COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 13.07.2006
COM(2006) 84 final

2006/0022 (CNS)

Proposal for a

COUNCIL REGULATION

amending Regulation (EC) No 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders of Member States and those whose nationals are exempt from that requirement

(presented by the Commission)

EXPLANATORY MEMORANDUM

In proposing amendments to Regulation (EC) No 539/2001,[1] as last amended by Regulation (EC) No 851/2005,[2] the Commission is pursuing the following objectives:

- ensuring in the context of the periodic review of Regulation (EC) No 539/2001 that the current composition of its annexes – which contain the list of third countries whose nationals must be in possession of visas when crossing the external borders of Member States (Annex I) and the list of those whose nationals are exempt from that requirement (Annex II) – complies with the criteria set out in recital 5, in particular as regards the illegal immigration and public policy criteria and transferring countries from one annex to another as appropriate;

- amplifying the two annexes to the Regulation so that they give full effect to the objective set by Article 62(2)(b)(i) of the Treaty, viz. the Regulation must determine exhaustively whether a third-country national is to be subject to or exempt from the visa requirement;

- adjusting the rules applicable to refugees and stateless persons so that they remain eligible for a visa exemption if they reside in a third country listed in Annex II but enjoy automatic exemption if they reside in a Member State;

- adding a new case of exemption for holders of local border traffic cards;

- providing for a visa exemption for members of the armed forces travelling on NATO or Partnership for Peace business;

- clarifying the categories of passports other than ordinary passports.

Cases of non-reciprocity in visa matters are not covered by this proposal for amendment of Regulation (EC) No 539/2001. They are dealt with in the context of the reciprocity mechanism as amended by Regulation (EC) No 851/2005.

1. Review of the annexes to the Regulation

1.1. Transferring a third country from one annex to the other

The Seville European Council for the first time highlighted the need to review the annexes to Regulation (EC) No 539/2001. The first review resulted in Regulation (EC) No 453/2003,[3] which transferred Ecuador from Annex II to Annex I. For the purposes of the new periodic review, the Commission has gathered information by, in particular, approaching the Member States direct to check whether the annexes to Regulation (EC) No 539/2001 as they stand still correspond to the criteria determined by the Regulation. The information transmitted by the Member States in response has been cross-checked against other information and statistics supplied under the CIREFI. Having analysed the information, the Commission has come to the following conclusions:

First of all, the information received points to persistent and intense migratory pressure from Bolivia. The effect is being felt in the large number of refoulements at the external borders and in expulsions in several Member States. Nor can the public policy dimension be neglected since

[1] OJ L 81, 21.3.2001, p. 2.
[2] OJ L 141, 4.6.2005, p. 3.
[3] OJ L 69, 13.3.2003, p. 10.

detention orders and convictions of Bolivians for criminal offences and illegal immigration are also rising. In addition, nationals of Latin American countries subject to the visa requirement are seeking to circumvent the requirement by fraudulently acquiring Bolivian passports. For all these reasons, the Commission believes that there are good grounds, in view of the criteria in recital 5 to Regulation (EC) No 539/2001, for proposing to transfer Bolivia from Annex II to Annex I.

Secondly, the Commission has observed that imposing the visa requirement on nationals of certain third countries is no longer justified by the statistics or other information confirming that the country represents a risk in terms of the criteria in recital 5 to Regulation (EC) No 539/2001, in particular illegal immigration and public policy. Nor is maintaining the visa requirement justified in terms of regional consistency or the Union's international relations. Apart from that, the Commission has not confined its attention to facts observed in countries that apply Regulation (EC) No 539/2001. It has also had regard to the visa policy of Ireland, the United Kingdom and Switzerland and has drawn valuable conclusions regarding the illegal immigration and public policy criteria. It is accordingly proposed that Antigua and Barbuda, the Bahamas, Barbados, Mauritius, Saint Kitts and Nevis, and the Seychelles be transferred from Annex I to Annex II. This amendment will also make it possible to put an end to the practical difficulties currently encountered with those countries given that no Member State has a consulate in four of them and only one Member State has a consulate in the other two. The plan is that the visa exemption will be applied to nationals of those countries in parallel with, and at the same time as, the entry into force of a visa exemption agreement with them, thereby ensuring reciprocity and the benefit of the visa exemption for nationals of all the Member States.

