Franco Frattini
Vice-President of the European Commission

Brussels, 22 JAN. 2007

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Dear President, dear Jean-Marie,

I am replying to your letter of 16 November 2006, in which you raise a number of issues related to the visa facilitation and readmission agreements between the European Community and the Russian Federation. In a separate letter dated 22 November, I replied to the more urgent issues related to the SIS II.

Regarding the visa facilitation Agreement between the EC and the Russian Federation, allow me to refer first to Mr Lax's objection to the legal basis. Article 300(1) TEC clearly states that negotiations of international agreements on matters falling under Community competence are conducted by the Commission on the basis of negotiating directives given by the Council. The European Parliament needs to be consulted before the conclusion of the Agreement as laid down in Article 300(3). This provision – even if the EP might regret this – also applies in areas of co-decision. Therefore, in my view, the procedures set up by the EC Treaty have been fully respected in this case as well as in the case of the readmission agreement.

Secondly, as an overall assessment of the visa Agreement, I do not share the view that the Agreement does not constitute an improvement of the 'status quo'. The visa facilitation Agreement contains important facilitations for issuing short-stay visas, which will apply on a reciprocal basis, to citizens of the Schengen Members States and of the Russian Federation. Some of these facilitations apply to all visa applicants; others apply to specific categories who have a particular interest in regular travelling. The Agreement provides for legally binding rights and obligations, which will ensure greater flexibility in the issuing procedures of short-stay visas and exclude an arbitrary processing of visa applications.

Thirdly, there is a general question as to whether it is appropriate to conclude a visa facilitation agreement with the Russian Federation, as long as the border demarcation with all Member States has not been settled and in the light of the assessment made by some of the members of the LIBE Committee, expressing

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Mr Jean-Marie CAVADA
Chairman of the Committee for
Civil Liberties, Justice and Home Affairs
of the European Parliament

Rue de la Loi 200 - B-1049 Brussels
Tel. +32 2 298 75 00 - Fax +32 2 298 85 95 - e-mail: franco.frattini@ec.eu.int

doubts on the respect of human rights in the Russian Federation. I take these issues very seriously. However, it seems to me that not concluding a visa facilitation agreement with Russia will not contribute to solving these two issues. Each year, and this is a simple fact, thousands of EU citizens travel to the Russian Federation and they will benefit from these important visa facilitations.

In this context, I would like to draw your attention in particular to the fact that the Commission has managed to negotiate important visa facilitation for journalists who will no longer require an invitation or a validation by the Russian authorities.

A reply to the more technical questions raised in your letter regarding the visa facilitation Agreement, is set out in annex I to this letter.

As far as readmission agreements are concerned, there is no "one size fits for all" approach. Each negotiation must be considered in its own right and the final result of the negotiation strikes a careful overall balance whilst reflecting the specific circumstances of the third country in question.

Due to the huge size of its territory, its long Eastern borders and the fact that it is a strategic partner of the Union, Russia is a very specific case. The at times difficult negotiations with this country on the conclusion of a readmission agreement lasted for more than 5 years and resulted in a final compromise text which contains all the important elements for a humane and more effective return management in the future. The Eastern flank of the European Union still is a major source for illegal immigration. Therefore the Commission has not only been negotiating with Russia but is also engaged in similar talks with other neighbouring countries in the region, such as Ukraine or Moldova. However, for the specific reasons mentioned before, Russia was granted a longer transitional period for the phasing-in of the readmission obligations with regard to non-nationals.

In this context I would like to point out that, contrary to doubts expressed by the rapporteur Ms Esteves, the readmission agreement with Russia fully respects human rights and fundamental freedoms and is consistent with the European Union's human rights policies. Article 18 (1) of the agreement explicitly clarifies that it is without prejudice to the rights, obligations and responsibilities of the Community, the Member States and the Russian Federation arising from International Law, and in particular from the 1951 Geneva Refugee Convention, the 1950 European Convention on Human Rights and the 1984 UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. In particular the guarantees and rights enshrined in these

international instruments, such as the principle of non-refoulement, will have to be taken into account by Member States' competent authorities before proceeding to return a person to Russia on the basis of the readmission agreement. Depending on the individual case in question, other rights including those related to the protection of children, may become relevant as well. Finally, the agreement also contains detailed data protection provisions.

