Ulkoasiainministeriö E-KIRJE UM2011-01164

KPA-20 Häkkinen Vesa 14.06.2011

VASTAANOTTAJA
Eduskunta
Suuri valiokunta

Viite

Asia
EU/OSA; komission ehdotus EY:n viisumiasetuksen 539/2001 muuttamiseksi mm. lisäämällä asetukseen ns. suojalauseke kolmannen maan kansalaisten viisumivapauden väliaikaiseksi keskeyttämiseksi. Asetus luettelee kolmannet maat, joiden kansalaisilla tulee olla viisumi Schengenin ulkorajoja ylittäessään, ja ne maat, joiden kansalaiset on vapautettu viisumivaatimuksesta.

U/E-tunnus: **EUTORI-numero:**

Ohessa lähetetään perustuslain 97§:n mukaisesti selvitys komission ehdotuksesta EY:n viisumiasetuksen 539/2001 muuttamiseksi mm. lisäämällä asetukseen ns. suojalauseke kolmannen maan kansalaisten viisumivapauden väliaikaiseksi keskeyttämiseksi. Asetus luettelee kolmannet maat, joiden kansalaisilla tulee olla viisumi Schengenin ulkorajoja ylittäessään, ja ne maat, joiden kansalaiset on vapautettu viisumivaatimuksesta.

Yksikön päällikkö Päivi Blinnikka

Lähetystöneuvos Vesa Häkkinen

LIITTEET COM(2011) 290 final/2
UM2011-01165

Asiasanat	Schengen viisumi, viisumit, oikeus- ja sisäasiat
Hoitaa	**OM, SM, UM**
Tiedoksi	EUE, STM, TH, VM, VNEUS

Ulkoasiainministeriö
Kansalaispalvelut
KPA-20 Häkkinen Vesa

PERUSMUISTIO

UM2011-01165

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Asia

EU/OSA; komission ehdotus EY:n viisumiasetuksen 539/2001 muuttamiseksi mm. lisäämällä asetukseen ns. suojalauseke kolmannen maan kansalaisten viisumivapauden väliaikaiseksi keskeyttämiseksi. Asetus luettelee kolmannet maat, joiden kansalaisilla tulee olla viisumi Schengenin ulkorajoja ylittäessään, ja ne maat, joiden kansalaiset on vapautettu viisumivaatimuksesta.

Kokous

Liitteet

Viite

EUTORI/Eurodoc nro:

U-tunnus / E-tunnus:

Käsittelyn tarkoitus ja käsittelyvaihe:

Komissio on tehnyt ehdotuksen EY:n viisumiasetuksen (Neuvoston asetus (EY) N:o 539/2001, annettu 15 päivänä maaliskuuta 2001, luettelon vahvistamisesta kolmansista maista, joiden kansalaisilla on oltava viisumi ulkorajoja ylittäessään, ja niistä kolmansista maista, joiden kansalaisia tämä vaatimus ei koske) muuttamiseksi. Asetus luettelee kolmannet maat, joiden kansalaisilla tulee olla viisumi ulkorajoja ylittäessään ja maat, joiden kansalaiset on viisumivaatimuksesta vapautettu.

Komission ehdotuksen taustana on eräiden jäsenmaiden vuoden 2010 joulukuun lopulla tekemä ehdotus jonkinlaisen viisumivapauden keskeytysmekanismin, suojalausekkeen, käyttöönotosta. Esitys tehtiin ajallisessa yhteydessä Bosnia-Hertsegovinan ja Albanian viisumivapauden soveltamisen aloittamiseen. Komissio antoikin tuolloin lausunnon, jossa viitattiin Euroopan unionin toiminnasta tehdyn sopimuksen (SEUT) 78 artiklan 3 kohdan mukaiseen mahdollisuuteen ottaa käyttöön väliaikaisia toimenpiteitä, jos kolmansien maiden kansalaisten äkillinen joukoittainen maahantulo aiheuttaa yhdessä tai useammassa jäsenvaltiossa hätätilanteen.

Suojalausekkeen lisäksi komissio esittää asetusta tietyiltä osiltaan muutettavaksi niin, että se vastaisi paremmin niitä vaatimuksia, joita mm. yhteisön viisumisäännöstö (EU-asetus 810/2009) sekä Lissabonin sopimus asettavat EU-säädöksille. Komissio haluaa myös viedä eteenpäin jäsenmaiden viisumipolitiikan harmonisointia ja uudistaa niin sanottua viisumivastavuoroisuusmekanismia suhteessa kolmansiin maihin.

Asia esiteltiin jäsenmaille 25.5.2011 strategisessa maahanmuutto-, raja- ja turvapaikka-asioiden komiteassa (Scifa). Esittelemistä jatkettiin oikeus- ja sisäasiainneuvostossa 9. - 10.6.2011. Aihe on esillä komission toimesta myös neuvoston viisumityöryhmässä 22.6.2011.

Asiakirjat:

COM(2011) 290 final/2, 2011/0138 (COD)

EU:n oikeuden mukainen oikeusperusta/päätöksentekomenettely:

SEUT 77 artikla (2) ja 78 artikla

Käsittelijä(t):

UM/Päivi Blinnikka, 160 55211
UM/Vesa Häkkinen, 160 55219

Suomen kanta/ohje:

Valtioneuvosto on alustavassa kannassaan pitänyt tärkeänä, että asetusta uudistetaan. Erityisen tärkeä on esitys niin sanotusta suojalausekkeesta. Valtioneuvosto katsoo myös, että ennen EU:n ja kolmannen maan välisestä viisumivapaudesta päättämistä kolmansien maiden valmius viisumivapauteen tulisi arvioida jopa nykyistä tarkemmin, sillä mahdolliset viisumivapauteen liittyvät ylilyönnit olisi parempi torjua etukäteen. Suojalauseke antaisi kuitenkin nykyistä paljon paremman mahdollisuuden puuttua epäkohtiin, mikäli niitä kuitenkin syntyisi tarkkaan harkintaan perustuvan viisumivapauden myöntämisen jälkeen.

