
GEPLAC ACTIVITIES

Visa Facilitation Regime with the European Union: Legal Basis and Conditions

JURIS GROMOV^{*}

The goal of this article is to provide a brief overview of the legal basis and the conditions for the conclusion of agreements between the European Community and the Third Countries on the facilitation of the issuance of visas as well as to provide recommendations for Georgia on the steps for the achievement of the visa facilitation regime with the European Union.

1. Legal Basis for the Conclusion of Visa Facilitation Agreements

Although the foundations of the European Union visa policy can be traced back to the Agreement on the gradual abolition of checks at common borders signed on 14 June 1985, the Convention Implementing the Agreement signed on 19 June 1990 as well as all the acts adopted under their framework (referred further as the Schengen *acquis*), from the legal point of view this initial policy was developed outside the European Community legal framework by then the much smaller group of the EU Member States; that is, the Schengen states.

After the Treaty on the European Union entered into force, “immigration policy was limited to co-operation in the areas of asylum and the reciprocal recognition of transit visas located in the ‘third pillar’ of Justice and Home Affairs where decisions required EU Member States’ unanimity and the European Court of Justice could not rule on the validity of provisions or act to enforce them.¹ Only few aspects of the visa policy were added to the European Community competence. Article 100c(1) of the Treaty establishing the European Community (amended by Treaty on European Union) provided for “The Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, shall determine the Third Countries whose nationals must be in possession of a visa when crossing the external borders of the Member States.”

^{*} GEPLAC expert, a Representative of Latvia for the Odysseus Academic Network for Legal Studies on Immigration and Asylum, a lecturer at the University of Latvia and a visiting lecturer at the Riga Graduate School of Law.

¹ *Caviedes*, The Open Method of Co-ordination in Immigration Policy: A Tool for Prying Open Fortress Europe? *Journal of European Public Policy*, 11:2 April 2004, 293.

Finally after the entry into force of the Amsterdam Treaty on 1 May 1999² and the introduction of the goal to develop the Area of Freedom, Security and Justice, Article 62 (2) - (3) of the amended Treaty establishing the European Community³ laid down the basis of the modern common visa policy of the European Union providing that “the Council shall, within a period of five years after the entry into force of the Treaty of Amsterdam, adopt:

2) measures on the crossing of the external borders of the Member States which shall establish:

a) standards and procedures to be followed by Member States in carrying out checks on persons at such borders;

b) rules on visas for intended stays of no more than three months, including:

(i) the list of Third Countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement,

(ii) the procedures and conditions for issuing visas by Member States,

(iii) a uniform format for visas,

(iv) rules on a uniform visa;

3) measures setting out the conditions under which nationals of Third Countries shall have the freedom to travel within the territory of the Member States during a period of no more than three months.”

2. Brief History of the Negotiations of the Visa Facilitation Agreements

After the Amsterdam Treaty, the system of visa facilitation agreements between the EC and Third Countries started to develop in a relatively fast manner. Partially, it can be explained by the implications of the EU enlargement process when in most cases the Accession Countries started to implement the EU *acquis communautaire* on visas a few years before the actual EU enlargement date of 1 May 2004. This created a “spillover effect” since the then-Accession Countries started to adopt the national laws with the rules almost identical to the EU visa regime (for example, in terms of the Third Countries whose nationals shall be in possession of visas), creating the Schengen-like barriers in the countries which at that time were not yet EU Member States. In some Accession Countries, it created highly political problems (for example, in Poland whilst introducing the visa regime for Ukraine and Russia⁴). As regards the EU Member States, it should be stressed that EC law did not prevent EU Member States (Schengen States), which were the neighbours of a particular

² Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing European Communities and certain related acts, as signed in Amsterdam on 2 October 1997, Official Journal of the European Communities C 340 of 10 November 1997.

³ Treaty establishing the European Community (consolidated text), Official Journal of the European Union C 325 of 24 December 2002.

