



**PILLAR IV
EUROPEAN UNION AND INTEGRATION**

Visa Suspension Mechanism as a Last Resort to Protect the Schengen Area
By Gledis Gjipali and Nirvana Deliu

I. ABSTRACT

This article focuses on the visa policy of the Schengen area and more specifically on the EC Regulation 539/2001 listing the third countries whose nationals must be in possession of visas and those whose nationals are exempt from this requirement while crossing the external borders. This Regulation has faced many amendments, whether adding and removing countries from the lists or the amendment of mechanisms and other tools. A peculiar feature of this policy is that even though a country can be exempted from visa requirement after achieving and fulfilling the required criteria, there are some scenarios or emergency cases that can force the reintroduction of the visa requirement for the concerned country, such as the increase of unfounded asylum applications or security concerns. The article will be focused on the recent changes that the mechanism used in such cases, known as Visa suspension mechanism, has undergone recently.

KEY WORDS: *Suspension Mechanism, Schengen Policy, Visa Liberalisation Process, Western Balkan countries*

ABBREVIATIONS

| | |
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| B&H | Bosnia and Herzegovina |
| Council Regulation No. 539/2001 | Council Regulation No. 539/2001 on “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”. |
| EC/Commission | European Commission |
| EP | European Parliament |
| EU | European Union |
| FYROM | the Former Yugoslav Republic of Macedonia |
| MEP | Member of the European Parliament |
| TEEC | Treaty Establishing the European Community |
| WB | Western Balkans |

I. INTRODUCTION TO THE SCHENGEN AREA AND SCHENGEN POLICY

One of the fundamental rights guaranteed by the European Union, is the Free Movement of persons, giving the right to all EU citizens to travel, work, study or live in any other EU country with no need for special formalities or requirements. The Schengen Area fosters the free movement of citizens for tourism purposes, business purposes or family and study related matters. According to the official webpage of the EU, it is estimated that more than 400 million EU citizens are guaranteed with this opportunity. There are almost 1.7 million people in Europe



ALBANIA

Law Journal

ISSN 2523-1766

LAWJOURNAL.AL ♦ Issue 1 February 2017

who work in a Schengen country different from that in which they live, and every day around 3.5 million people cross internal Schengen-area borders. In addition, there are circa 24 million business trips and 57 million cross-border goods movements within the Schengen area each year. It is estimated as well that every year, Europeans make more than 1.25 billion journeys within this area. A number of studies have demonstrated that economic benefits of Schengen states have been increased over time, while intra-European trade has reached more than €5 trillion in 2014.¹

The first feature of Schengen cooperation is that there is no border check in internal borders while citizens are crossing borders from one Schengen country to another. Yet, it is important to highlight that national authorities are allowed to **carry out police checks** which differ from border checks and are based on general police information. Abolishing the Union's internal borders has tightened the controls on external ones, because the external borders of the countries are as well the external borders of the EU. To ensure and to secure this area a set of rules are set up covering several issues:

- i. harmonisation of the conditions of entry and rules on visas for short stays;
- ii. enhancing police cooperation;
- iii. enhancing judicial cooperation;
- iv. establishing and implementing the Schengen Information System;
- v. a set of documents needed for travelling in Europe;

The free movement has always been one of the fundamental pillars of the Union. In 1985 the signing of the Agreement on the *Gradual Abolition of Checks at Common Borders* was concluded between five European countries: France, Germany, Belgium, Luxembourg and the Netherlands, in a small village in Luxembourg called Schengen. This meant that signatory states had abolished all internal borders and had created a common area. Five years later, in 1990 it was signed the *Convention of Implementing the Agreement*, followed by the *implementation of Schengen Agreements in 1995*, firstly only in seven EU Member states. Despite the fact it started as an intergovernmental initiative, nowadays the Schengen Agreements have been incorporated within the EU Acquis. Yet, it should be made clear that not all EU countries are part of the Schengen area, as well as there are some non-EU states that have joined it. Hence, there are 26 Schengen countries, including 22 EU countries except Bulgaria, Croatia, Cyprus, Ireland, Romania and the United Kingdom. Other states like Iceland, Norway, Switzerland and Liechtenstein, have joined this area, even though as mentioned before, they are not part of the European Union.²