Valtioneuvosto katsoo alustavassa kannassaan niin ikään, että myös komission esityksen muut osat ovat tärkeitä. Vastavuoroisuusmekanismi vaatii uudistamista, vaikka se on nykyisellääkin toiminut vähintään kohtuullisesti. Komissio on seurannut tarkasti jäsenmaiden tasapuolisen viisumivapauden toteutumista suhteessa kolmansiin maihin; se on myös raportoinut vastavuoroisuuden toteutumisesta vuosittain.

Valtioneuvosto pitää hyvänä, että esityksessä poistetaan epäselvyyttä, jota liittyy Schengeniin kuulumattomissa EU-maissa Britanniassa ja Irlannissa asuvien pakolaisten ja kansalaisuudettomien viisumimääräyksiin heidän matkustaessaan Schengen-alueelle.

Asetuksen ristiriitaisuudet suhteessa yhteisön viisumisäännöstöön (EU-asetus 810/2009) on valtioneuvoston kannan mukaan syytä oikaista.

Valtioneuvosto pitää lisäksi perusteltuna lisätä viisumipolitiikan harmonisointia Schengen-maiden välillä.

Pääasiallinen sisältö:

Komission esityksessä EU:n viisumiasetuksen (Neuvoston asetus (EY) N:o 539/2001, annettu 15 päivänä maaliskuuta 2001, luettelon vahvistamisesta kolmansista maista, joiden kansalaisilla on oltava viisumi ulkorajoja ylittäessään, ja niistä kolmansista maista, joiden kansalaisia tämä vaatimus ei koske), 1 artiklan 4 kohdan c alakohtaa muutettaisiin vastavuoroisuusmekanismin osalta niin, että jäsenmaan ilmoittaessa komissiolle kolmannen maan sille langettamasta viisumivelvollisuudesta komissio raportoi asiasta neuvostolle ja Euroopan parlamentille. Raportti voi sisältää ehdotuksen väliaikaisesta viisumipakosta kyseisen kolmannen maan kansalaisille. Ehdotus voidaan esittää myös, mikäli neuvosto ja parlamentti päätyisivät tällaiseen ehdotukseen omissa. Tämän jälkeen

neuvosto ja parlamentti yhdessä normaalissa menettelyssä hyväksyisivät vastatoimet kyseistä kolmatta maata kohtaan.

Keskeisenä esityksenään komissio esittää suojalausekkeen (uusi 1a artikla) sisällyttämistä viisumiasetukseen, jotta EU:n kolmannelle maalle myöntämä viisumivapaus voitaisiin jäädyttää väliaikaisesti.

Ehdotetun 1a artiklan 1 kohdan mukaisesti edellytyksenä suojalausekkeen käytölle olisi hätätilanne, jossa jäsenmaahan a) viisumivapaasta maasta kuuden kuukauden aikana tulleiden laittomasti maahan jääneiden kansalaisten määrä olisi kasvanut 50 prosenttia verrattuna edellisen kuuden kuukauden määrään tai b) vastaavassa kuuden kuukauden vertailussa turvapaikanhakijoiden määrä olisi kasvanut 50 prosenttia, silloin kun ao. maasta hyväksyttyjen turvapaikkahakemusten määrä on ollut vähemmän kuin 3 prosenttia edeltävällä kuuden kuukauden jaksolla, tai c) vastaavassa kuuden kuukauden vertailussa viisumivapaa kolmas maa olisi torjunut ainakin 50 prosenttia edellistä jaksoa enemmän jäsenmaan esittämiä takaisinottopyyntöjä.

1a artiklan 2 kohdan mukaan edellä mainittujen tilanteiden kohteeksi joutunut jäsenmaa voi ilmoittaa asiasta komissiolle. Ilmoitus on perusteltava täsmällisin tiedoin ja tilastoin ja siihen on liitettävä tieto toimenpiteistä, joihin jäsenmaa on ryhtynyt tilanteen korjaamiseksi.

1a artiklan 3 kohdan mukaan komissio tutkii jäsenmaan ilmoituksen ja ottaa huomioon kohdejäsenmaiden lukumäärän sekä lisääntyneen maahanjäämisen vaikutukset unionin maahantulotilanteeseen tilastojen ja tietojen pohjalta (jäsenmaat, Frontex, European Asylum Support Office). Kolmen kuukauden kuluessa jäsenmaan ilmoituksesta komissio voi tehdä päätöksen ao. kolmannen maan kansalaisten viisumivapauden keskeyttämisestä kuuden kuukauden ajaksi. Päätös tehdään komitologiamenettelyssä (uusi 4a artikla).

1a artiklan 4 kohdassa todetaan, että ennen em. kuuden kuukauden jakson päättymistä komissio antaa yhdessä ko. jäsenmaan kanssa raportin parlamentille ja neuvostolle. Raporttiin voidaan liittää ehdotus asetuksen muuttamisesta niin, että ko. kolmas maa siirretään asetuksen liitteeseen yksi, jossa mainittujen maiden kansalaiset tarvitsevat viisumin. Tällaisessa tapauksessa komissio voi 1a artiklan 5 kohdan mukaan jatkaa viisumivapauden keskeyttämisaikaa vielä yhdeksällä kuukaudella. Päätös tehdään komitologiamenettelyssä (4a artikla)

Komissio esittää samalla asetusta muutettavaksi siten, että artikla 4 muutetaan vastaamaan nykytodellisuutta eräiden erityismatkustusasiakirjojen osalta, joiden viisumivapaudesta jäsenmaat voivat itse päättää. Artiklassa ei ole enää syytä säätää esimerkiksi ilma-alusten miehistöjen viisumivapaudesta koska kaikki jäsenmaat ovat jo vapauttaneet ne. Tätä koskeva maininta lisätään 1 artiklaan.

Kansalliseen päätösvaltaan jäisivät 4 artiklan mukaan yhä diplomaatti-, virka- ja erityispassinhaltijoiden, kansainvälisillä vesillä liikkuvien alusten miehistöjen sekä tiettyjen kansainvälisten järjestöjen ja vastaavien yksiköiden diplomaatti- ja virkapassin- sekä laissez-passer -asiakirjojen haltijoiden mahdollinen viisumivapautus.

