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COMMISSION OF THE EUROPEAN COMMUNITIES

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2009/0104 (CNS)

Proposal for a

COUNCIL REGULATION

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

EXPLANATORY MEMORANDUM

1. Context of the proposal

In proposing this amendment to Regulation (EC) No 539/2001¹ as last amended by Regulation (EC) No 1932/2006², the Commission is pursuing the following objectives:

- adjusting the two annexes to the Regulation, so as to fully reflect the new situation in the countries of the Western Balkan region, considering the political commitment taken by the European Union on the liberalisation of the short term visa requirement for the citizens of all Western Balkan countries as part of the Thessaloniki agenda and the progress made in the visa liberalisation dialogues started in 2008 with Albania, Bosnia and Herzegovina, the former Yugoslav Republic of Macedonia, Montenegro and Serbia;
- ensuring that this adjustment for Western Balkan countries is in line with the need for periodic review of Regulation (EC) No 539/2001 and the composition of its annexes – which contain the list of third countries whose nationals must be in possession of visas when crossing the external borders of Member States (Annex I) and the list of those whose nationals are exempt from that requirement (Annex II) – and that it complies with the criteria set out in recital 5, in particular as regards the illegal immigration and public policy criteria for transferring countries from one annex to another as appropriate;
- transferring the former Yugoslav Republic of Macedonia, Montenegro and Serbia from the Annex I to the Annex II of the Regulation; introducing Kosovo under United Nations Security Council Resolution (UNSCR) 1244/99 into Annex I of Regulation (EC) No 539/2001 under "Entities and territorial authorities that are not recognised as states by at least one Member State". This is without prejudice to the status of Kosovo under UNSCR 1244/99.

° Background and existing provisions in the area of the proposal

In accordance with Article 62(2)(b)(i) of the EC Treaty, the Council has adopted Regulation (EC) No 539/2001 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')³. Article 61 of the EC Treaty cites those lists among the flanking measures which are directly linked to the free movement of persons in an area of freedom, security and justice.

The determination of those third countries whose nationals are subject to the visa requirement, and those whose nationals are exempt from it, is governed by a considered, case-by-case assessment of a variety of criteria relating inter alia to illegal immigration, public policy and security, and to the European Union's external relations with third countries, consideration also being given to the implications of regional coherence and reciprocity (see recital 5 of the preamble of Regulation (EC) No 539/2001). As these criteria can evolve over time in relation to third countries, the composition of the negative and positive lists should be reviewed regularly. Hence, since its adoption, Regulation (EC) No 539/2001 has been amended five

¹ OJ L 81, 21.3.2001, p. 1.

² OJ L 405, 30.12.2006, p. 23.

³ OJ L 81, 21.3.2001, p. 1.

times⁴. Taking into account the above-mentioned evolution of the situation in relation to some countries of the Western Balkans, it is appropriate to review the lists again as regards the latter.

° **Short term visa policy for Western Balkan countries – Follow-up of the Thessaloniki agenda**

When adopting Regulation (EC) No 2317/95⁵, the Council determined for the first time such a negative list: this list included Albania, the former Yugoslav Republic of Macedonia and the Federal Republic of Yugoslavia (Serbia and Montenegro). Bosnia and Herzegovina was not included in the list, leaving Member States free to decide on the visa requirement for the nationals of this country: all Member States but one imposed a visa obligation⁶.

When after the entry into force of the Amsterdam Treaty, the Council adopted Regulation (EC) No 539/2001 determining for the first time a negative and a positive list, all the Western Balkan countries but Croatia were included in the negative list: Albania, Bosnia and Herzegovina, the Federal Republic of Yugoslavia (Serbia-Montenegro) and the former Yugoslav Republic of Macedonia. After the independence of Montenegro, Serbia and Montenegro were both included in the negative list⁷.

Heads of State and Government reaffirmed the importance of a dialogue on short term visas in the conclusions of the EU-Western Balkans Summit held in Thessaloniki on 21 June 2003, which also confirmed the European perspective of the countries of the Western Balkans. The “Thessaloniki agenda” confirmed in particular that the perspective of visa liberalisation for the Western Balkan countries is a goal linked to the progress of the countries concerned in implementing major reforms in areas such as the strengthening of the rule of law, combating organised crime, corruption and illegal migration and the strengthening of their administrative capacity in border control and security of documents.

As a first concrete step towards the establishment of a visa free travel regime, and considering that facilitating people to people contacts was as an important condition for a steady development of economic, humanitarian, cultural, scientific and other ties, the European Community concluded in 2007 Visa Facilitation Agreements with Albania, Bosnia and Herzegovina, the former Yugoslav Republic of Macedonia, Montenegro and Serbia⁸ (in parallel with readmission agreements).