For a better understanding of its practical functioning, it is important to recall that, generally, readmission agreements only open up channels for orderly and coordinated returns but it remains exclusively for the competent authorities of Member States to decide whether to make use of them. All the Member States are directly bound by the aforementioned International instruments and their individual return decisions, including in border cases, are subject to judicial review before national courts. This means that readmission agreements only come into play once it has been finally established – if need be after national Courts have ruled on the matter – that the person concerned does not have (under any circumstances, including humanitarian ones) a right to stay on the territory of the Member State in question.

A reply to the more technical questions on the readmission agreement, raised by the rapporteur Ms Esteves in her working document, is set out in annex II to this letter.

I conclude by stressing that both agreements, on visa facilitation and readmission, are a balanced package and the result of complex negotiations with the Russian side. These agreements will open the way for easier contacts across the European continent, while creating conditions for effectively fighting illegal immigration.

Sincerely yours

ANNEX I

REPLIES FROM THE COMMISSION ON THE QUESTIONS ON THE VISA FACILITATION AGREEMENT CONTAINED IN THE WORKING DOCUMENT PE 378.863V02-00 DRAFTED BY MS ESTEVES AND TO QUESTIONS FROM MR LAX AND MR TANNOK.

Questions raised in the Working Document PE 378.863V02-00 drafted by Mr Esteves

- Question 1.

In accordance with The Hague Programme approved by the European Council in November 2004, the negotiation and the conclusion of visa facilitation agreements with third countries have to be considered within the framework of the readmission policy of the EC. The conclusion of visa facilitation agreements between the European Community and third countries is therefore not subject to the adoption of the Commission's proposal for a Draft Regulation establishing a Community Code on Visas [COM(2006)403/final/2)] nor to the Schengen Borders Code. Visa facilitations can be negotiated, if deemed appropriate, both on the basis of the current *acquis* on visas and the future Code on Visas.

- Question 2 (also raised in point 4 of Draft opinion of the Committee of Foreign Affairs drafted by Mr Vatanen).

Regarding registration procedures, it has to be noted that the Schengen acquis also imposes in principle -exceptions are allowed- the obligation for aliens to report their entry and that registration, as it applies to all aliens no matter whether they are required to obtain a visa or not- is not properly "a procedure for issuance of visas" which is the subject matter of the visa facilitation Agreement. The compromise reached on this question is the following: (1) Article 10 of the Agreement, which stipulates that the two parties agree to undertake measures as soon as possible to simplify the procedures of registration, with a view to an equal treatment and (2) an exchange of letters with the Russian Federation agreeing to consider regularly this issue in the framework of JHA related meetings between the EU and Russia.

In accordance with this engagement, the Commission has raised regularly this question at several meetings held with the Russian authorities, most recently during the EU-Russia PPC on JLS which took place on 30 October in Helsinki. New Russian legislation on registration of foreigners should be entering into force in January 2007. According to our information on this new law, as from its entry into force, it will be the responsibility of the receiving party to make sure that guests are registered. Moreover, foreigners will be allowed to send their registration papers by registered mail to the Russian authorities. No personal appearance will be required anymore. The Commission will follow closely the implementation of this new law.

- Question 3 (also raised in point 8 of Draft opinion of the Committee of Foreign Affairs drafted by Mr Vatanen).

The negotiations with the Russian Federation on the visa facilitation Agreement were concluded in October 2005, a few months before the adoption of the "common approach on visa facilitation", which was approved in December 2005. In any event, the negotiations with the Russian Federation complied in general with the guidelines established in the common approach. The Russian Federation is a strategic partner of the EU and the Council authorised

the Commission in July 2004 to start negotiations with Russia regarding facilitation of issuance of short-stay visas.

- Question 4 (also raised in point 3 of Draft opinion of the Committee of Foreign Affairs drafted by Mr Vatanen).
The purpose and scope of the Agreement, as laid down in its Article 1, is to facilitate the issuance of short-stay visas. In accordance with Article 2(2) of the Agreement, national law of the Russian Federation, or of the Member States or Community law shall apply to issues not covered by the provisions of this Agreement, such as the refusal to issue a visa, recognition of travel documents, proof of sufficient means of subsistence and the refusal of entry and expulsion measures. These matters were not covered by the mandate given by the Council. It has to be noted that some of them, such as the motivation of the refusal to issue a visa are dealt with in a horizontal way, in the Commission's proposal for a Draft Regulation establishing a Community Code on Visas, which is under discussion at the Council.