4 artiklassa määriteltäisiin lisäksi se, että Iso-Britanniassa ja Irlannissa asuvat pakolaisten sekä kansalaisuudettomien ao. maiden matkustusasiakirjojen haltijoiden viisumivapaudesta päättäminen kuuluisi jäsenmaiden kansalliseen päätösvaltaan. Samassa artiklassa huomioitaisiin myös EU-tuomioistuimen ennakkopäätöksen (ns.

Soysal-tapaus) mukaisesti erityistapauksina Turkin ja EY:n välisen sopimuksen 41 (1) artiklan mukaiset Turkin kansalaiset, jotka tuottavat palveluja EU-alueella.

Lisäksi asetuksen 1 ja 2 artiklojen sanamuotoja tarkistetaan EU:n viisumisäännöstöä vastaaviksi.

Kansallinen käsittely:

Jaosto 6, 16.6.2011

Eduskuntakäsittely:

Käsittely Euroopan parlamentissa:

Kansallinen lainsäädäntö, ml. Ahvenanmaan asema:

Taloudelliset vaikutukset:

Valtioneuvoston näkemyksen mukaan esityksen suojalauseketta koskevalla kohdalla voi toteutuessaan olla positiivisia taloudellisia vaikutuksia laittomiin maahantulijoihin, turvapaikanhakijoihin ja käännytyksiin liittyvien kulujen vähenemisen muodossa. Muuten esityksellä ei ole taloudellisia vaikutuksia.

Muut mahdolliset asiaan vaikuttavat tekijät:

Asiasanat	Schengen viisumi, viisumit, oikeus- ja sisäasiat
Hoitaa	**OM, SM, UM**
Tiedoksi	EUE, STM, TH, VM, VNEUS

EUROPEAN COMMISSION

Brussels, 8.6.2011
COM(2011) 290 final/2

2011/0138 (COD)

CORRIGENDUM
Annule et remplace le document COM(2011) 290 final du 24.5.2011
Concerne uniquement la version EN

Proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

amending Council Regulation (EC) No 539/2001 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

EXPLANATORY MEMORANDUM

1. GENERAL CONTEXT AND GROUNDS FOR THE PROPOSAL

In accordance with Article 62(2)(b)(i) of the Treaty Establishing the European Community, the Council has adopted Council Regulation (EC) No 539/2001[1] listing the third countries whose nationals must be in possession of visas when crossing the external borders (the so-called negative list) and those whose nationals are exempt from that requirement (the so-called positive list). Article 61 of the EC Treaty cited those lists among the flanking measures which are directly linked to the free movement of persons in an area of freedom, security and justice.

Hence, since its adoption, the Regulation has been amended eight times[2]. All the recent modifications of the Regulation focused on the revision of the positive and the negative visa lists annexed to the Regulation, most recently with regard to the transfer of Taiwan to the positive list and also to the outcome of the visa liberalisation dialogues by transferring the two remaining Western-Balkan countries, Albania and Bosnia-Herzegovina to the positive visa list.

Throughout the past years, a need arose to make some further, technical modifications as well to the main text of the Regulation, e.g. strengthening legal certainty by providing rules for certain situations which were not covered yet by the Regulation and adjusting certain definitions due to recent changes brought by secondary legislation, for instance by the adoption of the Visa Code (Council Regulation (EC) No 810/2009)[3].

Furthermore, ten years after the integration of the Schengen acquis into the framework of the EU and the establishment of the common visa policy, in accordance with Article 77(2) (a) of the TFEU, it is necessary to make progress towards further harmonisation of the EU's common visa policy with regard to certain categories listed under Article 4 of the Regulation and left until now to the unilateral decisions of the individual Member States.

Finally, in light of the consequences of the entry into force of the Lisbon Treaty, further modifications are required, such as the introduction of a safeguard clause and a modification of the reciprocity mechanism.

1.1. Summary of the proposed action

The present modification of the Regulation aims at

– providing for a visa safeguard clause allowing the rapid, temporary suspension of the visa waiver for a third country on the positive list in case of an emergency situation, where an urgent response needs to be given to solve the difficulties faced by Member States;

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1 OJ L 81, 21.3.2001, p. 1.

2 Council Regulations (EC) No 2414/2001 of 7 December 2001 (OJ L 327, 12.12.2001, p. 1), (EC) No 453/2003 of 6 March 2003 (OJ L 69, 13.3.2003, p. 10), (EC) No 851/2005 of 2 June 2005 (OJ L 141 4.6.2005, p. 3), (EC) No 1791/2006 of 20 November 2006 (OJ L 363 20.12.2006, p. 1), (EC) No 1932/2006 of 21 December 2006 (OJ L 405 30.12.2006, p. 23), (EC) No 1244/2009 of 30 November 2009 (OJ L 336 18.12.2009, p. 1), (EU) No 1091/2010 of 24 November 2010 (OJ L 329 14.12.2010, p.1) and (EU) No 1211/2010 of 15 December 2010 (OJ L 339 22.12.2010, p.9)

3 OJ L 243 15.9.2009, p. 1.

– modifying certain provisions, e.g. of the reciprocity mechanism, in order to have them fully comply with the respective provisions of the TFEU;

– ensuring compliance with Council Regulation (EC) No 810/2009 establishing a Community Code on visas (Visa Code)[4] applicable since 5 April 2010 by providing e.g. for appropriate definitions concerning short stay and visa;

– ensuring that, in accordance with Article 77(2)(a) of the TFEU, the Regulation determines exhaustively whether a third-country national is to be subject to or exempt from the visa requirement and thus providing legal certainty, by complementing the rules applicable to refugees and stateless persons in order to clarify the applicable visa regime for those residing in the United Kingdom or in Ireland;

– making progress towards a full harmonisation of the common visa policy by providing for new, more harmonised rules with regard to the visa requirement or exemption applicable to various categories of third country nationals;

– providing for clear rules as regards the visa requirement/exemption for holders of laissez-passers and different passports issued by certain entities subject to international law, but which do not qualify as international intergovernmental organisations;

– adopting new provision in respect of obligations for certain Member States flowing from prior EU/international agreements implying the need to derogate from the common visa rules.