⁴ *Truszczyński*, Problems Concerning the Implementation of the Justice and Home Affairs Acquis by the Candidate Countries – a Polish View, Closing Lecture at the Cicero Foundation Great Debate Seminar on Justice and Home Affairs – How to Implement the Amsterdam Treaty?, Paris, 13-14 April 2000.

Third Country, from introducing national visas (which could also be less expensive than the so-called Schengen visas) for the nationals of this country. Such visas, however, would only be valid in the EU Member State in which they were issued. Finally, it should also be said that due to the provisions of the visa facilitation agreements do not apply to the territory of the United Kingdom and Ireland as well as to the procedures for issuing visas by the diplomatic missions and consular posts of Denmark. In the case of the EC-Ukraine visa facilitation agreement, for example, the special declarations specify that “it is desirable” that the authorities of the United Kingdom, Ireland and Ukraine conclude bilateral agreements on the facilitation of the issuance of visas whilst for those authorities from Denmark, the formulation particularly stipulates that “it is desirable that the authorities of Denmark and of Ukraine conclude, without delay, a bilateral agreement on the facilitation of the issuance of visas in similar terms as the Agreement between the European Community and Ukraine.”

In 2004, the EU signed the Memorandum of Understanding between the European Community and the National Tourism Administration of the People’s Republic of China on visa and related issues concerning tourist groups from the People’s Republic of China⁵ which can be considered, although in its limited scope (tourist groups only), as the first visa facilitation agreement between the EC and a Third Country. At the end of the same year, the Hague Programme was adopted by the EU with a view to strengthen the Area of Freedom, Security and Justice. This document stresses the primary importance of having the readmission agreements concluded and the reciprocity principle followed and the European Council invited „the Council and the Commission to examine, with a view to developing a common approach, whether or not it would be opportune to facilitate, upon a case by case basis, the issuance of short-stay visas to Third-Country nationals, where possible and upon a basis of reciprocity, as part of a real partnership in external relations, including migration-related issues,” in the context of the EC readmission policy.⁶ Then, due both to Russia’s continuous requests and in order to accelerate the negotiations on the readmission agreement with this country (which lasted five years⁷), the Council approved a negotiating mandate for the conclusion of the visa facilitation agreement with Russia. Both the visa facilitation and readmission agreements were negotiated

⁵ Council Decision 2004/265/EC of 8 March 2004 concerning the conclusion of the Memorandum of Understanding between the European Community and the National Tourism Administration of the People’s Republic of China on visa and related issues concerning tourist groups from the People’s Republic of China (ADS), Official Journal of the European Union L 83, 12, 20.03.2004. Memorandum of Understanding between the European Community and the National Tourism Administration of the People’s Republic of China on visa and related issues concerning tourist groups from the People’s Republic of China, Official Journal of the European Union L 83, 14, 20.03.2004.

⁶ The Hague Programme: Strengthening Freedom, Security and Justice in the European Union, Doc. No. 16054/04, JAI 559, Brussels, 13 December 2004, 18.

⁷ Agence Europe, Agreements on Visas and Illegal Immigrants, Brussels, 14.10.2005.

⁸ *Papagianni*, Institutional and Policy Dynamics of EU Migration Law, Martinus Nijhoff Publishers, Brill Academic, 2006, 140.

in parallel and concluded at the same time.⁸ Since the opening of the negotiations for the visa facilitation between the EC and Ukraine in November 2005,⁹ the EU switches to the practice of simultaneous negotiations of both the readmission and the visa facilitation agreements with the particular Third Country. In this case, the burden imposed on the Third Countries by the common readmission agreements are in some way counterbalanced by the opportunities provided by the visa facilitation agreements. In its turn, EU Member States are reassured that they will have an effective tool in case of the misuse of the visa rules by the nationals of the Third Countries.¹⁰ In November 2006, the Council adopted the mandates for both the visa facilitation and readmission agreements with the Western Balkan states (except Croatia which enjoys a visa free regime with the EU and, in the case of Albania, only for the visa facilitation agreement since this country already had a readmission agreement with the EC).¹¹ Finally, the mandate for Moldova was adopted by the Council in December 2006. Currently, the following Third Countries enjoy a visa facilitation regime with the EU; namely, Russia, Ukraine, Moldova, Bosnia and Herzegovina, Montenegro, Serbia, the Former Yugoslav Republic of Macedonia and Albania.

