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REPORT FROM THE COMMISSION

of

**assessing the situation of non-reciprocity with certain third countries in the area of visa
policy**

I. Introduction

Council Regulation (EC) No 539/2001 of 15 March 2001¹ as amended by Regulation (EU) No 1289/2013 of the European Parliament and of the Council of 11 December 2013² provides for a revised reciprocity mechanism in the event that a visa-free third country maintains or introduces a visa requirement for the citizens of one or more Member States. According to this mechanism, within six months of the date of publication of a Member State's notification of non-reciprocity³ and then at regular intervals of up to six months, the Commission has to 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 has decided not to suspend the visa waiver. According to Article 1(4)(f) of Council Regulation (EC) No 539/2001, if the third country has not lifted the visa requirement within 24 months of the date of publication of the notification by the Member State(s) concerned, the Commission will adopt a delegated act temporarily suspending for 12 months the visa waiver for citizens of that third country.

Since the introduction of this mechanism, the Commission, the Member States concerned and the third countries involved have maintained tripartite and bilateral contacts to determine the practical action that would lead to full visa reciprocity being achieved as soon as possible.

Two earlier Commission reports, adopted on 10 October 2014⁴ (hereinafter: first report) and on 22 April 2015⁵ (hereinafter: second report) contain an assessment of the notifications made by Member States, describe the progress made in the tripartite framework, and highlight the issues requiring further attention.

Taking into account the continuing constructive engagement and commitment on all sides, the concrete steps taken in particular by some of the third countries concerned, and the fact that none of the Member States concerned has requested the Commission to suspend the visa waiver, the Commission has decided to present a third report and not to adopt suspension measures.

This report takes stock of developments since 22 April 2015.⁶

II. Steps taken since the adoption of the second report

a. Assessment of the situation per third country for which the Commission has received notifications

i. Australia (Notified by: Bulgaria, Romania)

Bulgaria and Romania notified the eVisitor system, stating that a high number of applications from their citizens were being processed manually, rather than via 'autogrant'.⁷ The Commission concluded in the second report that '*the Australian eVisitor's 'manual*

¹ OJ L 81, 21.3.2001, p. 1.

² OJ L 347, 20.12.2013, p. 74.

³ The Commission published the notifications of non-reciprocity on 12 April 2014. (OJ C 111, 12.4.2014, p.1.).

⁴ C(2014) 7218 final of 10.10.2014.

⁵ C(2015) 2575 final of 22.4.2015.

⁶ On 16 July 2015, the Court delivered its judgment in case C-88/14, *Commission v Parliament and Council*, in which the Commission brought an action for annulment of the revised reciprocity mechanism. The Court rejected the Commission's plea.

⁷ For a description of the eVisitor system, see C(2014) 7218 final of 10.10.2014, p. 7.

*processing' treatment should not be considered as equivalent to the Schengen visa application procedures and thus will not be covered by the reciprocity mechanism'. At the same time, the Commission undertook to monitor the implementation of the system and in particular its 'manual processing' treatment. Romania expressed its disagreement with the Commission's assessment of the eVisitor system *inter alia* at the meeting of the Visa Reciprocity and Visa Suspension Committee on 21 May 2015, but it did not provide any new, substantial arguments which would lead the Commission to change its position.*

The Commission will continue to monitor the implementation of the system via regular contacts with the Australian authorities. If the system is changed in any way that would cause more difficulty for citizens of Member States, the Commission may have to reconsider its position.

As noted in the second report, Australia lifted the airport transit visa requirement for up to 8 hours for Bulgarian citizens in October 2014. On 1 July 2015, Australia informed the Commission that 'Transit without Visa' status for both Romania and Croatia took effect as from 5 June 2015. The website of the Department of Immigration and Border Protection⁸ and IATA's TimaticWeb⁹ have been duly updated to reflect this.

The Commission is pleased that the remaining non-reciprocity issue with Australia has been resolved. Accordingly, and in the absence of other substantial issues to be discussed at this stage, the Commission did not convene a tripartite meeting with Australia in the reporting period.

ii. Brunei Darussalam (Notified by: Croatia)

In addition to the visa obligation imposed by Brunei on Croatian citizens, the Commission also noted in the first report that Brunei limited the duration of visa-free stay for citizens of Liechtenstein to a maximum of 14 days. On 11 February 2015, the Brunei authorities notified the Commission that citizens of Liechtenstein can stay without a visa for up to 90 days.