2. ELEMENTS OF THE PROPOSAL

2.1. Establishing a visa safeguard clause for suspending visa liberalisation

The JHA Council of 8 November 2010 adopted the visa waiver for Albania and Bosnia-Herzegovina despite the reluctance of certain Member States due to the rapid increase of asylum applications in some Member States after the granting of visa liberalization to some Western Balkan countries. In order to accommodate these concerns, the Commission issued a Statement to strengthen, as a matter of urgency, the post visa liberalisation monitoring in all Western Balkan countries that achieved visa liberalisation, and stated in particular that *in the event of sudden inflow of nationals of one or more third countries, including nationals of the Western Balkans, to one or more Member States, the Commission may propose that the Council adopt provisional measures for the benefit of the Member State(s) concerned in accordance with Article 78 of the Treaty, and a rapid suspension of visa liberalisation.*

Further to the Commission Statement, at the end of December 2010 two Member States submitted a document (doc. 18212/10 VISA 311 COMIX 842), in which they suggested the insertion of a safeguard clause into Regulation 539/2001, giving the power to the Commission to decide on a temporary suspension of the visa waiver, in accordance with a comitology procedure, if certain conditions are met.

A safeguard clause could also help to preserve in the future the integrity of the visa liberalisation processes and to build credibility vis-à-vis the public.

[4] OJ L 243 15.9.2009, p. 1.

Member States have moreover given general support to this suggestion in SCIFA. It was the common understanding of Member States that such a safeguard clause would provide a general framework for the future, without being related to specific third countries.

The clause would be complementary to, but distinct from, the safeguard clause in Article 78(3) of the TFEU. It should be applied only as a temporary measure in clearly defined emergency situations.

The safeguard clause should clearly state that it is about a suspension of the visa waiver only for a short period of time, as a matter of urgency, and on the basis of well defined, delimited criteria. The clause could be triggered only in case of an emergency situation, i.e. if there is a sudden change of the situation, e.g. when the relevant figures increase suddenly within a relatively short period of time, and where an urgent "visa" response needs to be given to solve the difficulties faced by affected Member States, and when measures to be based on Article 78(3) of the TFEU would not constitute an appropriate or sufficient response.

In order to be able to react quickly in the above situations, a decision on the temporary suspension of a visa waiver would be adopted in comitology in accordance with Regulation (EU) No 182/2011[5]: by conferring implementing powers on the Commission, based on Article 291 of the TFEU.

Even if the conditions for triggering the safeguard clause are clearly defined, the Commission shall have to assess the situation and there should be no automatism flowing from the notifications by Member States. When assessing the appropriateness of suspending the visa waiver for a third country, the Commission shall take into account the number of Member States affected by the sudden occurrence of any of the situations listed in this proposal and the overall impact of them on the migratory situation in the EU.

In accordance with the comitology rules in Regulation (EU) No 182/2011, under the examination procedure, the European Parliament and the Council will receive the proposal for a Commission decision suspending the visa waiver for one or more third countries together with other relevant documents, including e.g. possible reports of FRONTEX and EASO and the initial notifications by Member States, at the same time as the committee members.

For suspending a visa waiver, the application of *the examination procedure* seems to be appropriate. The committee shall deliver its opinion by qualified majority. The votes of the members shall be weighted in the manner as set out in the relevant Treaty provision (Art. 238 (3) of the TFEU). Where the committee delivers a positive opinion, the Commission shall adopt the implementing act. If the committee delivers a negative opinion, the Commission shall not adopt the act.

The European Parliament and the Council will have the right of scrutiny to ensure that the Commission does not exceed its implementing powers in accordance with Article 11 of Regulation (EU) No 182/2011.

Furthermore, in the interest of transparency, the Commission could exchange views with the European Parliament at the latter's request, following a proposal to suspend temporarily the visa waiver for one or more third countries.

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[5] OJ L 55, 28.2.2011, p. 13.

Before the end of the temporary suspension period, the Commission would send a report to the European Parliament and the Council accompanied, where considered appropriate, by a proposal to modify Regulation (EC) No 539/2001, in accordance with the ordinary legislative procedure, in order to transfer the third country to the negative visa list. In such a case the suspension measure could be extended by a new implementing decision adopted in comitology for a period of maximum nine months, leaving to the European Parliament and the Council sufficient time to reject or adopt the proposal to amend the lists of Regulation (EC) No 539/2001.

2.2. Modification of the reciprocity mechanism

In the course of a codification exercise concerning Regulation (EC) No 539/2001, the Consultative Working Group of the legal experts of the Commission, the Council and the European Parliament examined the secondary legal base established by Regulation (EC) No 851/2005[6]. Article 1 (4) (c) of Regulation (EC) No 539/2001 as amended reads as follows: "Within 90 days after publication of that notification, the Commission, in consultation with the Member State concerned, shall report to the Council. The report may be accompanied by a proposal providing for the temporary restoration of the visa requirement for nationals of the third country in question. The Commission may also present this proposal after deliberations in Council on its report. *The Council shall act on such proposals by a qualified majority within three months."*

The Consultative Group of the Legal Services considered that the said provision established a secondary legal base which is not manifestly obsolete, and therefore needs to be re-examined in the light of the judgement of the Court of Justice of 6 May 2008 in case C-133/06 with a view to either the deleting or the amending thereof.

In an area in which co-decision applies, it is legally not possible to provide in secondary legislation a simplified procedure allowing the Council to decide on a Commission proposal, without any involvement of the European Parliament.

Consequently, the said provision shall be maintained but modified on the one hand, by providing that the report should also be addressed to the European Parliament and, on the other hand, by adding the co-decisive role of the European Parliament to it.

The codification exercise will continue and be finalised once the present amendment is adopted.

In this context, it should be mentioned that a suggestion has been made by a Member State to *modify the current reciprocity mechanism* in order to make it more efficient. According to the suggestion, the Commission would be obliged to present a proposal, within a very short period of time, for a temporary restoration of a visa requirement for nationals of a third country, which does not lift the visa obligation within a period of no longer than 12 months of its introduction for a Member State.

