COMMISSION OF THE EUROPEAN COMMUNITIES

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Proposal for a

COUNCIL REGULATION

amending Regulation (EC) No 539/2001 as regards the reciprocity mechanism

(presented by the Commission)

EXPLANATORY MEMORANDUM

Article 1(4) of Regulation (EC) No 539/2001 contains a reciprocity mechanism to be used for the establishment by a third country on the list in Annex II to the Regulation (positive list) of a visa requirement for nationals of a Member State. The mechanism provides, on the request of the "victim" Member State, for a joint response consisting of a series of successive stages (notification by the Member State whose nationals are concerned by the visa requirement, introduction provisionally by the Member States, unless the Council decides otherwise, of a visa requirement for nationals of the third country in question, announcement in the Official Journal of the provisional introduction of the visa requirement, examination by the Commission of any request from the Council or a Member State to transfer the third country from the Regulation's positive list to the negative one).

The mechanism was not originally part of the Commission's initial proposal of 26 January 2000 but is the result of a series of discussions in the Council. To reflect the Member States' desire to give an operational dimension to reciprocity, the Commission added a paragraph 4 to Article 1 in its amended proposal of 21 September 2000. The proposed reciprocity mechanism, which reflected and formalised the suggestions made by the Member States in the Council, was taken on board, almost in its entirety, in Council Regulation (EC) No 539/2001.

Three years after the entry into force of Regulation (EC) No 539/2001, the reciprocity mechanism has never been applied. The reasons for this should be examined, taking as a basis the findings of a Commission staff working paper on reciprocity in the field of visas[1], and legislative adjustments proposed.

The first observation that has to be made is that whereas the nationals of some Member States or associated States are subject to a visa requirement by certain third countries on the positive list of Regulation (EC) No 539/2001 (United States/Greece; Brunei/Austria, Finland, Greece, Portugal, Iceland; Venezuela/Finland; Guatemala/Iceland), the States in question have refrained from initiating the reciprocity mechanism. Only they have the power to do so, and they are quite at liberty not to.

The attitude of these Member States is probably due to the mechanism being too rigid. Because it is virtually automatic, the second stage (provisional introduction by all Member States of a visa requirement for the third country in question) discourages Member States from invoking the mechanism lest they help to cause a major crisis either in external relations with the third country concerned or internally. The mechanism's second stage can be blocked only by a Council decision taken by a qualified majority. In the scheme of the reciprocity mechanism, the taking of such a decision can only be regarded as a refusal by the Member States to act in solidarity with the Member State concerned.

This first conclusion – that the solidarity mechanism is inadequate – is strengthened in the enlargement context. After 1 May 2004, the situation described in Article 1(4) of Regulation (EC) No 539/2001 may be invoked by the new Member States with regard to third countries

[1] Document JAI-B-1(2004)1372, 18.2.2004.

that continue to subject their nationals to a visa requirement. All the new Member States are legally entitled to invoke the reciprocity mechanism with regard to several third countries. The inadequacies and risks associated with the reciprocity mechanism observed since 2001 are thus enhanced by enlargement and make it even more necessary to review the mechanism.

Such a review is not intended to weaken the solidarity that characterises the common visa policy by making reciprocity disappear from Regulation (EC) No 539/2001. Reciprocity remains a fundamental principle of visa policy and is still one of the reference criteria (listed in the fifth recital of the Regulation) to be taken into consideration when the lists of third countries annexed to Regulation (EC) No 539/2001 are drawn up or amended. The proposal, basically, seeks to introduce an operational mechanism that is more flexible and more realistic, and hence likely to be used. The current mechanism, since it fails to recognise the political dimension of reciprocity, has been too maximalist and too fraught with political risk to play a useful role. It blindly emphasises reprisal, completely ignoring the diplomatic approach, even though none of the criteria for determining the positive and negative lists has absolute value; those lists are determined "by a considered, case-by-case assessment of a variety of criteria relating inter alia to illegal immigration, public policy and security, and to the European Union's external relations with third countries, consideration also being given to the implications of regional coherence and reciprocity".

The proposed mechanism is also intended to remedy a fundamental defect in the previous system, namely that the procedure was initiated only by the Member State affected by a third country's introduction of a visa requirement. The Commission considers that a situation of non-reciprocity can have a crucial impact on the common visa policy and that discussion of such a situation at Community level to produce an appropriate response should not depend on the goodwill of a single Member State. The principle which should guide the common visa policy is reciprocity based on soldarity between all the Member States with regard to measures taken against one of them. To ensure such solidarity and protect Community interests, it is essential to provide a mechanism that will give the Commission a real, effective negotiating instrument, which must be consistent with the Union's overall external relations policy.