Concerning Croatia, on 22 June 2015 the Mission of Brunei to the EU notified the Commission that Croatian nationals can also stay without a visa for up to 90 days, pointing out that '*the date of enforcement of the visa exemption [...] will come into force after an Agreement is reached between the two sides*'. According to the website of the Ministry of Foreign Affairs of Brunei, as well as IATA's TimaticWeb, citizens of Liechtenstein are still visa-free for only 14 days, while Croatian citizens are still subject to a visa requirement.

On 4 August 2015, the Commission contacted the Mission of Brunei to the EU again in order to clarify that concluding visa waiver agreements is an exclusive competence of the EU; individual Member States are not in a position to negotiate and sign such agreements. Moreover, Member States (including Croatia), by virtue of Regulation (EC) No 539/2001, already grant visa waiver to the citizens of Brunei. There is therefore no need to conclude a visa waiver agreement.

The Commission is pleased that the decision on a full visa waiver for the citizens of all Member States and Schengen associated countries has been taken by Brunei. The Commission will continue to monitor with the authorities of Brunei the full implementation of the waiver.

⁸ <http://www.border.gov.au/Lega/Lega/Form/Immi-FAQs/do-i-need-a-visa-to-transit-through-australia>
⁹ This is a database providing entry and visa information to airlines.

iii. Canada (Notified by: Bulgaria, Romania)

A third tripartite meeting took place on 22 June 2015, during which Canada highlighted two important measures taken by its Government.

First, Canada decided to expand the future Electronic Travel Authorization (eTA) system to Bulgarian/Romanian citizens who have travelled to Canada on a visa in the previous 10 years or who hold a valid US non-immigrant visa ('low-risk travellers'). The eTA would be extended to those groups of travellers after 15 March 2016, when it becomes a mandatory requirement for visa-exempt travellers, although no specific date has been set yet. Canada anticipates that a 'significant number' of Bulgarian/Romanian citizens will become visa-free upon application of this measure, although no estimated figures were provided.

Second, Canada also announced an 'interim' measure ('CAN+') - which will be put in place after the Canadian parliamentary elections of 19 October 2015 - to facilitate procedures for the same categories of Bulgarian/Romanian citizens. Until the mandatory introduction of the eTA mentioned above, visa applications from Bulgarian/Romanian citizens will be decided in an expedited procedure (in less than 5 days) and applicants will be exempted from submitting supporting documents regarding their financial means. Bulgaria and Romania consider these measures as positive steps, but have stressed that unconditional visa waiver for all EU citizens remains the ultimate goal.

The immigration violation rate and the visa refusal rate — two of the key criteria under Canadian visa policy — are still problematic. In particular, the visa refusal rate is well beyond the 4% threshold (over 3 years). For both Bulgaria and Romania the average for 2012-2014 is above 15%. As regards the threshold related to the immigration violation rate (average of less than 3% over 3 years), both countries have performed better: for 2012-2014, as far as Bulgaria is concerned, the average is slightly over 5%, while for Romania it is 3.9%. However, neither of them is likely to attain these thresholds in the near future. The number of asylum applications is very low; this does not seem to be a problem, not even for Bulgaria, which is the only Member State that has not yet been put on the list of Designated Countries of Origin (DCO).¹⁰

Bilateral exchanges continued both in the capitals of the Member States and in Ottawa. The two Member States undertook to continue working to get closer to the above-mentioned thresholds. Furthermore, Romania reported that an awareness-raising campaign was launched on 7 May 2015, which — among other things — involves sending text messages that advise Romanian nationals entering Canada not to overstay, not to work without authorisation and to abide by Canadian law.¹¹ During the tripartite meeting, Canada reiterated its interest in being regularly updated by Bulgaria/Romania on subjects such as the fight against corruption, the reform of the judiciary and the integration of Roma.

Regarding the establishment by Canada of the eTA system,¹² which will apply to all visa-exempt travellers, Canada confirmed that the system will be mandatory from 15 March 2016. Travellers will have to apply online, the authorisation would in principle be valid for five years and would cost CAD 7. It is estimated that around 94% of the authorisations will be processed in a few minutes after automatic checks in relevant databases. The rest of the applications will be checked manually (mostly for the purpose of name, gender and passport number reconciliation). About 1% of the applicants might be asked additional questions. In

¹⁰ After the meeting, Canada circulated a detailed presentation about its DCO policy to the participants.