It is important to stress that such modification of the reciprocity mechanism would infringe the exclusive right of initiative of the Commission and would not necessarily lead to adoption of the proposed retaliatory measure.

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[6] OJ L 141, 4.6.2005, p. 3.

The initial reciprocity mechanism of Regulation (EC) No 539/2001 already contained a certain automatism: the notification of non-reciprocity cases was not mandatory; the Member State concerned was free to decide to notify or not. But if notification took place, then Member States were obliged to impose the visa requirement for nationals of the third country concerned provisionally and automatically, 30 days after the notifications, unless the Council decided otherwise.

This automatism was considered to be the weakness of the initial reciprocity mechanism and thus it has been abandoned in 2005 as being counter-productive. There is no reason to believe that it would entail more efficiency now.

The current reciprocity mechanism, as modified in 2005, is considered to be overall efficient, and the cases of non-reciprocity have been reduced considerably. The remaining non-reciprocity situations are mostly cases where some Member States are considered by third countries not to meet objective criteria for visa waiver set out by these third countries in their domestic legislation.

While the use of comitology procedure is considered when applying the safeguard clause in cases of emergency situations characterised by well-defined conditions (see above point 2.3), in case of introducing the retaliatory measure of restoration of the visa requirement against a third country in case of non-reciprocity, the overall external policy of the European Union with the third country in question should be taken into account, without any automatism, as well as the principle of solidarity amongst EU Member States. A political assessment of the appropriateness of such a measure should be made.

Most Member States also cautioned against an "automatic" (re)imposition of a visa requirement for citizens of third countries due to its political implications and advocated instead for a tailor-made approach and application of provisional measures in other fields.

2.3. Definition of the visa and of short stay without a visa

This proposal aligns the definition of "visa" to the definition used in the Visa Code. Accordingly, a visa is an authorisation of transit through or for an intended stay in the territory of the Member States for a duration of no more than three months in any six-month period from the date of first entry in the territory of the Member States.

For the purpose of this Regulation, the airport transit visa is excluded from this definition, since the visa regime applicable by Member States to third-country nationals transiting through the international airports of Member States is regulated by and contained in the Visa Code.

Nationals of third countries on the list in Annex II shall be exempt from the requirement set out in paragraph 1 for stays in the territory of the Member States not exceeding three months in any six-month period.

This definition also takes into account the implications brought by the interpretation of the three-month short stay rule by the European Court of Justice in case 241/05[7].

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[7] In case 241/05 the European Court of Justice ruled that Article 20(1) of the Convention implementing the Schengen Agreement is to be interpreted as meaning that the term ‘first entry’ in that provision refers, besides the very first entry into the territories of the Contracting States to that agreement, to the

2.4. Refugees and stateless persons residing in the United Kingdom or in Ireland

A previous amendment of Regulation (EC) No 539/2001 in 2006 (Regulation (EC) No 1932/2006) already envisaged to clarify the situation of refugees and stateless persons by adjusting the applicable visa rules distinguishing between those, who are residing in a Member State and those residing in a third country.

On the basis of the Protocol on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and to the Treaty establishing the European Community, Ireland and the United Kingdom are not participating in the adoption of Regulation (EC) No 539/2001 and its amendments. Thus, for Regulation (EC) No 539/2001 the United Kingdom and Ireland are not considered to be Member States. Consequently, the provisions of Regulation (EC) No 1932/2006 on the visa rules applicable for refugees and stateless persons do not apply to such persons when they are residing in the United Kingdom or in Ireland.

The present proposal aims at remedying this unsatisfactory situation by including a provision into the Regulation on refugees and stateless persons residing in the UK or Ireland.

As there is no mutual recognition of visas and no equivalence between a residence permit and a visa in the relationship between, on the one hand, UK and Ireland and, on the other hand, the Schengen Member States, the Regulation leaves the freedom for Member States to decide individually on visa exemption or obligation for this category of persons. Such national decisions should be notified to the Commission in accordance with Article 5 of the Regulation.

2.5. Harmonisation of the visa requirement/exemption for certain categories listed under Article 4 (1)

Article 4 of Regulation (EC) No 539/2001 provides the possibility for Member States to exempt individually different categories of nationals of third countries on the negative list from the visa requirement or to submit to the visa requirement such nationals of third countries on the positive list.

In the view of the Commission, ten years after the integration of the Schengen acquis into the EU time has come to make a next step towards a more harmonised common visa policy. Efforts should be made to fully comply with the Treaty by creating a real common visa policy. For this reason, this proposal aims at limiting the freedom of Member States to grant visa waiver or to impose a visa requirement to various categories of persons covered by Article 4(1) of Regulation (EC) No 539/2001 by establishing further common rules on the visa requirement for some of these categories. However, the proposal also takes into account the current, considerable differences between the practices of Member States in case of certain categories (such as diplomatic and service passport holders) by maintaining the possibility for Member States to continue for the time being to decide individually on the visa

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first entry into those territories taking place after the expiry of a period of six months from that very first entry and also to any other first entry taking place after the expiry of any new period of six months following an earlier date of first entry. This – by analogue interpretation – applies also to stays on the basis of a visa. A short stay visa is a travel visa valid for one or more entries, provided that neither the length of a continuous visit nor the total length of successive visits exceeds three months in any half-year, from the date of first entry. Aliens not subject to a visa requirement may move freely within the territories of the Schengen States for a maximum period of three months during the six months following the date of first entry.

exemption or on the visa requirement except in cases where the EU would negotiate visa waiver agreements for these categories with certain third countries.

2.5.1. Further harmonisation

The Commission endeavours further progress towards full harmonisation with regard to the categories of Article 4(1), for which a de facto harmonisation or quasi harmonisation already exists.

In accordance with the present notifications provided by Member States, *civilian air crew* members are exempted from the visa requirement by all Member States. In such circumstances, maintaining the possibility for Member States to decide freely on the exemption of such category is no longer justified.

As regards *civilian sea crew*, all Member States but two exempt such persons from the visa requirement in case of *shore leave*, while all Member States but two maintain the visa requirement for *transit* purposes. This amendment will therefore set out the general, harmonised visa exemption for the first category and visa requirement for the second one respectively.