- Question 5.
Regarding Directive 2004/114/EC on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service (OJ L375, 23.12.2004,p.12), its subject matter in accordance with Article 1, is to determine the conditions for admission of third-country nationals to the territory of the Member States for a period exceeding three months, for the purpose of studies, pupils exchange, unremunerated training or voluntary service. It must be recalled that the scope of the visa facilitation Agreement with the Russian Federation is to facilitate, on the basis of reciprocity, the issuance of short-stay visas (i.e. up to three months), to the citizens of the European Union and the Russian Federation.

- Question 6.
The Commission has acted in accordance with the negotiating directives given by the Council to negotiate an agreement on facilitation of issuance of short stay visas. Matters mentioned by the *rapporteur* are dealt with in the framework of established cooperation structures with the Russian Federation.

Questions raised by Mr Lax

- Question 1.
Cfr reply in cover letter.

- Question 2.
There is a number of important facilitations that will apply to all visa applicants:
- the **visa fee** applied by Russia has been substantially reduced by aligning it to the current Schengen visa fee (35 €). This fee will be applied to all EU and Russian visa applicants (including tourists) and concerns both single and multiple-entry visas. Moreover, a wide range of categories of persons benefit from a full waiving of the visa fee: close relatives, officials participating in government activities, students, persons participating in cultural and educational exchange programmes or sporting events and humanitarian cases;
- in principle, for all visa applicants, a **decision** on whether or not to issue a visa will have to be taken within 10 calendar days. This period may be extended up to 30 days when further scrutiny is needed. In urgent cases, the period for taking a decision may be reduced to 3 days or less;
- the **documents to be presented have been simplified** for a wide range of categories of persons: close relatives, business people, members of official delegations, students,

participants in scientific, cultural and sporting events, journalists, persons visiting military and civil burial grounds, drivers conducting international cargo and passenger transportation services. For these categories of persons, only the documents listed in the agreement can be requested for justifying the purpose of the journey.

- there are also simplified criteria for issuing **multiple-entry visas** for the following categories of persons:

a) for members of national and regional governments and parliaments, Constitutional and Supreme Courts and spouses and children visiting citizens of the EU or the Russian Federation legally residing in the other Party, but limited to the time of duration of the validity of their authorisation for legal residence: visa of up to five years.

b) for members of official delegations, business people, participants in scientific, cultural and sporting events, journalists and drivers and train crews, provided that during the previous two years they have made use of 1 year multi-entry visas and the reasons for requesting a multi-entry visa are still valid: visas for a minimum of 2 years and maximum of 5 years can be issued.

- Question 3.

Regarding invitations, as pointed out in the reply to the previous question, for a wide range of categories of persons, only the documents listed in the agreement can be requested for justifying the purpose of the journey. No other justification, invitation or validation provided for by the legislation of the Parties is required. This is an important improvement for EU citizens applying for Russian visas in comparison with the current situation, where the invitation from the Russian host needs to be validated by the Russian authorities. As for the registration issue, cfr reply to question 2 of the rapporteur's working document.

- Question 4.

Cfr reply to question 3.

- Question 5.

Regarding the priority requested for "applicants with a clean visa history" it has to be noted that in accordance with the current Schengen acquis, each visa application has to be examined individually by the diplomatic mission or consular post, which shall assume full responsibility on whether there is in particular an immigration risk or a threat to public order. Checks can be reduced where the applicant is known to be a *bona fide* person through the information exchanged in the framework of consular cooperation.

- Question 6 .

The Commission has known about this "extensive border zone" and this issue was raised by Vice President Frattini at the last EU-Russia PPC on JLS issues, which took place on 30 October in Helsinki. Vice President Frattini inquired whether these new rules would somehow prejudge or endanger the full implementation of the local border traffic Regulation.

Presidential Aide Mr Ivanov informed that the Russian legislation on extended border zones aims at improving the effectiveness of border and security controls and operative work along the 10 000-kilometre-long borderline and that there will not be repercussions for the EU. The Commission will closely follow this issue. Moreover, Article 12 of the Visa facilitation Agreement stipulates that, subject to national rules concerning national security of both Parties, the citizens of the European Union shall be entitled to travel within the territory of the Russian Federation on equal basis with the citizens from the Russian Federation and reciprocally, citizens of the Russian Federation shall be entitled to travel within the territory of the Schengen Member States on equal basis with the citizens from the Schengen Member States.