¹¹ Romania is implementing a similar campaign vis-à-vis the US and Japan.

¹² http://www.cic.gc.ca/english/visit/eta.asp?utm_source=slash-eta&utm_medium=short-url&utm_campaign=eta

such cases, the file will be transferred electronically to the respective consulate with a view to calling the applicant for an interview and/or requesting certain supporting documents. Denials will never be automatically processed. In the event of denial, applying for a visa would not be an alternative because the denial would, in principle, be based on inadmissibility to enter Canada. However, an individual could apply for a Temporary Resident Permit to overcome inadmissibility. Regarding the data protection aspects, Canada undertook to provide further information. As from 1 August 2015, visa-exempt travellers can apply for an eTA on a voluntary basis.

The Commission will closely monitor the implementation of the system and will invite the Canadian authorities — while finalising the work on the eTA — to bear in mind that the system should constitute the smallest possible additional burden for EU citizens in comparison to the current visa-free travel regime. In this context it should be remembered that in its preliminary assessment of 2 December 2008¹³, the Commission considered that the US ESTA (Electronic System for Travel Authorisation) is not tantamount to the Schengen visa application process (i.e. it was not a breach of visa waiver reciprocity). While the mandatory implementation of the eTA cannot be considered as travel facilitation, it should be noted that the available information suggests that the Canadian eTA will be less burdensome than the US ESTA (it will e.g. be cheaper, issued with a longer validity and on the basis of less data required). Therefore, without prejudging its final assessment after the full implementation of the system, the Commission at this stage considers that the eTA should not be covered by the reciprocity mechanism.

iv. Japan (Notified by Romania)

A third tripartite meeting took place on 24 July 2015. Discussions focused on the possible conversion, on 31 December 2015, of the current temporary visa waiver for Romanian citizens into a permanent one, as well as on the issue of the visa requirement which Japan maintains for holders of Romanian temporary passports.

As regards the first topic, all sides understood that because the visa waiver already exists, although of a temporary nature, the matter as such should not be considered as falling under the reciprocity mechanism. However, given the expiry date of 31 December 2015, it was considered appropriate to have an exchange of views on this matter. Romania underlined the serious efforts taken in past years to improve the relevant statistics (e.g. reducing the number of landing denials or overstays), for instance by information campaigns. Japan provided updated statistics (until February 2015) which show a positive trend. However, Japan was not in a position to say whether the temporary visa waiver would be extended or converted into a permanent one. At the time of the meeting, formal inter-ministerial consultations had not started.

Based on the relevant statistics provided by Japan and the efforts made by the Romanian authorities to respond to the Japanese requests, the Commission expects that the temporary visa waiver for Romanian citizens will be converted into a permanent one, or at least will be extended for several years. The EU side made a strong request to Japan to communicate its decision well in advance so that Romanian citizens travelling to Japan could plan their trips accordingly.

As regards the visa requirement for holders of Romanian temporary passports, the Japanese side requested additional information on certain aspects of the issuing of such passports. It became clear that the Japanese and Romanian approaches to issuing temporary/emergency passports are quite divergent. The Commission and Romania questioned why this very small

¹³ SEC(2008) 2991 final of 2.12.2008.

number (as compared to ordinary passport holders, or holders of temporary passports issued by other Member States) of Romanian citizens would pose a problem to Japan. Japan, on the other hand, as a matter of principle and in line with the global trend on security of travel documents, is not inclined to grant a visa waiver to holders of non-biometric passports, irrespective of the country of issue. Japan said that it only derogates from this principle in cases where temporary, non-biometric passports are issued for true emergency situations (i.e. travellers who are clearly not in a position to obtain a regular, biometric passport). While inter-ministerial consultations are ongoing in Japan on this matter with a view to a possible change of the policy vis-à-vis Romania, Japan would welcome any steps taken by the Romanian Government to reduce the number of (non-biometric) temporary passports issued in general (not only for those willing to travel to Japan). The Commission pointed out that the number of temporary passports issued by Romania had in fact fallen considerably between 2011 and 2013. Due to the different approaches on this matter, and given the very low number of Romanians travelling to Japan with such passports, the Commission requested flexibility from both sides so that this issue could be resolved in the foreseeable future. It is to be noted that the Member States which took the floor on this subject at the meeting of the Visa Reciprocity and Visa Suspension Committee on 21 May 2015, with the exception of Romania, considered that this case is not covered by the reciprocity mechanism.

v. United States of America (Notified by: Bulgaria, Croatia, Cyprus, Poland and Romania)

During the third tripartite meeting held on 23 June 2015, the Commission drew attention to the Renewed EU-US Statement — Enhancing transatlantic cooperation in the area of Justice, Freedom and Security, endorsed by the EU-US JHA ministerial meeting on 3 June 2015, which calls on the parties to continue tripartite meetings with the aim of achieving full visa waiver reciprocity as soon as possible, without prejudice to the necessary US legislative efforts.