There is only one Member State exempting *flight crew and attendants on emergency or rescue flights and other helpers in case of a disaster or accident* from the visa requirement, therefore this Regulation would abolish this category.

2.5.2. Maintaining the rules

For the category of *civilian crew of ships navigating in international inland waterways* the current provisions would be maintained as from Member States' notifications it can be seen that Member States having the Rhine or the Danube flowing across their territories follow divergent practices with regard to the exemption or visa requirement applicable to this category. Furthermore, there is legislative work going on in the CCNR (Rhine Committee) on this issue, which should also be taken into account.

The current possibility for Member States to decide on the exemption of *holders of laissez-passer issued by some intergovernmental organisations* would not be affected by this modification either.

2.5.3. New provision – In respect of obligations flowing from prior EU agreements

Prior to the establishment of the EU common visa policy, the European Union and its Member States have concluded international agreements, like association agreements, with third countries dealing i.a. with the movement of persons and services, which might have an impact on the visa requirement imposed on nationals of third countries. Such international agreements concluded by the Union take primacy over provisions of secondary EU legislation, including Regulation (EC) No 539/2001. In case such international agreements contain a so-called 'standstill clause', it might entail the obligation for certain Member States to derogate from the rules of the common visa policy in accordance with their respective legislations and practices applicable/in force on the date the standstill clause entered into force for them.

Therefore, the Commission proposes the introduction in Article 4 of a provision allowing Member States to exempt service providers from the visa requirement, to the extent necessary

to respect international obligations concluded by the Community before the entry into force of Regulation (EC) No 539/2001.

This proposal is coherent with the ruling of the Court of Justice of the European Union of 19 February 2009 in Case C-228/06, *Mehmet Soysal and Ibrahim Savatli*, in which the Court ruled that "Article 41(1) of the Additional Protocol to the Association Agreement with Turkey, signed on 23 November 1970 in Brussels, is to be interpreted as meaning that it precludes the introduction, as from the entry into force of that protocol, of a requirement that Turkish nationals such as the appellants in the main proceedings must have a visa to enter the territory of a Member State in order to provide services there on behalf of an undertaking established in Turkey, since, on that date, such a visa was not required".

Article 41 of the Additional Protocol lays down a 'standstill' clause, which stipulates that "the Contracting Parties shall refrain from introducing between themselves any new restrictions on the freedom of establishment and the freedom to provide services". At present, the Commission is not aware that other countries than Turkey benefit from a similar 'standstill clause' established by an international agreement concluded with the Union.

Member States concerned by such derogation shall notify it to the Commission and the other Member States.

2.5.4. Procedure to exempt diplomatic and service passport holders of third countries from the visa requirement after the abolition of Council Regulation (EC) No 789/2001[8]

The current text of Article 4(1) of Regulation (EC) No 539/2001 refers to the procedure established by Regulation (EC) No 789/2001 to be followed when a Member State decides to exempt the diplomatic and/or service passport holders of a third country from the visa requirement.

Pursuant to Regulation (EC) No 789/2001, Member States, willing to exempt holders of diplomatic and service passports of third countries whose nationals are subject to prior consultation, should have submitted a legislative initiative, on which the Council decided by qualified majority (since 2006).

As regards the holders of such passports of third countries not subject to prior consultation, Regulation (EC) No 789/2001 obliged Member States to simply communicate to the Council any amendments to their visa rules (requirement or exemption).

However, Regulation (EC) No 789/2001 has been repealed by Council Regulation (EC) No 810/2009 establishing a Community Code on visas (Visa Code)[9]. It was considered that after the repeal of the above Regulation, the appropriate place to cover these "procedural" aspects of national decisions on visa requirement or exemption for such passport holders would be Regulation (EC) No 539/2001, if need be.

Thus, in the framework of the present modification, it needs to be examined whether a specific decision-making procedure should be provided for the case when a Member State wants to abolish the visa requirement for the diplomatic and service passport holders of a third country subject to prior consultation.

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8 OJ L 116 24.4.2001, p. 2.

9 OJ L 243 15.9.2009, p. 1.

In the view of the Commission, there is no need to establish such a specific "common decision mechanism" for this issue, both for institutional and substantive reasons.

As regards the institutional aspects:

After the five years transitional period provided by the Amsterdam Treaty for Title IV of the TEC and the entry into force of the new Treaty on the Functioning of the European Union, it is legally no longer possible to establish a decision making procedure with a right of initiative for a Member State; it is even unacceptable, from an institutional point of view, to accept that a Member State's suggestion or intention (to abolish the visa requirement for diplomatic passport holders of a country under prior consultation) would bind the Commission's right of initiative; the Commission cannot be obliged to present a proposal.

Moreover, if a procedure for a "common decision" would be established, the principles and procedures provided by the TFEU should be respected (see above on the reciprocity mechanism, point 2.2). The Council could not decide alone; such a measure should be adopted in co-decision procedure with the European Parliament.

As regards the substantive aspects:

The decision to ask for prior consultation on the visa applications lodged by the nationals of a certain third country (or certain categories of them) is a purely national decision. The Schengen solidarity implies that the other Member States indeed, systematically, send the visa applications concerned for prior consultation to the requesting Member State.

In principle, the decision to lift the visa requirement for the holders of diplomatic and service passports of countries who figure on the negative list is also a unilateral decision by a Member State. In principle, the other Member States do not have to accept such measures: on the basis of such a decision, the diplomats concerned can travel without a visa to the Member State concerned, but continue to require a visa to travel to the other Member States. Of course, the diplomats are present in the Schengen area without internal borders which could imply a certain risk.

However, the following elements should be recalled:

– if one or more Member States have lifted the obligation for the diplomatic and service passport holders of a certain third country before another Member State adds this country to the list of countries for prior consultation, the earlier lifting of the visa requirement is not at all affected and continues to apply;

– even if in a procedure of prior consultation a Member State opposes the issuing of a visa to an applicant, the Member State processing the visa application is not obliged to refuse the visa; he can decide to issue a visa with limited territorial validity, only allowing access to its own territory this way. Of course, the person is present in the Schengen area without internal borders, which – again – could imply a certain risk.