The purpose of the agreements was to make it easier for citizens of Western Balkan countries, in particular for those who travel frequently to the European Union, to acquire short stay

⁴ 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).

⁵ Of 25 September 1995 (OJ L234, 3.10.1995, p. 1).

⁶ See, e.g. the Commission Communication pursuant to Council Regulation (EC) No 2317/95 of 25 September 1995 determining the third countries whose nationals must be in possession of visas when crossing the external borders of the Member States (OJ C 101, 3.4.1998, p. 4).

⁷ Amendment of Regulation (EC) No 539/2001 by Council Regulation (EC) No 1932/2006 of 21 December 2006 (OJ L 405, 30.12.2006), and corrigendum (OJ L29, 3.2.2007, p. 10).

⁸ See the preamble of these agreements : with Albania (OJ L 334, 19.12.2007, p. 85), Bosnia and Herzegovina (OJ L 334, 19.12.2007, p. 97), the former Yugoslav Republic of Macedonia (OJ L 334, 19.12.2007, p. 125), Montenegro (OJ L 334, 19.12.2007, p. 169) and Serbia (OJ L 334, 19.12.2007, p. 109).

visas, whilst simultaneously putting in place clear rules for combating illegal immigration through Community readmission agreements. These agreements entered into force on 1 January 2008. During 2008 and 2009 the Commission followed closely the implementation of the Visa Facilitation Agreements by the five Western Balkan countries. On the basis of the results of the first period of monitoring, the Commission considered this new legal instrument to have led to an improvement of the visa issuing procedure in Western Balkan countries.

° **Visa liberalisation dialogue with Albania, Bosnia and Herzegovina, the former Yugoslav Republic of Macedonia, Montenegro and Serbia – achievements of the process**

Opening the Visa Liberalisation Dialogues

Within this dynamic context and in parallel with the implementation of the Visa Facilitation Agreements, the European Commission expressed the intention to start dialogues on visa liberalisation with Albania, Bosnia and Herzegovina, the former Yugoslav Republic of Macedonia, Montenegro and Serbia. In this context, the Commission in its Communication on the enlargement strategy of 6 November 2007⁹ announced its intention to gradually move towards visa liberalisation with the Western Balkan countries through further concrete steps. To that end, it proposed to open a dialogue with each of the countries concerned with a view to establishing a roadmap on the conditions to be met.

The General Affairs and External Relations Council in its conclusions of 28 January 2008 "*welcomed the intention of the European Commission to launch soon a visa dialogue with all countries in the [Western Balkan] region and expressed its readiness to further discuss this issue... with a view to define detailed roadmaps setting clear benchmarks to be met by all the countries in the regions in order to gradually advance towards visa liberalisation. This would enable the Council and the Commission to closely monitor progress in necessary reforms*".

When setting up the methodology for a structured visa liberalisation process with the clear commitment for a result-oriented dialogue, the European Union took into consideration the European perspective of Western Balkan countries, the political commitment made on the liberalisation of short term visas, the conclusion by all five countries of a Community readmission agreement as well as the visa exemption granted to all EU citizens by the countries concerned.

In its Communication on enhancing the European perspective for the Western Balkan countries of 5 March 2008¹⁰, the Commission outlined the process it proposed for moving towards visa liberalisation in the Western Balkans. It underlined the considerable importance visa free travel to the EU bears for the people of the Western Balkans, noted that moving towards a visa free regime is, for all the countries of the region, part of their preparations for EU membership and stressed its intention to closely monitor the implementation of the necessary reforms towards achieving this objective.

The Commission formally launched the visa liberalisation dialogue in early 2008, respectively with: Serbia (30 January 2008¹¹), the former Yugoslav Republic of Macedonia (20 February 2008), Montenegro (21 February 2008), Albania (3 March 2008), Bosnia and Herzegovina (26 May 2009).

⁹ COM(2007) 663, 6.11.2007.

¹⁰ COM(2008) 127, 5.3.2008.

¹¹ This visa liberalisation dialogue does not cover the territory of Kosovo under UNSCR 1244/99.

Roadmaps for each of the five countries concerned were established by the Commission in agreement with the Member States and in consultation with the respective country. The roadmaps aimed at identifying all the measures to be adopted and implemented by each of the Western Balkan countries and to set up clear requirements to be achieved. The process aims at assisting the countries concerned to meet the criteria listed in recital 5 of the preamble of Regulation (EC) No 539/2001. In particular, the roadmaps were divided into four sets of issues: document security, illegal immigration, public order and security as well as external relations items linked to the movement of persons. The dialogues and roadmaps were tailor-made so as to allow each country to focus reform efforts and address the EU's requirements. The speed of movement towards visa liberalisation depends on the progress made by each of the countries in fulfilling the conditions set.