Although one can find the similarity of the texts of the visa facilitation agreements concluded so far, the European Commission stresses that they are indeed “tailor-made, responding to the specific needs of the Third Country concerned and providing simplification of the short-term visa issuing procedures for certain categories of persons.”¹² The differences between these agreements becomes more visible if one compares the categories of persons benefiting from a waiving of the visa fee (please see table below). Seemingly, some of these beneficiaries were subject of the particular negotiations in the case of each agreement in some instances.

Category	Russia	Ukraine	Moldova	Western Balkan states
Close relatives (spouses, children, parents, grandparents, grandchildren)	X	X	X	X
Members of official delegations	X	X	X	X
Members of regional or national government and parliaments, Constitutional or Supreme Courts	X	X	X	
Pupils, students and accompanying teachers	X	X	X	X

⁹ Agence Europe, EU to Open Negotiations with Ukraine, Brussels, 08.11.2005.

¹⁰ The comprehensive analysis of both contents of the visa facilitation agreements and the readmission agreements and their mutual linkage and impact upon EU member States and Third Countries can be found in Trauner/Kruse, Readmission Agreements: Implementing a New EU Security Approach in the Neighbourhood, CEPS Working Document No. 290, April 2008.

¹¹ Agence Europe, Council Adopts Negotiation Mandates on Visa Facilitation and Readmission Agreements, Brussels, 13.11.2006.

¹² Communication from the Commission to the Council and the European Parliament on strengthening the European Neighbourhood Policy, COM(2006)726 final, 6.

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Category	Russia	Ukraine	Moldova	Western Balkan states
Disabled persons and those accompanying them	X	X	X	X
Persons travelling on humanitarian grounds, including medical purposes	X	X	X	X
Participants in international sports events and persons accompanying them		X	X	X
Participants in youth international sports events	X		X	X
Participants in scientific, cultural and artistic activities	X	X	X	X
Participants in official exchange programmes organised by twin cities	X	X	X	X
Journalists		X	X	X
Pensioners		X	X	X
Drivers of international cargo and passenger transportation		X	X	X
Members of train, refrigeration and locomotive crews		X	X	X
Children under the age of 18 and dependent children under the age of 21		X		X
Members of professions participating in international exhibitions, conferences, symposia, seminars or similar events			X	X
Representatives of the civil society organisations				X
Representatives of religious communities				X
Children under the age of 6				X
Mayors and members of municipal councils				Only FYROM
Politically persecuted persons during the communist regime				Only Albania ¹³

¹³ Trauner/Kruse, Readmission Agreements: Implementing a New EU Security Approach in the Neighbourhood, CEPS Working Document No. 290/April 2008, 19-20.

The implementation of the visa facilitation agreement can be delayed by such practicality as distance to the nearest diplomatic mission or the consular post of a particular EU Member State (in most cases these are in the capital city of the Third Country) or its non-existence in the Third Country in question. It should be noted that although the idea of the so-called “common consular offices” to be established in Pristina (Kosovo) and Kinshasa (Democratic Republic of the Congo) was not initially implemented in 2002-2003,¹⁴ two joint visa application centres were opened in 2007 in Podgorica and Chisinau, allowing the citizens of Montenegro and Moldova easier access to the visa application procedures in the conditions when a number of EU Member States do not have embassies or consulates in these two countries covered by the visa facilitation agreements with the EU.¹⁵

3. Conditions for the Conclusion of the Visa Facilitation Agreement with the European Community

The limited size of this article does not allow the listing of all the documents which reflect the position of EC institutions or EU Member States on the issue of the visa policy, especially the conditions of the conclusion of the visa facilitation agreements as well as their provisions. In any case, it should be said that most of them are not legally binding and adopted in the form of the conclusions of the European Council, communications of the European Commission, action plans, non-papers and other documents. It should also be remembered that visa facilitation is a matter of high political priority for the European Union and that it is also always a subject of the political agreement to be reached by the Council via qualified majority voting which presumes that most of the EU Member States are in favour of such action.