Being an EU member state, does not make a country automatically part of the Schengen Area, because the membership in this area it is not just a political decision, but first of all it is linked

¹ European Parliamentary Research Service, March 2016, *The economic impact of suspending Schengen*, pg. 1-2: <https://goo.gl/KubIQn>

² Official Webpage of European Commission: <https://goo.gl/Q3npR3>



ALBANIA

Law Journal

ISSN 2523-1766

LAWJOURNALAL ♦ Issue 1 February 2017

with completing a list of pre-conditions, by covering all the capacity and expertise in such matters:

- i. responsibility to control the external borders on behalf of the other Schengen States;
- ii. a smooth and efficient cooperation with law enforcement agencies in other Schengen States;
- iii. implementing the Schengen acquis, all the rules consisting of border controls, issuing visas, police cooperation and protection of personal data;
- iv. connect with and use the Schengen Information System.

II. VISA POLICY IN SCHENGEN AREA

In March 2001, following the Schengen acquis and the Schengen Protocol of the European Union and based on Article 62, point 2 (b) of the TEEC, it was adopted the Council Regulation No. 539/2001 containing the list of third country nationals needing Visas and third country nationals exempted from Visas. This Regulation replacing the former Council Regulation No 574/1999 is applied by all Member States including: Iceland, Liechtenstein, Norway and Switzerland. On the other hand, neither the United Kingdom nor Ireland is subject of this Regulation. The determination of the third countries whose nationals are subject to the visa requirement (the so called *negative list*) and those who are exempted from it (the so called *positive list*), is conducted through a case-by-case assessment and evaluation based on a wide range of requirements linked directly to: illegal immigration, public policy and security, and EU's external relations with third countries.³ In legal terms, a third country enters a Visa Free Dialogue with the EU, to be removed from the negative list and to be included in the positive list. Bulgaria and Romania were the first two countries removed from the "negative visa list" in April 2001 and January 2002, respectively. Inclusion in the positive list appeared to increase the illegal migration from these countries within the Schengen area, mainly for job purposes. This experience was evaluated as problematic, but EU and Member States did not provide any instrument to tackle this issue.⁴

All the nationals of the countries which are listed in the Annex 1 of the EC Regulation 539/2001, are required to apply for short stay visa if they intend to enter the Schengen area for a period less than 90 days, as stated at Article 1: "*Nationals of third countries on the list in Annex I shall be required to be in possession of a visa when crossing the external borders of the Member States, while the nationals of third countries on the list in Annex II shall be exempt from the requirement set out in paragraph 1, for stays of no more than three months overall.*" What is relevant to mention is that the composition of the negative and positive lists should be reviewed when appropriate, implying that the composition on both lists can be changed and updated time after

³ Council Regulation (EC) No 539/2001 of 15 March 2001, "*listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement*", Official Journal of the European Communities, L 81, 21.3.2001

⁴ F. Trauner & E. Manigrassi, 2014, *When visa-free travel becomes difficult to achieve and easy to lose: the EU Visa Free Dialogues after the EU's experience with the Western Balkans*, European Journal for Migration and Law, 16 (2014), 123-143.



time, regarding the visa liberalization process with third countries. Up to now the Regulation has been amended 11 times by other Regulations, including Regulation (EU) No 1091/2010 which adjusted the Annex 2 (Positive List), adding Albania and Bosnia & Herzegovina, as countries whose nationals will be exempted from visa requirements. The last amendment is made by the Regulation (EU) No 509/2014 of the European Parliament and of the Council of 15 May 2014.⁵