1.2. Determining the visa regime applicable to certain specific categories of third-country national

Thirdly, the Commission wishes to put an end to a situation that is contrary to Article 62 (2)(b)(i) of the EC Treaty and to Regulation (EC) No 539/2001, which was adopted on that basis. There is no doubting that the lists of third countries must be exhaustive and must cover all third-country nationals. That interpretation is clear from the text of the Article itself and is confirmed, should that be necessary, by the historical evolution of the common visa policy, which began with the establishment of a single list of third countries whose nationals must be in possession of a visa. But the fact is that certain categories of people who are not Union citizens are in neither Annex I nor Annex II to Regulation (EC) No 539/2001. These include British Nationals (Overseas) and people who are "British" to differing degrees but are not regarded as UK nationals for the purposes of Community law.[4] The Member States, faced with this gap in Regulation (EC) No 539/2001, have adopted varying solutions, some of them imposing the visa and others applying the exemption. The Commission communication concerning Regulation (EC) No 539/2001[5] reflects this practical reality, which runs counter to the full harmonisation imposed by Community law.

To put an end to this unsatisfactory situation, the Commission proposes that these categories be placed in either Annex I or Annex II so that the lists can be exhaustive. The Commission's option for one or the other list is based on the criteria in recital 5 to Regulation (EC) No 539/2001.

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4 See Declaration by the United Kingdom, most recently in 1983 (OJ C 23, 28.1.1983, p. 1).

5 OJ L 68, 21.3.2003, p. 11.

It proposes that British Nationals (Overseas) be listed in Annex II. They are attached to the territory of Hong Kong, and most of them also hold a Hong Kong SAR passport and are accordingly exempt from the visa requirement in the Member States. There is no evidence to suggest that, as British Nationals (Overseas), they will constitute a migratory risk or a risk in terms of public policy, as the Member States have already pointed out on several occasions in discussions in Council working parties. British Nationals (Overseas) are readmissible in Hong Kong. And the passport issued to them by British offices exclusively have highly reliable security features. For all these reasons, the visa exemption (already applied by nine Member States without any problems so far) is fully justified. The purpose of Article 5(2) of the proposal is to draw that conclusion and to add British Nationals (Overseas) to Annex II to Regulation (EC) No 539/2001. But there will have to be a specific heading as they do not have the nationality of a third country and cannot be regarded as nationals of the territory of Hong Kong from the point of view of the travel document they hold.

On the other hand, the Commission is proposing that British Overseas Territories Citizens (BOTC), British Overseas Citizens (BOC), British Subjects and British Protected Persons (BPP) be placed in Annex I. The United Kingdom nationality laws were extensively amended by the British Territories Act 2002, which made most BOTC eligible to apply to become British citizens and therefore Union citizens. As regards BOTC who have not become British citizens and BOC, British Subjects and BPP, these categories of people have what can only be regarded as a tenuous link with the United Kingdom as they have no right of abode and are subject to immigration controls. There is also considerable uncertainty as to possible links to other States and the exact nature of such links. The Commission accordingly concludes that these categories should be subject to the visa requirements as there is a risk of illegal immigration.[6] Article 5(1) places them in Annex I. But there will have to be a specific heading as they do not have the nationality of a third country.

2. Rules applicable to bearers of passports other than ordinary passports

Under Article 4(1) of the Regulation, the Member States retain the possibility of exempting "holders of diplomatic passports, official-duty passports and other official passports", while Annex 2 to the Common Consular Instructions (CCI)[7] refers to "holders of diplomatic, official and service passports". The Table of travel documents which may be endorsed with a visa refers to three categories – diplomatic, service and special passports.[8] The varying typologies used in all these instruments is a source of ambiguities and can engender practical difficulties where a specific scheme is to be applied (visa requirement or exemption) to this or that type of passport. To remedy these difficulties and to clarify the matter, the Commission proposes that a more precise distinction be made between three categories of passports ("diplomatic passports, service/official passports, special passports"). Such is the purpose of Article 1(2) of the proposal. The distinction will also have to be made, of course, in Annex 2 to the CCI and the Table of travel documents. Proposals for decisions will have to be presented for that purpose.

The Commission is also planning to clarify the rules applied to this category of passport holder. Article 4(1)(a) in its current form suggests that the Member States are free to decide whether

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6 It can be seen from the Commission's 2003 communication that most Member States subject BOTC to the visa requirement.

7 Latest edition: document 12357/05, VISA 230 COMIX 586, 27.9.2005.

8 Latest edition: document 11599/05, VISA 200 COMIX 527, 29.07.2005.

to grant an exception to the visa requirement. But that is not the case, as can be seen from the combined provisions of Articles 1(1) and 2(1) of Regulation (EC) No 789/2001 of 24 April 2001 reserving to the Council implementing powers with regard to certain detailed provisions and practical procedures for examining visa applications.[9] Article 1(2) of this proposal accordingly adds to Article 4(1)(a) a reference to the procedures referred to in Regulation (EC) No 789/2001.