Questions raised by Mr Tannok

- Question 1 (also raised in point 7 and 9 of Draft opinion of the Committee of Foreign Affairs drafted by Mr Vatanen).

The facilitations provided by the Agreement will benefit to all the citizens of the Russian Federation, as defined in Article 3(c) of the Agreement. Negotiations on visa facilitation -and readmission- with the Western Balkans were opened on 30 November 2006.
As regards Moldova, the Commission is in the process of adopting draft negotiating directives for EC readmission and visa facilitation agreements with that country.

- Question 2.
Cfr reply in cover letter.

- Question 3.
Reference can be made to the reply given to written question to the Commission E – 3092/06 by Mr Tannock:

E-3092/06EN
Answer given by Mrs Ferrero-Waldner
on behalf of the Commission
(30.8.2006)

The visa facilitation agreement between the EC and the Russian Federation eases the procedures for issuing short-stay visas – i.e. for intended stays of no more than 90 days - to Russian and EU citizens travelling to the Schengen Member States (all Member States except the United Kingdom (UK) and Ireland) and the Russian Federation respectively.

Article 5(1)(a) of the Agreement provides for the issuing of multiple-entry visas with a term of validity of up to 5 years to members of national and regional governments and parliaments, constitutional and supreme courts of the Member States and the Russian Federation. Members of Parliament or members of the Commission are not to be covered by this provision.

However, the Agreement foresees some facilitations that would apply to members of Parliament or members of the Commission: certain provisions deal with members of official delegations who, following an official invitation addressed to the Member States, the European Union and the Russian Federation, shall participate in meetings in the other Party. These facilitations relate in particular to the simplification of documentation regarding the purpose of the journey, the possibility of issuing multiple-entry visas (valid up to one year in a first stage and up to five years if some conditions are fulfilled for further visas) and the waiving of the fee for processing the visa application.

Other horizontal provisions contained in the Agreement, such as the length of procedures for processing visa applications - 10 calendar days is fixed as the standard time period for taking a decision on the issuance of a visa apply to all visa applicants and thus also to Members of Parliament.

ANNEX II

REPLIES FROM THE COMMISSION ON THE TECHNICAL QUESTIONS ON THE READMISSION AGREEMENT CONTAINED IN THE WORKING DOCUMENT OF 11 OCTOBER 2006, DRAFTED BY MS ESTEVES

- Question 1.1

The practical application of the readmission agreement will fall in the exclusive competence of the competent authorities of Member States; neither the Council nor the Commission (services) will be involved in any return operation under the agreement. When deciding whether or not to make use of the procedures available under the readmission agreement, the competent authorities of Member States will have to take into account all relevant legal and factual aspects of the concrete case in question. This includes the legal issues raised in this question. The fact, however, that a third country has not yet abolished the death penalty is not in itself an obstacle to forced returns to this country.
Cfr also reply in cover letter.

- Question 1.2

Asylum seekers have not been specifically mentioned since they have, for the duration of their asylum procedure, a temporary right to stay on the territory of the Member States. As a consequence, they do not come under the scope of the readmission agreement. This also applies to asylum seekers who lodge an application for asylum at the border. The readmission agreement only covers illegal immigrants, i.e. persons who "do not, or do no longer, fulfil the conditions in force for entry to, presence in, or residence on the territory". It goes without saying that, also in the case of asylum applications lodged at the border, in particular the principle of non-refoulement (Article 33 of the 1951 Geneva Refugee Convention) has to be fully respected by Member States, in accordance with Article 18 (1) of the agreement.

- Question 1.3

Any use of the accelerated procedure for border cases (Article 6 (3) of the agreement) requires that the competent authorities are able to prove that the person concerned entered illegally and came directly from the territory of the other side. There is no presumption of irregularity. However, the very fact of apprehending a person within the immediate proximity of the border has lead to both sides mutually accepting certain facilitations with regard to the means of evidence that need to be produced (see, in particular, Article 10 (4) of the agreement). All this is without prejudice to the right of any third-country national to seek asylum at the border of a Member State (see above).

- Question 1.4

Section IV of the agreement (Articles 14 and 15) deals with transit operations which are different from readmission cases. It is mainly out of considerations of practical convenience that the issue of transit has been negotiated together with readmission rules in one single agreement.
Transit applications are not about requesting the other side to take back a person but to allow the use of the other side's territory for the onward journey to another country which accepted to readmit the person concerned to its territory. The latter has to be assured by the Member

States at the time of submitting a transit application to the Russian authorities (Article 14 (2) in conj. with annex 6 to the agreement), and vice versa. Thus in the framework of transit operations, the country of final destination is always known in advance, otherwise the requested State would not agree to the envisaged transit operation through its territory.