2.6. Clarifying the situation and establishing the legal basis of the visa requirement or exemption for other entities subject to international law which issue diplomatic or service passport or laissez-passers to its members, but which are not intergovernmental organisations

There are certain entities subject to international law, which do issue diplomatic or service passports or laissez-passers. These entities are not intergovernmental organisations, thus they are not covered at this moment by Article 4 of Regulation (EC) No 539/2001. On the other hand they are included in the Table of travel documents and Member States declared whether they recognise their travel documents or not (e.g. Sovereign Order of the Knights of Malta).

It is necessary to have such entities also covered by Regulation (EC) No 539/2001 and Member States should decide and notify to the Commission in accordance with Article 5 whether they exempt the holders of travel documents issued by such entities.

3. MAIN ORGANISATIONS/EXPERTS CONSULTED

Member States were consulted.

4. IMPACT ASSESSMENT

Not necessary.

5. LEGAL BASIS

In view of the Treaty on the Functioning of the European Union (TFEU), this proposal constitutes a development of the common visa policy in accordance with Article 77(2) (a) of the TFEU.

6. PROPORTIONALITY AND SUBSIDIARITY PRINCIPLES:

Regulation (EC) No 539/2001 lists the third countries whose nationals must be in possession of visas when crossing the external borders (the negative list) and those whose national are exempt from that requirement (the positive list).

The decision to change the lists, to transfer countries from the negative to the positive list or vice versa, and also to make other modifications to the Regulation falls within the competence of the Union in accordance with Article 77(2) (a) of the TFEU. It constitutes a subject matter in which full harmonisation has been pursued for a considerable period of time for obvious efficiency reasons.

7. CHOICE OF INSTRUMENTS

Regulation (EC) No 539/2001 is to be amended by a Regulation.

8. BUDGETARY IMPLICATION

The proposed amendment has no implication on the budget of the EU.

2011/0138 (COD)

Proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

amending Council Regulation (EC) No 539/2001 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

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the functioning of the European Union, and in particular Article 77(2)(a) thereof,

Having regard to the proposal from the European Commission[10],

After transmission of the draft legislative act to the national Parliaments,

Acting in accordance with the ordinary legislative procedure,

Whereas:

(1) This Regulation establishes a visa safeguard clause allowing the rapid, temporary suspension of the visa waiver for a third country on the positive list in case of an emergency situation, where an urgent response is needed in order to resolve the difficulties faced by one or more Member States, and taking account of the overall impact of the emergency situation on the European Union as a whole.

(2) In order to ensure uniform conditions for the implementation of the visa safeguard clause, implementing powers should be conferred on the Commission. Those powers should be exercised in accordance with Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by the Member States of the Commission's exercise of implementing powers[11].

(3) The mechanism regarding reciprocity to be implemented if one of the third countries included in Annex II to Regulation (EC) No 539/2001 decides to make the nationals of one or more Member States subject to the visa obligation needs to be adapted to the entry into force of the Lisbon Treaty in combination with the case law of the Court on secondary legal bases.

(4) In order to ensure consistency with Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code)[12], this Regulation aligns the definition of visa with the Visa Code.

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10 OJ C […], […], p. […].
11 OJ L 55, 28.2.2011, p. 13.
12 OJ L 243 15.9.2009, p. 1.

(5) Further progress should be made towards a full harmonisation of the common visa policy as regards the categories of exceptions which Article 4 of Regulation (EC) No 539/2001 allows the Member States to provide for. To this end, this Regulation amends Article 4 of Regulation (EC) No 539/2001 on matters where a de facto harmonisation or a quasi harmonisation already exists on the basis of convergent practices of Member States.

(6) As Regulation (EC) No 1932/2006 on the visa rules applicable for refugees and stateless persons does not apply to such persons when they are residing in the United Kingdom or Ireland, it is necessary to clarify the situation concerning the visa requirement for certain refugees and stateless persons who reside in the United Kingdom or in Ireland. This Regulation leaves Member States free to decide on visa exemption or obligation for that category of persons. Such national decisions shall be notified to the Commission.

(7) Having regard to certain obligations on the Member States under international agreements concluded by the Community before the entry into force of Regulation (EC) No 539/2001 which imply the need to derogate from the common visa rules, this Regulation introduces a provision allowing Member States to exempt persons providing services during their stay from the visa requirement, to the extent necessary to respect those obligations.

(8) This Regulation provides a legal basis for the visa requirement or exemption of holders of laissez-passer, diplomatic or service passports issued by certain entities subject to international law which are not international intergovernmental organisations.

(9) This Regulation constitutes a development of the Schengen acquis, in accordance with the Protocol integrating the Schengen acquis into the framework of the European Union, as defined in Annex A to Council Decision 1999/435/EC[13] of 20 May 1999 concerning the definition of the Schengen acquis for the purpose of determining, in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union, the legal basis for each of the provisions or decisions which constitute the acquis.

(10) 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 latters' association with the implementation, application and development of the Schengen acquis[14], which falls within the area referred to in Article 1, point (B), of Council Decision 1999/437/EC of 17 May 1999 on certain arrangements for the application of that Agreement[15].

(11) As regards Switzerland, this Regulation constitutes a development of the provisions of the Schengen acquis within the meaning of the Agreement concluded between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of

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13 OJ L 176, 10.7.1999, p. 1.
14 OJ L 176, 10.7.1999, p. 36.
15 OJ L 176, 10.7.1999, p. 31.

the Schengen acquis[16], which fall within the area referred to in Article 1, point (B) of Council Decision 1999/437/EC read in conjunction with Article 3 of Council Decision 2008/146/EC[17].