3. Converting certain possibilities for the Member States to grant an exception to the visa requirement into harmonised exemption cases

Articles 3 and 4 of Regulation (EC) No 539/2001 as its stands provide for a number of possibilities for Member States to decide on exceptions to the visa requirement. In view of the criteria in recital 5, and in particular the illegal immigration and public policy criteria, there is every justification for taking harmonisation a stage further by providing for an automatic visa exemption for two categories of people residing in a Member State.

3.1. Recognised refugees and stateless persons

Article 3 of Regulation (EC) No 539/2001 provides that recognised refugees and stateless persons "may be exempted from the visa requirement if the third country where they reside and which issued their travel document is one of the third countries listed in Annex II". Enlargement of the European Union to include ten new Member States on 1 May 2004 had the paradoxical effect of reducing the scope of the possibility of granting a visa exemption since the Regulation does not provide for a visa exemption for recognised refugees and stateless persons who reside in a Member State that does not yet fully apply the Schengen acquis.[10]

The Commission intends to remedy this unsatisfactory situation, especially as it has been expressly asked to do so by Parliament and the Council in the course of the negotiations on the proposal for a Regulation establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code).[11] In view of the criteria relating to illegal immigration and public policy, the Commission considers that it is possible to go further than merely providing for the possibility of exemption. It therefore proposes adding to Article 1 of Regulation (EC) No 539/2001 an automatic visa exemption for refugees and stateless persons resident in a Member State. This exemption will resolve, for example, the situation of "Latvian non-citizens", who cannot yet benefit from the equivalence between residence permits and visas because the Council has not yet adopted the ad hoc decision on full application of the Schengen rules to the new Member States. Article 1(2) of this proposal thus maintains in Article 4(2) of the Regulation the possibility of a visa exemption for school pupils residing in a third country listed in Annex II.

3.2. School pupils travelling on school excursions

Article 4(2) of Regulation (EC) No 539/2001 provides for the possibility of an exemption from

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9 OJ L 116, 24.6.2001, p. 2.

10 In the Technical Adaptations made by the Act of Accession, it was decided quite logically to delete the reference to the new Member States from Annex II to Regulation (EC) No 539/2001.

11 Declaration on holders of aliens' passports and non-citizens' passports: "The European Parliament and the Council call on the Commission to present proposals within the framework of the review of Regulation (EC) No 539/2001 with a view to exempting from the visa requirements holders of aliens' passports and non-citizens' passports who reside in a Member State".

the visa requirement for school pupils who reside in a third country listed in Annex II. As in the case of recognised refugees and stateless persons, school pupils residing in a Member State that does not yet fully apply the Schengen acquis are not entitled to a visa exemption. With a view to minimising the administrative obstacles to the organisation of school trips in Europe, the Commission proposes adding to Article 1 of Regulation (EC) No 539/2001 an automatic visa exemption for school pupils residing in a Member State who are travelling in the context of school excursions. Article 1(2) of this proposal thus maintains in Article 4(2) of the Regulation the possibility of a visa exemption for school pupils residing in a third country listed in Annex II.

4. Adding a new exemption from the visa requirement for persons travelling in the context of local border traffic

On 22 February 2005 the Commission presented a proposal for a Regulation of the European Parliament and of the Council laying down rules on local border traffic at the external land borders of the Member States and amending the Schengen Convention and the Common Consular Instructions.[12] The Council's discussions on this proposal highlighted the need to provide for the issue of a special border card that would entitle holders who were nationals of third countries subject to the visa requirement under Regulation (EC) No 539/2001 to travel without a visa in the border area. The Commission is prepared to adopt this approach since it does not affect the main purpose of the Regulation, i.e. facilitating border crossings for bona fide border residents. For reasons relating to the legal basis, such an exemption from the visa requirement cannot be included in the proposed regulation on local border traffic but must be added to Article 1(2) of Regulation No 539/2001, which, as it stands, does not provide for such an eventuality. Such is the purpose of Article 1(1) of this proposal.

The proposed regulation on local border traffic, which is still at the discussion stage, will be adopted by the codecision procedure. Should the Council and the European Parliament ultimately adopt arrangements that do not provide for the combination of exemption from the visa requirement and travel in the border area with a special local border traffic card, the Commission would have to amend its proposal.