III. VISA LIBERALISATION PROCESS

Regarding the Western Balkans countries* the first concrete step towards the establishment of a visa free travel regime, was the conclusion of Visa Facilitation Agreements (including readmission agreements) in 2007. This step paved the road to start the structured dialogues on visa liberalization, including detailed roadmaps with clear benchmarks required to be accomplished by the five countries as the only way to progress on visa liberalization process.⁶ The roadmaps prepared by the Commission consisted of 4 challenging and essential topics such as: document security (block 1), illegal immigration and readmission (block 2), public order and security (block 3), as well as external relations and fundamental rights (block 4), as stated at *point (5)* of EC Regulation No. 539/2001.

Following the introduction of the Roadmap for the WB countries, the second phase was the submission by national governments of readiness reports, to help the EC to better understand the situation of each country while comparing it with the standards stated in the Roadmap. Based on these reports, the EC drafted the first Assessment Report which was discussed on 24 November 2008 in the EU Council on WB meeting, so called COWEB. During this meeting FYROM was considered as the frontrunner, followed by Montenegro and Serbia. Regarding Albania and B&H, it was evaluated that they need to put more efforts to undertake the essential reforms.⁷

During 2009 the next phase started, incorporating organized field assessment missions, consisting of experts of the EC and EU Member States, to verify all the information provided by the governments of the WB countries while submitting the readiness reports. Based on field verifications the EC submitted the second Assessment Report, which served as a basis for EC Proposal of 15 July 2009. Almost 5 months later, the Council decided on 30 November 2009 to lift the visa obligation on citizens of the FYROM, Montenegro and Serbia starting from 19 December 2009. Regarding Albania and Bosnia & Herzegovina, despite their progress and efforts, the Council decided to not abolish the visa regime for these countries. Even though the EU has always tried to hide the political dimension of this process, yet the Visa Liberalization process of WB countries had a political impact in internal and external relations and developments. Granting the visa waiver to only three countries, by not including B&H and

⁵ Regulation (EU) No 1091/2010 of the European Parliament and of the Council of 24 November 2010, *amending Council Regulation (EC) No 539/2001*: <https://goo.gl/gCu9Lj>

* All Western Balkan countries except Kosovo

⁶ Proposal for a Regulation of the European Parliament and of the Council of The European Union amending Regulation (EC) No 539/2001, pg. 3-4.: <https://goo.gl/7b9CoE>

⁷ European Movement Albania, 2009, *Visa Liberalization Implications of a proposal*, pg. 4-5: <https://goo.gl/9TrgYA>



Albania in December 2009, increased the criticism against the EU and showed the political dimension of this process alongside the technical and procedural one. Since ethnic Serbs can hold two passports in Bosnia and Herzegovina, the preferential treatment of Serbia was seen to put the already fragile stability of Bosnia further at risk. The EU was presented as being “anti-Muslim” given that Albania and B&H have bigger Muslim populations.⁸

In the meantime, the situation after the visa-free regime with Serbia, FYROM and Montenegro was worsened due to the sudden increase of the number of asylum seekers coming from the three countries. In the first year after visa liberalisation, the asylum applications from Serbian citizens in the EU rose by 76%, and the ones of Macedonian nationals even seven fold, mostly aiming Schengen countries such as Germany and Belgium. This increase of asylum applications was not anticipated in the capitals of EU member states and caused EU politicians to call for new safeguards and emergency measures, which would allow a temporary introduction of visa restrictions in emergency situations.⁹ Countries such as Belgium, Luxembourg, Germany, Austria and Netherlands were requiring EU Institutions to foster the process of security mechanisms. Their argumentation was that only by suspending visas the flow of asylum seekers and illegal migrants from Montenegro, Serbia and FYROM can be stopped or at least will be reduced.