(12) As regards Liechtenstein, this Regulation constitutes a development of the provisions of the Schengen acquis within the meaning of the Protocol between the European Union, the European Community, the Swiss Confederation and the Principality of Liechtenstein on the accession of the Principality of Liechtenstein to the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen acquis, which fall within the area referred to in Article 1, point (B) of Council Decision 1999/437/EC read in conjunction with Article 3 of Council Decision [xx/2011/EU]. FN [ref. to JO, adopted on 7.3.11; not yet published][18]

(13) This Regulation constitutes a development of provisions of the Schengen acquis in which the United Kingdom does not take part, in accordance with Council Decision 2000/365/EC of 29 May 2000 concerning the request of the United Kingdom of Great Britain and Northern Ireland to take part in some of the provisions of the Schengen acquis[19]. The United Kingdom is therefore not taking part in its adoption and is not bound by it or subject to its application.

(14) This Regulation constitutes a development of provisions of the Schengen acquis in which Ireland does not take part, in accordance with Council Decision 2002/192/EC of 28 February 2002 concerning Ireland's request to take part in some of the provisions of the Schengen acquis[20]. Ireland is therefore not taking part in its adoption and is not bound by it or subject to its application,

HAVE ADOPTED THIS REGULATION:

Article 1

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

1. Article 1 is amended as follows:

(a) paragraph 2 is amended as follows:

(i) the first subparagraph is replaced by the following:

"Nationals of third countries on the list in Annex II shall be exempt from the requirement set out in paragraph 1 for stays not exceeding three months in any six-month period from the date of first entry in the territory of the Member States."

(ii) in the second subparagraph, the following indents are added:

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16 OJ L 53, 27.2.2008, p. 52.
17 OJ L 53, 27.2.2008, p. 1.
18 OJ L ……
19 OJ L 131, 1.6.2000, p. 43.
20 OJ L 64, 7.3.2002, p. 20.

– "civilian air crew members;

– civilian sea crew members when they go ashore who hold a seafarer's identity document issued in accordance with the International Labour Organisation Conventions (No 108 of 1958 and No 185 of 2003) or the IMO London Convention of 1965 (FAL) on the facilitation of international maritime traffic."

(b) in paragraph 4 point (c) is replaced by the following:

(c) "within 90 days after publication of that notification, the Commission, in consultation with the Member State concerned, shall report to the European Parliament and the Council. The report may be accompanied by a proposal providing for the temporary restoration of the visa requirement for nationals of the third country in question. The Commission may also present this proposal after deliberations in the European Parliament and the Council on its report. The European Parliament and the Council shall act on such proposal by the ordinary legislative procedure.

2. The following Article 1a is inserted:

"Article 1a – Safeguard clause

1. Paragraphs 2 to 5 of this Article shall apply in the event of one or more Member States being confronted by an emergency situation characterised by the occurrence of any of the following:

(a) a sudden increase of at least 50%, over a six month period, in the number of nationals of a third country listed in Annex II found to be illegally staying in the Member State's territory, in comparison with the previous six month period;

(b) a sudden increase of at least 50%, over a six month period, in comparison with the previous six month period, in the number of asylum applications from the nationals of a third country listed in Annex II for which the recognition rate of asylum applications was less than 3% over that previous six month period;

(c) a sudden increase of at least 50%, over a six month period, in the number of rejected readmission applications submitted by a Member State to a third country listed in Annex II for its own nationals, in comparison with the previous six month period.

2. A Member State which is confronted by any of the emergency situations described in paragraph 1 may notify the Commission. This notification shall be duly motivated and shall include relevant data and statistics as well as a detailed explanation of the preliminary measures that the Member State concerned has taken with a view to remedying the situation.

3. The Commission shall examine the notification taking into account the number of Member States affected by any of the situations described in paragraph 1 and the overall impact of the increases on the migratory situation in the Union as the latter appears from the data provided by the Member States as well as from reports prepared by FRONTEX and/or the European Asylum Support Office, and, within three months following receipt thereof, the Commission may adopt an implementing decision suspending the exemption of visa requirement for the nationals of the third country concerned for a period of six months. The implementing decision shall be adopted in accordance with the procedure referred to in Article 4a (2). The

implementing decision shall determine the date on which the suspension of the exemption of visa requirement is to take effect.

4. Before the end of the period of validity of the implementing decision adopted pursuant to paragraph 3, the Commission, in cooperation with the Member State(s) concerned, shall submit a report to the European Parliament and the Council. The report may be accompanied by a proposal amending this Regulation in order to transfer the third country concerned to Annex I.

5. Where the Commission has proposed an amendment to this Regulation in order to transfer a third country to Annex I pursuant to paragraph 4, it can extend the validity of the implementing decision adopted pursuant to paragraph 3 for a period of maximum nine months. The decision to extend the validity of the implementing decision shall be adopted in accordance with the procedure referred to in Article 4a (2).

3. Article 2 is replaced by the following:

"For the purposes of this Regulation, "visa" shall mean an authorisation issued by a Member State with a view to transit through or an intended stay in the territory of the Member States of a duration of no more than three months in any six-month period from the date of first entry in the territory of the Member States."

4. Article 4 is amended as follows:

(a) Paragraph 1 is replaced by the following:

"1. A Member State may provide for exceptions from the visa requirement provided for by Article 1 (1) or from the exemption from the visa requirement provided for by Article 1 (2) as regards:

(a) holders of diplomatic passports, service/official passports or special passports;

(b) the civilian crew of ships navigating in international waters;

(c) the holders of laissez-passer, diplomatic or service passports issued by some intergovernmental international organisations or by other entities subject to international law to their officials."

(b) in paragraph 2 the following point (d) is added:

"(d) recognised refugees and stateless persons and other persons who do not hold the nationality of any country who reside in the United Kingdom or in Ireland and are holders of a travel document issued by those Member States".

(c) A new paragraph 4 is added:

"To the extent imposed by the application of Article 41(1) of the Additional Protocol to the Association Agreement between Turkey and the EC, a Member State may provide for exceptions from the visa requirement provided for by Article 1(1), as regards Turkish nationals providing services during their stay."

5. The following Article 4a is inserted:

"Article 4a

Committee procedure

1. The Commission shall be assisted by a committee. That committee shall be a committee within the meaning of Regulation (EU) No 182/2011.

2. Where reference is made to this paragraph, Article 5 of Regulation (EU) No 182/2011 shall apply."

Article 2

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 Treaties.

Done at Brussels, […]

For the European Parliament	*For the Council*
The President	*The President*