In the light of the above considerations, the Commission is therefore proposing a mechanism that should ensure more effective observance of the principle of reciprocity, which is essential for the common visa policy.

Comments on the Articles

Article 1

Observations on the proposed wording of Article 1(4) of Regulation (EC) No 539/2001:

Use of the term "introduction" clearly indicates that a new situation has arisen, created by the decision of a third country in Annex II to subject to a visa requirement the nationals of one or more Member States who were previously exempt. To make it clear that the mechanism should also apply to situations arising prior to the new Regulation but still applying when it comes into force, a specific provision is introduced in Article 2.

- Subparagraph (a):

The aim is to make information about a situation of non-reciprocity automatic and transparent. The Member State concerned is now obliged to notify such a situation.

- Subparagraph (b):

The current arrangements, which overemphasise the reprisal aspect by making it the "normal" response, from which the Council can derogate, should be dropped.

To be able to resolve a situation of non-reciprocity in the most appropriate manner, the Commission should take steps with the third country, so that the latter again applies visa-free travel to nationals of the Member State concerned. This role of the Commission's is consistent with the fact that the Community has exclusive powers to take external action with regard to a visa requirement/visa-free travel. The Commission's findings should be the subject of a report to the Council. The report should be presented as soon as possible, in accordance with the urgency of the situation, while allowing a realistic time limit for assessing the facts and taking appropriate diplomatic steps with a view to restoring visa-free travel.

- Subparagraph (c):

The proposed wording reflects the desire that the mechanism should follow the customary decision-making patterns in this field more closely. Thus, at the same time as its report, the Commission can present the Council with a proposal to restore the visa requirement provisionally with regard to the third country concerned. Provisional restoration, which in any event should end at the same time as the third country terminates its measure, is one possibility, to be decided by the Council by a qualified majority. Limiting the time available for the Council to act is meant to ensure the effectiveness of a measure that will allow, where necessary, a rapid reaction with regard to the third country concerned, it being understood that this is a provisional safeguard measure.

- Subparagraph (d):

The Commission should not be required to first present a report to the Council before it can propose a provisional measure. Circumstances may make it necessary to propose a provisional measure as a matter of urgency. Clearly, in the explanatory memorandum to its proposal, the Commission will explain why those circumstances have led it to use this procedure without a prior report. The urgency justifying the Commission's action makes it necessary for the Council to act quickly.

- Subparagraph (e):

The restoration of the visa requirement, in accordance with the procedures provided for in subparagraphs (c) and (d), remains a specific, provisional measure compared with the transfer of the third country concerned from the positive list to the negative list of Regulation (EC) No 539/2001. To ensure the effectiveness of the reaction with regard to the third country which is the cause of the non-reciprocity situation, it should be explained that the provisional

measure does not affect the possibility of proposing such a transfer. It is also appropriate to provide that if the third country does not react to the provisional measure, the Commission will, within a short period, present a proposal for transferring the third country to Annex 1.

- Subparagraph (f):

This deals with the procedures to be applied when the third country decides to terminate the visa requirement. The plan is taken from subparagraphs (e) and (f) in the current mechanism. However, the end of the provisional restoration of the visa requirement coincides exactly with the date of entry into force of the abolition of the visa requirement by the third country.

Article 2

Article 2 is designed to make clear that the mechanism must also be applied to the situation existing when the Regulation, which obliges Member States to notify any introduction of a visa by a third country, enters into force, i.e. to cases where, at that time, one or more third countries in Annex II are maintaining a visa requirement for nationals of a Member State. As is provided for when a visa requirement is introduced, a strict deadline must be set for notification by the Member State concerned. The various details of the mechanism apply to the maintenance as well as the introduction of a visa requirement.

The maintenance of a visa requirement is not dealt with in Article 1, because it is a specific situation which will already be in existence when the Regulation comes into force. It is a transitional measure, applicable only during the changeover from the current arrangements (where the Member State concerned may choose to initiate the reciprocity mechanism) to the new system (which obliges each Member State to notify the introduction of a visa requirement by a third country). There is no need, therefore, to incorporate this item, the maintenance of a visa requirement, into the substantive provisions of Regulation (EC) No 539/2001, which is limited to covering future introductions of a visa requirement by a third country.