The US side reiterated its commitment to this goal and referred to the ongoing good cooperation with the Member States concerned and some positive developments since the last tripartite meeting. In particular, the JOLT Bill,¹⁴ which would increase the threshold of the visa refusal rate criteria from 3% to 10% if all other Visa Waiver Program (VWP) requirements are met, has been reintroduced in Congress. Should this Bill or any other of a similar nature¹⁵ be adopted (which does not seem likely in current circumstances despite the support of some members of Congress for extension of the VWP), it would have a positive impact on three or four Member States for which the visa refusal rate is below 10%. The US Administration has been taking steps to reassure Congress that the VWP is secure, while underlining that any temporary measure adopted by the EU would hamper its efforts to extend the VWP.

Some headway was made in the country-specific dialogues, mainly as regards the VWP requirement for cooperation between law enforcement authorities. Discussions on the required bilateral agreements (preventing and combating crime) with two Member States could be finalised by the end of this year. Cooperation between Member States' Ministries and US Embassies was assessed as positive by all sides. The US was not in a position to provide

¹⁴ <https://www.congress.gov/bill/114th-congress/house-bill/1401/text>

¹⁵ Besides the JOLT Bill, see the 'Bill to amend section 217 of the Immigration and Nationality Act to modify the visa waiver program, and for other purposes' (S.1507), which was introduced in the Senate (<http://thomas.loc.gov/cgi-bin/query/z?c114:S.1507>).

updated figures regarding visa refusals; the data for 2015 will not be available until January 2016.

According to the available data, the 3 % visa refusal rate is only within reach for one Member State (Cyprus). Even if the refusal rate were increased to 10% by Congress, it is still unlikely that all five Member States could join the VWP by April 2016.

The Final Rule of the ESTA was published in the Federal Register on 8 June 2015.¹⁶ The Commission's preliminary assessment shows that the only major change introduced by the Final Rule is that the Secretary of Homeland Security may increase or reduce the ESTA travel authorisation period (which is currently two years as a general rule) on a per country basis to the three-year maximum period or to less than two years. The Commission, in its written comments on the Interim Final Rule sent on 7 October 2010, called on the US Administration to extend the period of validity of the ESTA to three years for all Member States.

On 6 August 2015, DHS Secretary Johnson announced¹⁷ security-related enhancements to the VWP, with a particular reference to the implementation of UNSCR 2178 (2014). The Secretary's announcement highlights three 'new security requirements':

- (1) 'Required use of e-passports for all Visa Waiver Program travellers coming to the United States,
- (2) Required use of the INTERPOL Lost and Stolen Passport Database to screen travellers crossing a Visa Waiver country's borders,
- (3) Permission for the expanded use of US federal air marshals on international flights from Visa Waiver countries to the United States.'

Also in August, the US provided additional information and gave a commitment not to take unilateral steps, but to enter into discussions with the EU/VWP countries to tailor the requirements to the actual situation on the ground in the Member States. The Commission agrees with this approach. It falls outside the scope of this report to provide an analysis of the envisaged measures and assess their likely impacts. From the perspective of this report — which focuses on solving cases of non-reciprocity — the measures are only relevant to the extent that they would impact on the achievement, as soon as possible, of full visa waiver reciprocity for the five Member States. It is not possible to assess this at this stage. Generally speaking, it can be said that introducing additional requirements does not make the Member States' situation easier, be they candidates for or participants in the VWP. On the other hand — and this is the Commission's expectation — by enhancing the VWP, these measures can in fact contribute to creating a better political climate for the designation of new countries to the Program.

In recent discussions with the US, the Commission underlined the importance of ensuring that the implementation of any measure should not hamper the travel of *bona fide* EU citizens to the US. With this in mind, the Commission will closely monitor the security enhancements of the VWP and the implementation of the new provision of the Final Rule.

¹⁶ <http://www.gpo.gov/fdsys/pkg/FR-2015-06-08/pdf/2015-13919.pdf>.