Key Stages in the Process

Based on detailed readiness reports provided by the five countries concerned, the Commission presented in November 2008 a first preliminary assessment to the Council on the progress made by the five countries concerned for the implementation of the roadmaps for visa liberalisation.

On 25 May 2009, after a series of meetings and expert missions to the countries concerned (in which Member States experts were actively involved), the Commission presented to the Council an updated version of the assessment reports. The assessment reports were presented to the Western Balkan countries concerned on 11 and 12 June 2009.

In particular, the updated version of the assessment reports concluded that:

- the former Yugoslav Republic of Macedonia has met all the benchmarks set in the roadmap;
- for two countries, Montenegro and Serbia, important progress has also been achieved and only a very limited number of benchmarks remain open;
- for two others, Albania and Bosnia and Herzegovina, despite the important progress made, a series of benchmarks are still open.

Following discussion of the assessment reports in the competent Council Working Parties, on 15 June 2009 the Council (GAERC) concluded as follows:

"The Council restates its support for the dialogue on visa liberalisation with Albania, Bosnia and Herzegovina, the former Yugoslav Republic of Macedonia, Montenegro and Serbia, based on the roadmaps containing clear and realistic benchmarks and on a country-by-country assessment. The Council recalls that the countries concerned should continue to focus on full implementation of these benchmarks.

In this regard, the Council welcomes the updated assessment reports presented by the European Commission on the progress in the visa liberalisation dialogues with these countries. The reports reflect the clear progress made by these countries in meeting the benchmarks set out in the visa liberalisation roadmaps. In this context, the Council encourages the European Commission to present as soon as possible a legislative proposal amending Regulation (EC) No 539/2001, as it applies to the Member States, in order to achieve a visa free regime ideally by the end of 2009 with those countries that will have met all the benchmarks.

Acknowledging the significance of visa liberalisation for the Western Balkans region, the Council underlines the importance of all the countries concerned achieving a visa free regime by their own merits. Therefore, the Council welcomes the progress achieved so far and calls for the countries in the region to further accelerate and implement reforms to fulfil soon the necessary benchmarks."

The present proposal reflects the outcome of the above-mentioned process: taking into account also, on the one hand, that the Visa Facilitation and Readmission Agreements with the countries concerned are implemented in a satisfactory way and, on the other hand, the respective visa and entry refusal rates for their citizens, the Commission proposes to transfer from the negative to the positive list the former Yugoslav Republic of Macedonia, which already meets all the benchmarks, and Montenegro and Serbia, which are very close to meeting all the benchmarks, it being understood that by the day of adoption of the proposal by the Council, also the latter two indeed should fulfil all benchmarks.

Next Steps

In parallel with the examination of its proposal in the EP and the Council, the Commission will continue to assess the implementation of the open benchmarks for Serbia and Montenegro and it will share its assessment in a timely manner with the EP and the Council.

For Montenegro, the remaining open benchmarks relate to:

- the effective implementation of the Law on foreigners, in force since January 2009;
- the definition of a sustainable solution regarding the status of displaced persons and internally displaced persons, including access to identity documents;
- the strengthening of capacities in the area of law enforcement and the effective implementation of the legal framework for the fight against organised crime and corruption, including through allocation of adequate financial, human and technical resources.

For Serbia, the remaining open benchmarks relate to:

- the improvement of cross-border/boundary surveillance, which includes in particular the exchange of information with EULEX/Kosovo police
- the effective implementation of the Law on Foreigners in force since April 2009 and the adoption of the Migration Management Strategy;
- the effective implementation of the legal framework for the fight against organised crime and corruption, including through allocation of adequate financial and human resources;
- the integrity and security of the procedures followed in issuing new biometric passports to persons residing in Kosovo.

Since 1999 Serbia has not had the possibility to make on the spot verifications regarding persons residing in Kosovo under UNSCR 1244/99. Regarding the issuance by Serbia of the new biometric passports to persons residing in Kosovo, given the absence of a visa liberalisation dialogue, the Commission and the Member States experts were not in a position to verify (in particular through expert missions) the issuing of breeder documents and the

integrity and security of the procedures followed by the Serbian authorities for the verification of the correctness of data submitted by persons residing in Kosovo when applying for new Serbian biometric passports. In order to prevent abuse of this situation in applications for biometric passports, the Serbian authorities announced the establishment in July in Belgrade of a specific Coordination Directorate (in Serbian: *Koordinaciona uprava*), solely in charge of processing all passport applications received from persons residing in Kosovo and persons whose citizenship certificate has been issued for the territory of Kosovo under UNSCR 1244/99.