3.1 Non-Binding List of Conditions

In my opinion, the document of the Council, entitled “Common Approach on Visa Facilitation,” summarises almost all the conditions which are to be fulfilled by the Third Countries in order to conclude the visa facilitation agreement with the EC by stressing that “the EC should take account of the following factors inter alia in deciding whether or not to open negotiations on visa facilitation with Third Countries: whether or not a readmission agreement is in place or under active negotiation, external relations objectives, implementation record of existing bilateral agreements and progress on related issues in the area of justice, freedom and security (for example, border management, document security, migration and asylum, fight against terrorism, according to the standard counterterrorism clause agreed by COREPER on 6 March 2002, organised

¹⁴ Peers, *EU Immigration and Asylum Law: Text And Commentary*, Rogers/Nijhoff (ed.), 2006, 207.

¹⁵ Agence Europe, *Joint Visa Application Centre to Open*, 31.07.2007.

crime and corruption) and security concerns, migratory movements and the impact of the visa facilitation agreement.”¹⁶

The European Commission, in its Communication “A Strong European Neighbourhood Policy,”¹⁷ indicated specifically in this regard, that: “The implementation of the 2003 Council Conclusions on flexibility in issuing visas to participants in Euro-Mediterranean meetings should be extended to include all ENP partner countries. This extension would mainly concern Armenia, Azerbaijan and Georgia as visa facilitation agreements for Ukraine and the Republic of Moldova are about to enter into force. Member States are requested to fast-track the processing of visa applications made by persons attending ENP events and, where the applicant has previously complied with visa requirements, to grant multi-entry visas more systematically. The Commission will play a more active role by providing letters of support and encouraging applicants to start the procedure in due time.”¹⁸

In 2006, the European Commission proposed that the “Union should be willing to enter into negotiations on readmission and visa facilitation with each neighbouring country with an Action Plan in force once the proper preconditions have been met.”¹⁹ The suggestion led scholars to conclude that one of the major preconditions for the conclusion of the visa facilitation agreement is a European Neighbourhood Policy Action Plan (referred to further as the ENP Action Plan) in force for the country concerned.²⁰ In fact, some of the visa facilitation agreements contain references to the ENP Action Plan with the ENP country concerned (in the cases of Moldova and Ukraine).

The recent resolution of the European Parliament on strengthening the European Neighbourhood Policy²¹ is also worth noting. The European Parliament suggested that visa facilitation and readmission agreements be negotiated with all ENP countries, and stressed the need to improve the capacity of ENP countries to manage migration flows, effectively combat illegal migration and ensure that international human rights obligations are respected and called on the Member States, the EU and all ENP countries to intensify their co-operation in the fight against transnational organised

¹⁶ Common Approach on Visa Facilitation, Council Document 16030/05 VISA 328 RELEX 776, 21.12.2005.

¹⁷ Communication from the European Commission, A Strong European Neighbourhood Policy, 5 December 2007 (COM(2007)774 final), 5.

¹⁸ See *Ibid.*

¹⁹ Communication from the Commission to the Council and the European Parliament on strengthening the European Neighbourhood Policy, COM(2006)726 final, 6.

²⁰ *Trauner/Kruse*, Readmission Agreements: Implementing a New EU Security Approach in the Neighbourhood, CEPS Working Document No. 290, April 2008, 14. The involvement into the European Neighbourhood Policy was indicated to Belarus as one of the preconditions for visa facilitation according to the report of Agence Europe, Brussels, 06.02.2008.