¹⁷ <http://www.dhs.gov/news/2015/08/06/statement-secretary-jeh-c-johnson-intention-implement-security-enhancements-visa>.

b. Assessment of visa non-reciprocity situations with third countries which have not been notified

The only remaining issue under this point concerns Croatian citizens vis-à-vis Barbados. Since Croatia became a member of the EU on 1 July 2013, its citizens should, in accordance with the EC-Barbados visa waiver agreement, be allowed to stay in Barbados for up to three months without a visa. However, Barbados continues to grant a stay of 28 days only. As follow-up to the letter and explanatory note sent to the Embassy of Barbados in Brussels in February 2015, the Commission requested Barbados again in July 2015, via the EU Delegation in Bridgetown, to grant three months' visa-free stay to Croatian nationals.

The Commission will maintain contact with the Barbadian authorities to ensure that the visa waiver agreement is properly implemented as soon as possible.

III. Conclusions

Cooperation in the framework of the revised reciprocity mechanism has continued. Some progress has been made since the adoption of the second report in the following areas.

- Australia has lifted the transit visa requirement for citizens of Croatia and Romania. The Commission will continue to monitor the implementation of the eVisitor system and encourage cooperation between the two Member States concerned and the Australian authorities, aiming at increasing the 'autogrant' rate.
- The Commission welcomes the fact that the decision on full visa waiver for citizens of all Member States and Schengen associated countries has been taken by Brunei. The Commission will follow up implementation by the authorities of Brunei.
- Canada will extend the future eTA system to certain categories of Bulgarian and Romanian citizens after March 2016 which, in practice, will lead to a visa waiver for those travellers. In addition, until the eTA expansion takes effect, Canada will implement further measures to facilitate procedures for those categories of Bulgarian/Romanian citizens via CAN+. The Commission welcomes those measures and hopes that implementation of the eTA system will contribute to lifting of the visa requirement for all Bulgarian and Romanian citizens. The Commission will also closely monitor the implementation of the eTA in relation to other EU citizens who can already travel visa-free to Canada.
- Regarding Japan, the Commission trusts that the visa waiver which is currently granted temporarily to Romanian citizens until 31 December 2015 will be converted into a permanent one, or that it will at least be extended for several years. As regards the visa obligation for Romanian temporary passport holders, it has become clear that the two sides approach this issue from a different angle. Taking into account the extremely low number of travellers concerned and the fact that they are in a position to obtain an ordinary, biometric passport, the Commission calls for a pragmatic approach on both sides to avoid the need for further discussion of this issue, which in practice should not be a major concern for either Romania or Japan.
- Regarding the US, legislative proposals being discussed in Congress aim at increasing the threshold of the visa refusal rate criteria from 3% to 10%. Their adoption could increase the chances of three or four Member States being admitted to the VWP. The Final Rule of the ESTA was published in the Federal Register on 8 June 2015. The Commission will closely follow the security enhancements to the VWP announced on 6 August 2015 and the implementation of the new provision of the Final Rule. At the very least, the Commission expects that the implementation of any new or refined

measure will not hamper the travel of *bona fide* EU citizens; in fact, the flexibility provided by the Final Rule to issue the ESTA for three years should be used for citizens of EU Member States and Schengen associated countries.

The intensive and structured cooperation established in the framework of the revised reciprocity mechanism and in particular the tripartite meetings provide good opportunities for exchanging information. This also contributes to better understanding of each other's policies and to identifying measures and new forms of cooperation that could lead to a reduction in the number of non-reciprocity cases in a shorter period of time. Nevertheless, the Commission notes that these discussions and exchanges are reaching their limits. In the most important remaining cases, Member States are considered by third countries as not meeting objective criteria for visa waiver set out unilaterally in legislation (US) or in a policy framework (Canada).

At this stage, the Commission does not consider that suspending the visa waiver for certain categories of citizens of these third countries would lead to a change in their legislation/policy framework which would ensure full visa waiver reciprocity. Furthermore, none of the Member States concerned has requested the Commission to suspend the visa waiver. In the coming months all sides should intensify their efforts to achieve tangible and concrete progress. According to the Commission's assessment, however, it is unlikely that all non-reciprocity cases involving Canada and the US will be resolved by April 2016.

The Commission remains committed to working with Member States and the third countries concerned in order to achieve full visa reciprocity as soon as possible.