts and Nevis¹¹ and Seychelles¹² still refer to the old definition ('three months during a six months period following the date of first entry'¹³) when defining the duration of visa-free stay.

On 16 July 2014 the Commission adopted a recommendation for a Council Decision for authorising the opening of negotiations for amending the short-stay visa waiver agreements between the European Union and the above mentioned countries¹⁴, which the Council adopted on 9 October 2014.¹⁵ The purpose was to implement vis-à-vis these seven countries the new definition of short-stay as provided by the SBC amendment. Furthermore, defining 'short-stay' in the visa waiver agreements in terms of *days*, rather than in *months*, is less complex to be verified and calculated by electronic/IT means, and thus more fitting for centralised border management systems, such as the proposed Entry/Exit system (EES)¹⁶.

¹ OJ L 182, 29.06.2013, p. 1.

² OJ L 239, 22.09.2000, p. 19.

³ OJ L 105, 13.4.2006, p. 1.

⁴ OJ L 243, 15.9.2009, p. 1.

⁵ OJ L 081, 21.3.2001, p. 1.

⁶ OJ L 169, 30.6.2009, p. 1.

⁷ OJ L 169, 30.6.2009, p. 23.

⁸ OJ L 169, 30.6.2009, p. 9.

⁹ With Brazil the EU concluded two agreements. One for holders of ordinary passports (OJ L 255, 21.9.2012, p. 4) and a separate one for holders of diplomatic, service and official passports (OJ L 66, 12.3.2011, p. 2).

¹⁰ OJ L 169, 30.6.2009, p. 16.

¹¹ OJ L 169, 30.6.2009, p. 37.

¹² OJ L 169, 30.6.2009, p. 30.

¹³ Cf. "Purpose" and "Duration of stay" in the agreements.

¹⁴ COM(2014) 468 final.

¹⁵ Council Decision authorizing the Commission to open negotiations for amending the short-stay visa waiver agreements concluded between the European Union/Community and Antigua and Barbuda, the Commonwealth of the Bahamas, Barbados, the Federative Republic of Brazil, the Republic of Mauritius, the Federation of Saint Kitts and Nevis and the Republic of Seychelles, adopted by Council on 09.10.2014.

¹⁶ COM(2016)194 final.

Following the authorisation of the Council, the Commission started negotiations to amend the visa waiver agreements with the seven countries (Antigua and Barbuda, the Bahamas, Barbados, Brazil, Mauritius, Saint Kitts and Nevis and Seychelles).

The negotiations with Brazil were successfully finalised on 31 October 2017 by the initialling of the agreements amending the two Agreements between the European Union and the Federative Republic of Brazil on short-stay visa waiver for holders of diplomatic, service or official passports, and for holders of ordinary passports. Both parties have agreed to adopt the new definition of 'short-stay', among other technical details (see further below), but all amendments are insignificant from the traveller's point of view.

The specific situation of the United Kingdom and Ireland is reflected in the preamble of the agreements.

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

• Legal basis

The Agreement between the European Union and the Federative Republic of Brazil amending the Agreement between the European Union and the Federative Republic of Brazil on short-stay visa waiver for holders of ordinary passports (hereinafter: 'the Agreement') requires approval of both contracting parties in accordance with their respective procedures. On the part of the Union, this requires Council decisions on the signing and conclusion of the Agreement.

This proposal is submitted to the Council in order to authorise the conclusion of the Agreement.

The Agreement ensures legal coherence as well as harmonisation among Member States, by adhering to the new definition of short-stay as is provided by the SBC amendment, which provides a clear-cut interpretation of 'short-stay'.

The legal basis for this proposal is point (a) of Article 77(2) of the Treaty on the Functioning of the European Union (TFEU), in conjunction with Article 218 thereof.

The Union has no power to amend visa waiver agreements that would bind the four countries that are associated with the implementation of the Schengen *acquis*, including the common visa policy. In order to ensure a harmonised approach and implementation of the provisions on the duration of authorised stay in the Schengen area, a joint declaration is included in the Agreement, stating the desirability for Brazil, on the one hand, and Iceland, Liechtenstein, Norway and Switzerland, on the other, to accordingly modify their existing bilateral visa waiver agreements.

This proposal constitutes the legal instrument for concluding the agreement. The Council will decide by qualified majority after the signing of the agreement, on behalf of the Union, by a person designated by the presidency of the Council and after having obtained the consent of the European Parliament in accordance with point (a) of the second subparagraph of Article 218(6) TFEU.

• Subsidiarity (for non-exclusive competence)

Under Article 77(2)(a) TFEU, the negotiation of visa waiver agreements is within the exclusive competence of the Union.

In addition, if one of the contracting parties to an international agreement is the European Union, then any amendment of such an agreement cannot be legally implemented by Member States themselves. Hence, action at Union level is required.

- **Proportionality**

The present proposal does not go beyond what is necessary to achieve the objective pursued, namely the modification of the existing agreement between the Federative Republic of Brazil and the European Union on short-stay visa waiver for holders of ordinary passports.

3. BUDGETARY IMPLICATIONS

This proposal does not entail additional costs for the EU budget.

4. RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESMENTS

- **Stakeholder consultations**

On 9 October 2014, the Council adopted negotiating directives which authorized the Commission to open negotiations with Brazil to amend the agreement between the two parties on short-stay visa waiver for holders of ordinary passports. Member States were informed of the progress of negotiations in meetings of the Visa Working Party.

5. OTHER ELEMENTS

- **Outcome of negotiations**

The Commission considers that the objectives set by the Council in its negotiating directives were attained and that the draft Agreement is acceptable to the Union.

The final content of it can be summarised as follows:

a. Duration of stay

The Agreement provides for visa-free travel for the citizens of the European Union and for the citizens of Brazil when travelling to the other Contracting Party for a maximum period of 90 days in any 180-day period (instead of a maximum period of three months during a six months period following the date of first entry). The new definition is applied throughout the Agreement.

b. Final provision – suspension of the Agreement (Article 9(4))

The Agreement modifies the last sentence of Article 9(4) as follows: "A Contracting Party that has suspended the application of this Agreement shall immediately inform the other Contracting Party should the reasons for that suspension cease to exist and shall lift that suspension." By adding the words 'and shall lift that suspension' to the current text, the Agreement clarifies that a suspension of the visa waiver shall actually be lifted if the reasons that led to the suspension disappear. On this point, the amendment aligns the wording of the agreement with the Federative Republic of Brazil on short-stay visa waiver for holders of ordinary passports with that of all other visa waiver agreements signed by the Union in 2015 and 2016. On 14 June 2016, the Visa Working Party was consulted on this amendment and no Member State raised any objections.

c. Joint Declarations

Two joint declarations are attached to the Agreement:

- On the interpretation of 90 days in any 180-day period, and;
- Concerning Iceland, Norway, Switzerland and Liechtenstein.

e. Entry into force

The Agreement will enter into force on the first day of the 6th month following the date on which the last Contracting Party notifies the other that the ratification procedures have been completed. To ensure legal certainty and enable travellers to comprehend the law and to comply with it, a sufficiently long transitional period is necessary. Once ratification of the Agreement has been completed, the six-month period will allow travellers to complete short stays that are still entirely calculated under the old definition, before entry into force of the new short-stay definition and its 180-day backward-looking reference period.

All other provisions of the existing agreement between the European Union and the Federative Republic of Brazil on short-stay visa waiver for holders of ordinary passports remain unaffected by the Agreement, including the territorial scope.

6. CONCLUSION

In the light of the above-mentioned results, the Commission proposes that the Council approves, after obtaining the consent of the European Parliament, the Agreement between the European Union and the Federative Republic of Brazil amending the Agreement between the European Union and the Federative Republic of Brazil on short-stay visa waiver for holders of ordinary passports.

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THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular point (a) of Article 77(2), in conjunction with point (a)(v) of the second subparagraph of Article 218(6) thereof,

Having regard to the proposal from the European Commission,

Having regard to the consent of the European Parliament¹⁷,

Whereas:

- (1) In accordance with Council Decision (EU) XXX/[...], the Agreement with the Federative Republic of Brazil amending the Agreement between the European Union and the Federative Republic of Brazil on short-stay visa waiver for holders of ordinary passports ('the Agreement') was signed on [...].
- (2) This Decision constitutes a development of the provisions of the Schengen *acquis* in which the United Kingdom does not take part, in accordance with Council Decision 2000/365/EC¹⁸; the United Kingdom is therefore not taking part in the adoption of this Decision and is not bound by it or subject to its application.
- (3) This Decision constitutes a development of the provisions of the Schengen *acquis* in which Ireland does not take part, in accordance with Council Decision 2002/192/EC¹⁹; Ireland is therefore not taking part in the adoption of this Decision and is not bound by it or subject to its application,
- (4) The Agreement should be approved on behalf of the European Union,

HAS ADOPTED THIS DECISION:

Article 1

The Agreement between the European Union and the Federative Republic of Brazil amending the Agreement between the European Union and the Federative Republic of Brazil on short-stay visa waiver for holders of ordinary passports ('the Agreement') is hereby approved on behalf of the Union.

¹⁷ Consent given on [...].

¹⁸ Council Decision 2000/365/EC of 29 May 2000 concerning the request of the United Kingdom of Great Britain and Northern Ireland to take part in some of the provisions of the Schengen *acquis*, OJ L 131, 1.6.2000, p. 43.

¹⁹ Council Decision 2002/192/EC of 28 February 2002 concerning Ireland's request to take part in some of the provisions of the Schengen *acquis*, OJ L 64, 7.3.2002, p. 20.

The text of the Agreement is attached to this Decision.

Article 2

The President of the Council shall designate the person empowered to proceed, on behalf of the European Union, to give the notification provided for in Article 2 of the Agreement.

Article 3

This Decision shall enter into force on the twentieth day of its adoption²⁰.

Done at Brussels,

*For the Council
The President*

²⁰ The date of entry into force of the Agreement will be published in the *Official Journal of the European Union* by the General Secretariat of the Council.