Given the situation, on one hand the increased number of illegal migrants abusing with the visa-free regime, and on the other hand the criticism regarding liberalisation process, EC found a solution for all the actors concerned: the Member States, the WB countries and the EU institutions. Thus, while the process of assessment continued for two of the WB countries, Albania and B&H in April 2010, when the EC proposed to EP and the Council to transfer Albania and Bosnia & Herzegovina to the positive list¹⁰ it included as well the idea of a **post-monitoring mechanism and implementation of a suspension clause**. This safeguard clause was proposed as the main condition from the Netherlands and France to accept the inclusion of Albania and B&H on the visa-free regime, aiming to avoid a repetition of what happened with Macedonia and Serbia.

During the meeting of Justice and Home Affairs Council, while debating B&H and Albania's Visa Liberalization process in November 2010, the EU Commissioner of Home Affairs explained the mechanism that would prevent an abuse regarding visa liberalization process: *“With this decision Albania and B&H join, FYROM, Montenegro and Serbia who already joined the visa free regime. The Commission entered a statement to the minutes of the Council meeting on the establishment of a follow-up mechanism to the visa liberalisation process for the WB countries. This follow-up mechanism concerns the monitoring of the reforms which these countries need to continue to carry out. It also introduces emergency consultation arrangements*

⁸ F. Trauner & E. Manigrassi, *When visa-free travel becomes difficult to achieve and easy to lose: the EU Visa Free Dialogues after the EU's experience with the Western Balkans*, *European Journal for Migration and Law*, 16 (2014), 123-143

⁹ *Ibid*, 123-143

¹⁰ European Movement Albania, 2009, *Visa Liberalization Implications of a proposal*, pg. 4-5: <https://goo.gl/9TrgYA>



to react in the best possible conditions to any specific difficulties which might arise with flows of persons from WB countries and states that the Commission may if necessary propose the suspension of visa free travel. The Commission will report back regularly to the Council and the European Parliament."¹¹

Later on, in May 2011 the Commission presented its proposal on how to amend Council Regulation No. 539/2001 suggesting as well the creation of a safeguard clause for suspending temporarily the visa waiver. The new safeguard system was introduced for B& H and Albania, but became applicable for Serbia, Montenegro and Macedonia as well, which already had benefited from visa-free travel at that time. The monitoring of these countries should not only ensure that the countries continue to meet their obligations of the visa liberalisation dialogue but also act as an "*alert and prevention mechanism*" against abuses of the visa-free regime.¹²

IV. VISA SUSPENSION MECHANISM

The proposed amendments to the Regulation on visa requirements and exemptions in 2011 came to better manage the movement of third country nationals, while establishing a safeguard clause and allowing a temporary suspension of the visa waiver. This amending came at the moment when Visa Liberalisation process with WB countries was completed and many EU Member states were facing a huge number of persons from WB were abusing their right to travel visa free. In order to prevent the '*abuse*' of the visa free regime the commission announced its aim to enforce the monitoring of post visa liberalization process for the WB countries. This safeguard mechanism would "*preserve the integrity of the visa liberalisation processes and build credibility vis-à-vis the public. It would provide a general framework for the future, without being related to specific third countries.*"¹³

During this period there was a debate between the EP and the EC regarding this mechanism. This clause would have a political consequence and EP wanted to give more flexibility to WB countries and more time to react to the post-visa liberalisation context they were dealing with. Another discussion was linked with the comitology procedure regarding how suspension mechanism would be activated, whether with '*delegated acts*' or with '*implementing decisions*', as Commission had proposed. The difference between two proposals was that with delegated acts, the Parliament would have the possibility to block any decision on the reintroduction of visa requirement towards a third country. But this wasn't accepted. After two years of negotiations, in June 2013 a compromise was reached. The suspension mechanism will be activated through implementing acts meaning that there is no need for a co-decision procedure, and the Parliament will only have to be informed. Yet, many members of EP did not agree with this agreement that would leave the EP out of the decision procedure. One of them was Tanja Fajon, the shadow