- Question 1.5

The Joint Readmission Committee, established in accordance with Article 19 of the agreement, is a committee of technical experts which is, inter alia, tasked with monitoring the application of the agreement. Given this and considering that all legal and human rights related aspects have already to be taken into account, in each individual case, at the time of the taking of the expulsion decision, this joint body is primarily looking into the *technical* implementation of the agreement. However, should the Commission and Member States become aware that Russia is systematically violating human rights in the context of return operations under the readmission agreement; it will be raised in this committee.

- Question 1.6

The Commission's proposal for a Directive laying down common standards and procedures in Member States for returning illegally staying third-country nations (COM (2005) 391 of 1 September 2005) is still being discussed in the Council and in European Parliament. It is not yet a legally binding text and therefore, already for formal reasons, not of relevance to the readmission agreement.

But also in substantive terms there is no contradiction between the two instruments as they are fully complementary to each other. The proposed return directive seeks to harmonise Member States internal standards and procedures, including those mentioned in this question, which they have to follow in order to arrive at a final expulsion or return decision (*intra-EU dimension*). Once there is such a decision, i.e. once it has been finally established in conformity with national procedures (as harmonised by the proposed directive one day) that a person has to leave the territory since he or she does not or no longer fulfil the conditions for entry, presence or residence, the readmission agreement comes into play (*external dimension*). The readmission agreement deals exclusively with this external phase, i.e. with the actual physical transfer of the person concerned to a country outside the Union which is taking him or her back.

This also illustrates why readmission agreements are so important a policy tool. Any internal return decision of a Member State can only be executed and have any practical effect if the competent authorities of the Member States find a third-country which is willing or obliged to take the person concerned back. Readmission agreements, being binding instruments under international law, create such obligations and lay down the modalities for their practical implementation.

- Question 1.7

The 1954 UN Convention on the status of Stateless Persons has not been explicitly mentioned because, as a matter of principle and for reasons of good drafting technique, Article 18 could not possibly list each and every instrument under International law which might become relevant in the framework of the application of the readmission agreement.

The said Convention is of little relevance as, for the limited purposes of the readmission agreement, stateless persons and third-country nationals are treated alike. Their readmission is only foreseen under very narrow preconditions, laid down in Article 3 and Article 5 of the agreement respectively. In order to be taken back by Russia, Member States will have to prove that a stateless person either (a) unlawfully entered the Member States coming directly from Russian territory, or (b) held, at the time of the submission of the readmission application, a valid visa or residence authorisation issued by Russia.
As far as former own nationals are concerned, special readmission rules have been inserted in Article 2 (1) and Article 4 (1) in conjunction with a joint declaration on these two articles.

- Question 1.8

The readmission agreement is in full compliance with both the substance of Directive 2004/81 (human trafficking directive) and of Directive 2004/83 (qualification directive).

According to Council Directive 2004/81, third-country nationals who have been smuggled or are victims of human trafficking, and who cooperate with the competent authorities of Member States in order to dismantle the organised criminal networks, are entitled to a temporary (renewable) residence permit. This means they are lawfully residing and therefore not coming under the scope of the readmission agreement.

As far as Directive 2004/83 is concerned, see the reply to question 1.2.

- Question 1.9

In the case of (unaccompanied) minors, the UN Convention on the Rights of the Child has to be taken into account by Member States' competent authorities when preparing an expulsion or return decision in order to establish whether, in the light of the concrete circumstances of the individual case, such a decision is really in the "best interest of the child". The readmission agreement only applies to minors for whom the competent authority came to the conclusion – as the case may be after judicial review by a national court – that his or her return is in conformity with this interest.

Similarly, existing family ties (Article 8 of the European Human Rights Convention) as well as cases of illness or pregnancy have to be taken into account by the competent authorities of Member States when preparing an expulsion or return decision.

In addition to these obligations and the general safeguard clause in Article 18 (1), the readmission agreement only contains a few specific rules which are necessary to deal with practical problems arising from returning minors, families or ill or pregnant persons. According to Article 7 (2) in conj. with annex 1 to the agreement, the readmission application should contain information on special protection, help or care needs in the concrete individual transfer case.

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