5. Adding a possible exception to the visa requirement for members of the armed forces travelling on NATO or Partnership for Peace business

The possibility for Member States to allow an exception to the visa requirement provided for in Article 4(1)(d) of Regulation (EC) No 539/2001 concerns only officials of international organisations. It appears that the Member States which apply Regulation (EC) No 539/2001 (with the exception of Austria, Finland, Sweden, Cyprus and Malta) have given undertakings in the North Atlantic Treaty Organisation (NATO) concerning travel by members of the armed forces. Article III of the Agreement concluded between the parties to the North Atlantic Treaty in London on 19 June 1951 regarding the status of their forces states that members of the armed forces "shall be exempt from passport and visa regulations". However, it provides for presentation of a personal identity card and an individual or collective movement order. The scope of this visa exemption was extended by the Agreement concluded in Brussels on 19 June 1995 by the parties to the North Atlantic Treaty and the other States participating in the Partnership for Peace regarding the status of their forces. Article I of this Agreement thus stipulates that, as otherwise provided for, the provisions of the 1951 Agreement also apply, in

[12] COM(2005)56 final.

principle, within the framework of the 1995 Agreement. The 1995 Agreement does not provide for any exception to the above-mentioned Article III of the 1951 Agreement.

It therefore follows from the provisions of the 1951 and 1995 Agreements that members of the armed forces of the States that are parties to those agreements may travel without being subject to passport and visa regulations. This exemption from the visa requirement, which must be complied with by the signatory states of the above agreements, is not reflected in Regulation (EC) No 539/2001, although it can benefit members of the armed forces who are nationals of third countries listed in Annex I to the Regulation. Consequently, on the grounds of transparency and legal certainty, a reference to the exemption from the visa requirement resulting from the agreements within the framework of NATO and the Partnership for Peace should be added to Regulation (EC) No 539/2001. Such is the purpose of the proposed addition to Article 4(2).

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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,[13]

Having regard to the opinion of the European Parliament,[14]

Whereas:

(1) The composition of the lists of third countries in Annexes I and II to Regulation must be, and must remain, consistent with the criteria laid down in recital 5 to 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 of Member States and those whose nationals are exempt from that requirement.[15] Some third countries must be transferred from one annex to the other, particularly with regard to illegal immigration and public policy.

(2) Bolivia must be transferred to Annex I. The date of application of the visa requirement for Bolivian nationals must be such as to allow Member States to rescind in good time the bilateral agreements with Bolivia and to take all the necessary administrative and organisational measures for introducing the visa requirement in question.

(3) Antigua and Barbuda, the Bahamas, Barbados, Mauritius, Saint Kitts and Nevis, and the Seychelles must be transferred to Annex II.

Exemption from the visa requirement for nationals of those countries should not come into force before a bilateral agreement on exemption from the visa requirement between the European Community and the country in question has been concluded.

(4) The two annexes to Regulation (EC) No 539/2001 must be exhaustive. To that end, a heading making it possible to determine the visa arrangements to be applied by the Member States to categories of persons made subject to the visa requirement by certain

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13 OJ C […], […], p. […].
14 OJ C […], […], p. […].
15 OJ L […], […], p. […].

Member States and exempted therefrom by others should be added to each of the annexes to the Regulation. Various categories of "British" persons who are not nationals of the United Kingdom within the meaning of Community law should be added to Annex I to the Regulation and British Nationals (Overseas) should be added to Annex II.

(5) The Member States may provide for exceptions to the visa requirement for holders of certain passports other than ordinary passports. The designations of these passports require clarification. Reference needs also to be made in Regulation (EC) No 539/2001 to the procedures applicable where recourse is had to such exceptions.

(6) The Member States may exempt from the visa requirement recognised refugees and stateless persons residing in a third country listed in Annex II and school pupils travelling on school excursions who reside in one of those countries. A full exemption from the visa requirement should be introduced for these two categories of person if they reside in a Member States.

(7) The developments in the discussions on the introduction of local border traffic arrangements make it necessary to provide for a new exemption from the visa requirement for holders of a local border traffic card.

(8) The arrangements governing exceptions to the visa requirement must fully reflect actual practices. Certain Member States grant dispensation from the visa requirement for nationals of third countries listed in Annex I who are members of the armed forces travelling on NATO or Partnership for Peace business. For reasons of legal certainty, these dispensations, which are based on international obligations external to Community law, must nevertheless be referred to in Regulation (EC) No 539/2001.

(9) Because of the successive amendments to Regulation (EC) No 539/2001 it is necessary to improve its structure and make it easier to read, to which end it should be recast at a later date.