Therefore, in view of security concerns regarding in particular potential for illegal migration from persons residing in Kosovo and persons whose citizenship certificate has been issued for the territory of Kosovo under UNSCR 1244/99 and in the absence of any verification of the passport issuing procedures followed by the Serbian authorities for this category of persons, the Commission considers that holders of Serbian passports issued by the specific Coordination Directorate (in Serbian: *Koordinaciona uprava*) should be excluded from the visa free regime for Serbia.

For Albania and Bosnia and Herzegovina, the visa liberalisation dialogue will continue and the Commission will intensify its efforts to help these countries meet the benchmarks. The Commission intends to propose transferring them to the positive list as soon as they have fulfilled the necessary benchmarks.

◦ **Further Clarifications Regarding Holders of Biometric Passports and Visa Waiver Agreements**

The introduction of biometric passports by the Western Balkan countries has been an element of fundamental importance for the successful completion of the visa liberalisation dialogues. In this context, for reasons relating to security and prevention of illegal migration, the visa waiver for the citizens of the former Yugoslav Republic of Macedonia, Montenegro and Serbia should only apply to those holding the new biometric passports issued by each of these countries.

Taking into account the European vocation of the Western Balkan countries and the fact that they have already exempted all EU citizens from the visa requirement, there is no reason to condition the implementation of the visa waiver for these three countries on the conclusion of visa waiver agreements with the EC (as was the case for the Bahamas and the 5 other countries transferred from the negative to the positive list in December 2006).

◦ **Kosovo under UNSCR 1244/99.**

The European Council of 19 and 20 June 2008 emphasised the EU's 'willingness to assist the economic and political development of Kosovo through a clear European perspective, in line with the European perspective of the region'. Following the declaration of independence by the Kosovo Assembly on 17 February 2008, the Council declared Kosovo as constituting a *sui generis* case and left it to EU Member States to decide on their relations with Kosovo in accordance with international law and national practice. To date 22 EU Member States have recognised Kosovo as an independent state.

The version of Council Regulation (EC) No 539/2001 currently in force contains no reference to Kosovo. At present the Commission has not opened a visa liberalisation dialogue with Kosovo. Therefore, in line with Article 1(3) of the Regulation (EC) No 539/2001 a reference to Kosovo under UNSCR 1244/99 shall be added to Annex 1 of Regulation so that persons

residing in Kosovo shall be submitted to the visa requirement. This proposal is motivated exclusively by objectively determined security concerns regarding in particular the potential for illegal migration stemming from and transiting through Kosovo under UNSCR 1244/99. This is without prejudice to the current status of Kosovo under UNSCR 1244/99.

2. Legal elements of the proposal

° Summary of the proposed action

- The proposal aims at transferring the former Yugoslav Republic of Macedonia, Montenegro and Serbia from the negative to the positive list, it being understood that the latter two should meet all benchmarks of their respective roadmaps by the date of adoption of this proposal by the Council.
- For the reasons set out above, holders of Serbian passports issued by the Serbian Coordination Directorate shall be excluded from the visa free regime for Serbia.
- Bearing in mind that the introduction of new biometric passports by the Western Balkan countries constitutes a fundamental element in the visa liberalisation dialogues, the visa waiver for the citizens of each of these countries should only apply to those who are holders of such biometric passports.
- Reflecting the current situation, the present proposal should add Kosovo under UNSCR 1244/99 to the negative list as to date no visa dialogue has been opened with Kosovo.

° Legal basis

Regulation (EC) No 539/2001 is based on Article 62(2)(b)(i) of the EC Treaty. The proposal amending this Regulation should follow the same legal basis.

° Proportionality and subsidiarity principles

In accordance with Article 62(2)(b)(i), 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, falls within the exclusive competence of the EC.

° Choice of instruments

A Regulation as the instrument to be amended is Regulation (EC) No 539/2001.

3. Budgetary implication

The proposed amendment has no implication for the Community budget.