¹¹ Council of the European Union, November 2010, *Visa liberalisation for Albania and Bosnia and Herzegovina 2010 15957/10 PRESSE 294*

¹² European Commission, May 2011, *Commission staff working paper on the post-visa liberalisation monitoring for the Western Balkan countries in accordance with the Commission Statement of 8 November 2010 - SEC(2011) 695 fina.l*

¹³ European Commission, May 2011, MEMO/11/328, 24: <https://goo.gl/AFmXZ1>



reporter who showed her concerns regarding this new mechanism which could become a “political tool to be used by European Governments and puts in jeopardy the EU’s neighbourhood policy”.¹⁴

On December 2013, with the European Parliament and European Council’s adoption of Regulation 1289/2013 which amends the former regulation 539/2001, the Suspension Mechanism was first introduced. The suspension mechanism established by the new Regulation is described as follows: “a mechanism for the temporary suspension of the exemption from the visa requirement for a third country listed in Annex II to Regulation (EC) No 539/2001 (“the suspension mechanism”) in an emergency situation, where an urgent response is needed in order to resolve the difficulties faced by at least one Member State, and taking account of the overall impact of the emergency situation on the Union as a whole.”¹⁵ This mechanism will play the function of an emergency brake to protect the members States and the Union, in cases where visa-free travel in the EU is assessed as being abused by certain non- EU nationals, whose countries have visa-free travel agreements with the EU.

Three years later, it was the EC on May 4, 2016 that decided to present a proposal to amend the Regulation 539/2001, with the main focus of revising the current suspension mechanism. This was brought into spotlight given the situation of current migratory context in the EU and taking into account the proposals of the EC for visa liberalization with countries such as Georgia, Ukraine and Kosovo. According to suspension mechanism if a member state is facing one of the circumstances mentioned in the Regulation related to third countries nationals, causing an emergency situation, the Member State has the right to request the Commission to suspend for a short period of time the visa waiver for the nationals of that country. In the regulation is clearly mentioned that this mechanism, which can be applied to all existing visa liberalisation agreements, should be used only as a last resort: “the exemption from the visa requirement for nationals of a third country...shall be temporarily suspended in emergency situations, as a last resort, in accordance with this Article.”¹⁶

The visa requirements may be reintroduced for a non-EU country in one or more of the following cases:

- i. a substantial increase in the number of nationals of that country, refused entry or irregularly staying in the EU territory, staying in block longer than allowed;
- ii. a low recognition of asylum applications of around 3 or 4%;
- iii. a lack of cooperation on readmissions (returns of migrants);
- iv. a substantial increase in the risk to public policy or internal security of the member states.¹⁷

¹⁴ Euractiv, 2013, *Legal wrangling looms over EU plan to suspend visa-free travel*: <https://goo.gl/eVckGS>

¹⁵ European Parliament and European Council, December 2013, *Regulation 1289/2013 amending Council Regulation (EC) No 539/2001*: <https://goo.gl/A2li3x>

¹⁶ Ibid

¹⁷ Official Webpage of European Parliament: <https://goo.gl/zPdQgA>



The agreement between European Parliament and Council and Commission was reached on 7 December 2016 and it is assessed as positive regarding two matters: (i) it will make the suspension mechanism most adequate and flexible in addressing the challenges and (ii) it will open the door to further progress on visa liberalization with other countries. Nowadays the visa liberalisation process for countries such Ukraine or Kosovo, are directly connected to the visa suspension mechanism. This was evidenced recently when the EP approved on February 2nd 2017 the visa free regime for Georgian citizens to enter EU. The legislation was formally approved by the Council and was adopted at the same date as the revised suspension mechanism, on 27 February 2017, showing once again the relevance this mechanism has for further advancement of the visa liberalisation process with third countries.