²¹ European Parliament resolution of 15 November 2007 on strengthening the European Neighbourhood Policy 2007/2088(INI).

crime, terrorism, trafficking in human beings and drug trafficking. In addition, the European Parliament indicated the urgent need for EU Member States to improve the processing of visas in order to facilitate mobility and to make legitimate travel to the EU less burdensome and less costly, particularly for groups such as students, scientists, businessmen and representatives of civil society, to solve the problems experienced at their consular services and to establish the common Schengen visa application centres in the ENP countries.

As it follows from the experience of the EU Accession Countries, the Applicant Countries, potential EU future Member States (the Western Balkan states except for Croatia), third countries (Ukraine, Russia, Moldova, Belarus) and even from the current EC discussions about North African countries, in order to get receive the visa facilitation regime (and, in some perspective, to move this country from EU “black” list to “white one”) the specific individual conditions are to be met. It should be stressed, therefore, that, apart of the criteria discussed below, each third country entering the negotiations of a visa facilitation agreement with EC will be informed about the set of such individual conditions which, in the opinion of the EC, must be fulfilled for the introduction of the visa facilitation regime.

3.2 Conditions for the Conclusion of the Visa Facilitation Agreements in EC Law

Although the main purpose of the visa facilitation agreement is to facilitate the issuance of short-stay visas (90 days per period of 180 days), it must be stressed that the visa-free travel regime is recognised in all agreements as the long-term objective (the actual wording of this objective differs from agreement to agreement).²² Moreover, the conditions for the conclusion of the visa-free agreement are similar to the conditions for the visa facilitation regime mentioned above. Based upon the experience of the previous Third Countries which concluded visa facilitation agreements, it can be argued from the technical and legal point of view that the Third Countries willing to receive the visa facilitation are required to make the same steps and fulfil the same measures which would be needed in order to achieve a visa-free regime with the EU Member States. The Third Country, therefore, usually concludes the visa facilitation agreement upon reaching a certain degree of progress in the implementation of these measures.

What are these conditions and how should they be interpreted? The main source of the non-exhaustive list of conditions for the achievement of the visa-free regime is the Council Regulation (EC) No 539/2001 of 15 March 2001 listing those Third Countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement²³ (this Regulation was amended a

²² *Trauner/Kruse*, Readmission Agreements: Implementing a New EU Security Approach in the Neighbourhood, CEPS Working Document No. 290, April 2008, 17.

²³ 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 Union, L 81, 21.3.2001, 1–7.

number of times).²⁴ Recital (5) of Regulation No 539/2001 provides for the following: “The determination of those Third Countries whose nationals are subject to the visa requirement, and those 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.”

Upon the adoption of this Regulation, the European Commission gave its detailed explanation of the assessment of the criteria mentioned in Recital 5 and their application.²⁵ In summary, this explanation was as follows (for most of the conditions cited below, the wording of the explanation by the European Commission was kept unchanged):

a) Illegal immigration

- Reference can be made to a number of relevant sources of statistical information and indicators to assess the risk of illegal migratory flows (such as information and or statistics on illegal residence, cases of refusal of admission to the territory, expulsion measures and clandestine immigration and labour networks);
- The condition of the introduction of biometric passports in the Third Countries was introduced by the EC during negotiations with them which concluded the visa facilitation agreements in order to assess the reliability of travel documents issued by the relevant third country;
- The impact of readmission agreements with those countries would be considered.

b) Public Policy

- Conclusions reached in the context of police co-operation, amongst others, may highlight specific salient features of certain types of crime;
- Imposing the visa requirement could be a possible response worthy of consideration depending upon the seriousness, regularity and territorial extent of the relevant forms of crime;
- Threats to public order may be so serious in some cases as even to jeopardise domestic security in one or more Member States. If the visa requirement was imposed in a show of solidarity by the other Member States, this could again be an appropriate response.

²⁴ It should be mentioned that the United Kingdom and Ireland are not bound by Regulation (EC) No 539/2001. They are, therefore, not taking part in the adoption of this Regulation and are not bound by or subject to the application thereof. They apply the national visa regulations in relation to the Third Country nationals.