Proposal for a

COUNCIL REGULATION

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

THE COUNCIL OF THE EUROPEAN UNION,

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

Having regard to the proposal from the Commission¹²,

Having regard to the opinion of the European Parliament¹³,

Whereas:

- (1) The composition of the lists of third countries in Annexes I and II to Regulation (EC) No 539/2001 of 15 March 2001¹⁴ should be, and should remain, consistent with the criteria laid down in recital (5) thereto. Some third countries, for which the situation has changed as regards these criteria, should be transferred from one Annex to the other.
- (2) With five Western Balkan countries – Albania, Bosnia and Herzegovina, the former Yugoslav Republic of Macedonia, Montenegro and Serbia – Visa Facilitation Agreements entered into force on 1 January 2008, as a first concrete step forward along the path set out by the Thessaloniki agenda towards a visa free travel regime for the citizens of Western Balkan countries. With each of these countries, a visa liberalisation dialogue was opened in 2008 and roadmaps for visa liberalisation have been established. In its assessment of the implementation of the roadmaps of May 2009, the Commission considered that the former Yugoslav Republic of Macedonia has met all the benchmarks set out in its roadmap. Montenegro and Serbia have met the large majority of the benchmarks of their respective roadmaps.
- (3) For persons residing in Kosovo under UNSCR 1244/99 and persons whose citizenship certificate has been issued for the territory of Kosovo under UNSCR 1244/99, a specific Coordination Directorate in Belgrade will be in charge of collecting their passport applications and the issuance of passports. However, in view of security concerns regarding in particular the potential for illegal migration, the holders of

¹² OJ C , , p. .

¹³ OJ C , , p. .

¹⁴ OJ L 81, 21.3.2001, p. 1.

Serbian passports issued by this specific Coordination Directorate (in Serbian : Koordinaciona uprava) should be excluded from the visa free regime for Serbia.

- (4) Therefore the former Yugoslav Republic of Macedonia, Montenegro and Serbia [the latter two meeting all the benchmarks by the date of adoption of the present Regulation], should be transferred to Annex II to Regulation (EC) No 539/2001. This visa waiver should only apply to holders of biometric passports issued by each of the three countries concerned.
- (5) For reasons of legal clarity and security, and in accordance with Article 1(3) of Regulation (EC) No 539/2001, Kosovo under UNSCR 1244/99 should be added to Annex I to that Regulation. This is without prejudice to the status of Kosovo under UNSCR 1244/99.
- (6) As regards Iceland and Norway, this Regulation constitutes a development of provisions of the Schengen acquis within the meaning of the Agreement concluded between the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the association of those two States with the implementation, application and development of the Schengen acquis which fall 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 Agreement¹⁵.
- (7) 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 the Schengen acquis, which fall within the area referred to in Article 4(1) of Council Decision 2004/860/EC on the signing of the said Agreement¹⁶.
- (8) As regards Liechtenstein, this Regulation constitutes a development of provisions of the Schengen acquis within the meaning of the Protocol signed 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 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 the Schengen acquis, which fall within the area referred to in Article 1, point B, of Decision 1999/437/EC read in conjunction with Article 3 of Council Decision 2008/261/EC of 28 February 2008 on the signing of the said Protocol¹⁷.
- (9) This Regulation constitutes a development of the provisions of the Schengen acquis in which the United Kingdom is not participating, in accordance with Council Decision 2000/365/EC of 29 May 2000 on the request by the United Kingdom of Great Britain and Northern Ireland to take part in some of the provisions of the Schengen acquis¹⁸. The United Kingdom is therefore not taking part in the adoption of this Regulation and is not bound by it or subject to its application.

¹⁵ OJ L 176, 10.7.1999, p. 31.

¹⁶ OJ L 370, 17.12.2004, p. 78.

¹⁷ OJ L 83, 26.3.2008, p. 3.

¹⁸ OJ L 131, 1.6.2000, p. 43.

- (10) This Regulation constitutes a development of the provisions of the Schengen acquis in which Ireland is not participating, 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 acquis¹⁹. Ireland is therefore not taking part in the adoption of the Regulation and is not bound by it or subject to its application.
- (11) This Regulation constitutes provisions building on the Schengen acquis or otherwise related to it within the meaning of Article 3(1) of the 2003 Act of Accession and within the meaning of Article 4(1) of the 2005 Act of Accession,

HAS ADOPTED THIS REGULATION:

Article 1

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

1) Annex I shall be amended as follows:

(a) in Part 1, the reference to the former Yugoslav Republic of Macedonia, Montenegro and Serbia shall be deleted;

(b) in Part 2, the following reference shall be inserted:

"Kosovo under UNSCR 1244/99".

2) In Annex II, Part 1, the following references shall be inserted:

"the former Yugoslav Republic of Macedonia (*)

Montenegro (*)

Serbia [excluding holders of Serbian passports issued by the Serbian Coordination Directorate (in Serbian: *Koordinaciona uprava*)](*)

(*) The exemption from the visa requirement only applies to holders of biometric passports".

Article 2

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

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

¹⁹ OJ L 64, 7.3.2002, p. 20.

Done at Brussels,

*For the Council
The President*