(10) With regard to Iceland and Norway, this Regulation represents 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 latters' association with the implementation, application and development of the Schengen acquis,[16] which falls within the area referred to in Article 1(B) of Council Decision 1999/437/EC of 17 May 1999 on certain arrangements for the application of that Agreement.[17]

(11) The United Kingdom and Ireland are not bound by Regulation (EC) No 539/2001. Consequently, they are not participating in the adoption of this Regulation and are not bound by or subject to the application thereof.

(12) With regard to Switzerland, this Regulation represents a development of the provisions of the Schengen acquis, within the meaning of the Agreement signed by the European Union, the European Community and the Swiss Confederation on the association of the Swiss Confederation with the implementation, application and development of the

[16] OJ L 176, 10.7.1999, p. 36.
[17] OJ L 368, 15.12.2004, p. 26.

Schengen acquis,[18] which falls within the area referred to in Article 1(B) of Council Decision 1999/437/EC, read in conjunction with Article 4(1) of Council Decision 2004/860/EC of 25 October 2004 on the signing, on behalf of the European Community, and on the provisional application of certain provisions of the Agreement between the European Union, the European Community and the Swiss Confederation, concerning the Swiss Confederation's association with the implementation, application and development of the Schengen acquis,[19]

HAS ADOPTED THIS REGULATION:

Article 1

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

(1) Article 1 is amended as follows:

(a) The following subparagraph is added to paragraph 1:

"Without prejudice to the requirements stemming from the European Agreement on the Abolition of Visas for Refugees signed at Strasbourg on 20 April 1959, recognised refugees and stateless persons shall be in possession of a visa when crossing the external borders of the Member States if the third country in which they are resident and which has issued them with their travel document is a third country listed in Annex I."

(b) The following subparagraph is added to paragraph 2:

"The following shall also be exempt from the visa requirement:

– the nationals of third countries listed in Annex I who are holders of a local border traffic card issued by the Member States pursuant to Regulation (EC) No .....

– school pupils who are nationals of a third country listed in Annex I and who reside in a Member State and are travelling in the context of a school excursion as members of a group of school pupils accompanied by a teacher from the school in question;

– recognised refugees and stateless persons who reside in a Member State and are holders of a travel document issued by that Member State."

(2) Article 4 is amended as follows:

(a) Paragraph (1)(a) is replaced by the following:

"(a) holders of diplomatic passports, service/official passports or special passports in accordance with one of the procedures laid down in Articles 1(1) and 2(1) of Regulation (EC) No 789/2001;".

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[18] Council document 13054/044, available on http://register.consilium.eu.int.

[19] OJ L 370, 17.12.2004, p. 78.

(b) Paragraph 2 is replaced by the following:

"2. A Member State may exempt from the visa requirement:

(a) a school pupil having the nationality of a third country listed in Annex I who resides in a third country listed in Annex II and is travelling in the context of a school excursion as a member of a group of school pupils accompanied by a teacher from the school in question;

(b) recognised refugees and stateless persons if the third country where they reside and which issued their travel document is one of the third countries listed in Annex II;

(c) members of the armed forces travelling on NATO or Partnership for Peace business and holders of identification and movement orders provided for by the Agreement of 19 June 1951 between the Parties to the North Atlantic Treaty regarding the status of their forces."

(3) Annex I is amended as follows:

(a) a reference to Bolivia is inserted;

(b) the references to Antigua and Barbuda, the Bahamas, Barbados, Mauritius, Saint Kitts and Nevis, and the Seychelles are deleted;

(c) the following point 3 is added:

"3) BRITISH CITIZENS WHO ARE NOT NATIONALS OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND FOR THE PURPOSES OF COMMUNITY LAW:

British Overseas Territories Citizens

British Overseas Citizens

British Subjects

British Protected Persons";

(4) Annex II is amended as follows:

(a) the reference to Bolivia is deleted;

(b) the following lines are inserted:

Antigua and Barbuda

Bahamas

Barbados

Mauritius

Saint Kitts and Nevis

Seychelles

(c) the following point 3 is added:

"3) BRITISH CITIZENS WHO ARE NOT NATIONALS OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND FOR THE PURPOSES OF COMMUNITY LAW:

British Nationals (Overseas)".

Article 2

The Member States shall apply the visa requirement for Bolivian nationals with effect from ...

The Member States shall apply the exemption from the visa requirement for nationals of Antigua and Barbuda, the Bahamas, Barbados, Mauritius, Saint Kitts and Nevis and the Seychelles from the date of entry into force of an agreement on visa exemptions to be concluded by the European Community with the third country in question.

Article 3

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

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