The process of suspension mechanism allows member states to make their request to the Commission, while the Commission would have as well the power to trigger the mechanism on its own initiative. Another role the Commission has is the conduction of the Annual Reports submitted to two other EU institutions, the EP and the Council, regarding the process of third countries exempted by visa requirements. The period to implement the suspension mechanism will be shorter due to the fact that the reference periods and deadlines will foster the procedure. One fundamental amendment is the reducing of the period of the circumstances leading to suspension from six to two months.

Thus, if in a third country one of the abovementioned scenarios happens, for instance a sudden increase of asylum seekers and a low rate of acceptance, may encourage one of the member countries mostly affected by this situation, for example Germany to notify the Commission. On the other hand the request may be conducted by a simple majority of member states, or even Commission itself based on its own report, may request this mechanism. After that the Commission will have one month to decide whether to suspend the visa waiver for a period of nine months for this country. If it agrees, the decision will take effect automatically, meaning that for the nationals of this country the visa regime will be reintroduced. Yet, during the suspension period, the Commission will try, together with the country concerned, to find solutions to the circumstances that led to the suspension.¹⁸ If the circumstances continue the Commission will adopt (at the latest two months within the period of 9 months) a delegated act temporarily suspending the exemption from the visa requirement for a period of 18 months for the nationals of the third country concerned. This decision can be objected by either MEP's or Member States.¹⁹

To avoid the abuse with this mechanism, it is stressed that to activate the suspension mechanism it will take into account the number of member states affected, the overall impact of the increases on migrant numbers in the European Union and public policy and internal security issues.²⁰ If problems will persist, then the Commission can propose to move a third country from the

¹⁸ European People Party, *Visa-free travel: new suspension mechanism protects the EU*: <https://goo.gl/q6DKRH>

¹⁹ Official Webpage of European External Service: <https://goo.gl/dQL6VH>

²⁰ Official Webpage of European Commission, July 2016, *EU visa reciprocity mechanism - Questions and Answers*: <https://goo.gl/ysA6xU>



ALBANIA

Law Journal

ISSN 2523-1766

LAWJOURNAL.AL

Issue 1

February 2017

European Union's "positive list" to its "negative list", implied that its nationals would always have to obtain visas to travel to the European Union. Another important amendment of the Regulation, is that the implementing act will be adopted by Commission during the first 9 months of the suspension procedure, if the circumstances persist the process to continue or to stop the suspension should be decided by the adoption of a delegated act for a further period of 18 months, meaning that the European Parliament will be part of the decision-making process. During this period the Commission will prepare a report that may be accompanied by a legislative proposal to transfer the third country concerned from positive list to negative list.

V. CONCLUSIONS AND RECOMMENDATIONS

After the agreement was confirmed by the Permanent Representatives Committee, on February 27 the Council adopted the regulation to revise the suspension mechanism by strengthening it which can be applied to all existing visa liberalisation agreements. The next steps consist of ratification of the adopted regulation by the Council and the European Parliament and its publication in the EU Official Journal entering into force 20 days later.

The flexibility of the new amendment, in suspending the visa free travel, also increases the likelihood to be applied for the WB countries. The threats coming from the "*Balkan Route*" migration of refugees, even though diminishing, still presents a high rate of asylum applications needs to be addressed with the highest attention. A suspension of visa free travel although temporary affects not only the citizens benefiting from it but also the credibility of the accession process of the WB countries in EU. The developments in this area are also heavily affected more than ever by the internal political dynamics in the Members States which are less friendly towards free movement and increasingly concerned about security. Such dynamics are out of the influence of the WB countries however we need to follow closely the policy and legislative developments in the EU and Member States and reflect accordingly in our policies and legislations. Albeit worries and concerns the extension of visa free policies towards other countries like Georgia, Ukraine and soon Kosovo demonstrates the goodwill and trust of EU institutions and Member States on the free movement of people. The Western Balkan countries should demonstrate the same level of engagement and trust in adapting and reforming their institutions and legislation to create a more secure and free region and at the same time European Union.