2004/0141 (CNS)

COUNCIL REGULATION

amending Regulation (EC) No 539/2001 as regards the reciprocity mechanism

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 62(2)(b)(i) thereof,

Having regard to the proposal from the Commission[2],

Having regard to the opinion of the European Parliament[3],

Whereas:

(1) The mechanism provided for in Article 1(4) of 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[4] has proved unsuitable for dealing with situations of non-reciprocity in which a third country on the list in Annex II to that Regulation, i.e. a third country whose nationals are exempt from the visa requirement, maintains or introduces a visa requirement for nationals from one or more Member States. Solidarity with the Member States experiencing situations of non-reciprocity requires that the existing situation be adapted so as to make it effective.

(2) Given the seriousness of such situations of non-reciprocity, it is essential that they should be notified without fail by the Member State(s) concerned. To ensure that the third country in question again applies visa-free travel to nationals of the Member States concerned, a mechanism should be provided which, will combine measures at variable levels and intensities that can be rapidly carried out. Thus the Commission should take steps with the third country without delay, report to the Council and be able at any moment to propose that the Council adopt a provisional decision restoring the visa requirement for nationals of the third country in question. Resorting to such a provisional decision should not make it impossible to transfer the third country in question to Annex I of Regulation (EC) No 539/2001. A temporal link should also be provided between the entry into force of the provisional measure and any proposal to transfer the country to Annex I.

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2 OJ C […], […], p. […].
3 OJ C […], […], p. […].
4 OJ L 81, 21.3.2001, p. 1.

(3) A decision by a third country to introduce or reintroduce visa-free travel for nationals of one or more Member States should automatically terminate the provisional restoration of a visa requirement decided by the Council.

(4) Regulation (EC) No 539/2001 should be amended accordingly.

(5) Transitional arrangements should be provided for where, when this Regulation comes into force, Member States are subject to a visa requirement by third countries listed in Annex II to Regulation (EC) No 539/2001. As regards Iceland and Norway, this Regulation constitutes a development of the provisions of the Schengen acquis, within the meaning of the Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the association of those two States with the implementation, application and development of the Schengen acquis, which falls within the area referred to in Article 1(A) of Council Decision 1999/437/EC of 17 May 1999 on certain arrangements for the application of that Agreement.

(6) The United Kingdom and Ireland are not bound by Regulation (EC) No 539/2001. They are not taking part therefore in the adoption of this Regulation and are not bound by it or subject to its application.

(7) This Regulation constitutes an act building upon or related to the Schengen acquis within the meaning of Article 3(1) of the Act of Accession,

HAS ADOPTED THIS REGULATION:

Article 1

Article 1(4) of Regulation (EC) No 539/2001, is replaced by the following:

"4. Where a third country listed in Annex II introduces a visa requirement for nationals of a Member State, the following provisions shall apply:

(a) within ten days of such introduction, or its announcement, the Member State concerned shall notify the Council and the Commission in writing; the notification shall be published in the C series of the *Official Journal of the European Union*;

(b) the Commission shall immediately take steps with the authorities of the third country in order to restore visa-free travel and, at the latest within six months of publication of the notification, shall report on those procedures to the Council;

(c) depending on the conclusions in its report, the Commission may present to the Council a proposal for a provisional measure on the temporary restoration of the visa requirement for nationals of the third country in question. The Council shall act on such proposal by a qualified majority within three months;

(d) if it considers it necessary, the Commission may present the proposal referred to in subparagraph (c) without a prior report. The procedure provided for in subparagraph (c) shall apply to that proposal;

(e) the procedure referred to in subparagraphs (c) and (d) does not affect the Commission's right to present a proposal amending this Regulation in order to transfer the third country concerned to Annex I. In any event, where a provisional measure such as referred to in subparagraphs (c) and (d) has been decided, the proposal amending this Regulation shall be presented by the Commission at the latest six months after the entry into force of the provisional measure;

(f) where the third country abolishes the visa requirement, the Member State shall notify the Commission to that effect. The notification shall be published in the C series of the *Official Journal of the European Union*. Any provisional visa restoration decided under subparagraph (c) shall terminate automatically on the date of entry into force of the abolition of the visa requirement by the third country concerned."

Article 2

Member States whose nationals, at the date of entry into force of this Regulation, are subject to a visa requirement by a third country listed in Annex II to Regulation (EC) No 539/2001 shall notify the Commission in writing within ten days of that entry into force. The notification shall be published in the C series of the *Official Journal of the European Union*.

The provisions of Article 1(4)(b) to (f) of Regulation (EC) No 539/2001, as amended by this Regulation, shall apply.

Article 3

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaty establishing the European Community.

Done at Brussels,

For the Council

The President

[…]