²⁵ Criteria used for determining whether or not a Third Country should be in Annex I or Annex II (explanatory memorandum for the Proposal for Regulation COM/2000/0027 final – CNS 2000/0030, Official Journal of the European Union, C 177E, 27.6.2000, 66–69.

c) International Relations

- The option for or against imposing the visa requirement in respect of a given Third Country can be a means of underlining the type of relations which the EU is intending to establish or maintain with it;
- EU relations with a single country in isolation, however, are rarely at stake. Most commonly, it is the relationship with a group of countries and the option in favour of a given visa regime that also has implications in terms of regional coherence;
- The choice of visa regime can also reflect the specific position of a EU Member State in relation to a Third Country to which the other EU Member States adhere in a spirit of solidarity;
- The reciprocity criterion, applied by Member States individually and separately in the traditional form of relations under public international law, now has to be used by reason of the constraints of the EU external relations with Third Countries.

In addition, the European Commission stressed that “given the extreme diversity of situations in Third Countries and their relations with the EU and the Member States, the criteria set out here cannot be applied automatically by means of coefficients fixed in advance. They must be seen as decision-making instruments to be used flexibly and pragmatically, being weighted variably on a case-by-case basis.”

Finally, Recital 1 of Regulation (EC) No 1932/2006 of 21 December 2006 amending Regulation (EC) No 539/2001 provided for the following: “The composition of the lists of Third Countries in Annexes I and II to Regulation (EC) No 539/2001 of 15 March 2001 should be, and should remain, consistent with the criteria laid down in Recital (5) thereto. Some Third Countries should be transferred from one Annex to the other, particularly with regard to illegal immigration and public policy.”²⁶

4. Conclusions and Recommendations for Georgia

The basic conditions for the achievement of the visa facilitation regime are very broad and always the same for every Third Country, including Georgia:

- Approximation of laws in the area of migration, border control, asylum, fighting organised crime and corruption with the EU *acquis communautaire* and the obligations of the international law.

²⁶ Council Regulation (EC) No 1932/2006 of 21 December 2006 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, Official Journal of the European Union, L 405, 30.12.2006, 23.

- Democracy and the rule of law;
- Strengthening of the institutional and technical capacities in all above mentioned areas;
- The existence of the adopted ENP Action Plan (for ENP countries);
- Simultaneous negotiations for the readmission agreement and visa facilitation agreement.

At the same time, however, it should also be stressed that there is no exhaustive list of conditions that have to be met and some of the conditions may and do vary from country to country. The individual conditions, therefore, will be indicated to Georgia by the EC upon the start of negotiations. This list appears to be very broad and could be met more as the medium-term political priority due to their budgetary and human resources costs.

The contents of the ENP Action Plan for Georgia leads to the conclusion that the priorities in the areas of the asylum, migration, visa policy and border control are already included within and their proper implementation may lead to the conclusion of the visa facilitation agreement with the EC. It should be taken into account that the gradual evolution of the contents of the existing ENP priorities will simultaneously also take place through the substantial changes of EU legal standards with which the laws of Georgia would need to approximate (for example, the new EC legal acts in the area of combating illegal migration, legal migration, border control and asylum are adopted every year with one of the latest documents, the Regulation on Biometric Residence Permits, adopted on 18 April 2008²⁷).

Taking into account the amount of work to be done for progressing in the fulfillment of these conditions, which includes a budgetary impact and the availability of human and technical resources, a more detailed prioritisation of the future law harmonisation and capacity building activities for the achievement of the visa facilitation regime with the EC could be also made by the Government of Georgia. It is also possible to adopt the special visa facilitation action plan which would be separate from the ENP Action Plan and more detailed (to some extent similar to the so-called Schengen action plans adopted by some new EU Member States during the implementation of the Schengen regime).

²⁷ Council Regulation No 380/2008 of 18 April 2008 amending Regulation (EC) No 1030/2002 laying down a uniform format for residence permits for Third-Country nationals, Official Journal of the European Union L 115, 29.4.2008, 1.