EUROPEAN COMMISSION

Brussels, 6.8.2010
COM(2010)419 final

2010/0227 (NLE)

Proposal for a

COUNCIL DECISION

on the signature of the Agreement between the European Union and the Federative Republic of Brazil on short-stay visa waiver for holders of ordinary passports

EXPLANATORY MEMORANDUM

1. POLITICAL AND LEGAL BACKGROUND

In accordance with Council Regulation (EC) No 539/2001[1], Brazilian nationals can travel to all Member States of the European Union without requiring a visa for short stays. This should be reciprocated by Brazil, however the country still requires a visa from the nationals of four Member States: Estonia, Cyprus, Malta and Latvia.

For constitutional reasons, Brazil cannot grant a visa waiver for these Member States unilaterally; it is necessary to conclude a visa waiver agreement to be ratified by its Parliament.

Brazil has bilateral visa waiver agreements with the Member States, except the four concerned. These bilateral agreements differ from each other considerably as regards their personal scope of application (i.e. as regards the categories of persons benefiting from the visa waiver).

It stems from the nature of the common visa policy and the exclusive external competence of the European Union in this area that only the Union can negotiate and conclude a visa waiver agreement, and not the individual Member States. Therefore, on 18 April 2008, the Council adopted a decision authorizing the Commission to open negotiations on the conclusion of a short-stay visa-waiver agreement between the European Union and Brazil.

The negotiations started on 2 July 2008 and have been finalized on 1 October 2009.

During the negotiations, the Contracting Parties agreed to conclude two separate agreements**:** one on ordinary passport holders and the other on diplomatic and service passport holders, since the agreement on diplomatic and service passport holders does not need to be ratified by the Brazilian Congress, thus its ratification can go quicker and separately from the agreement on ordinary passport holders.

After the talks have stalled in July 2009 due to the disagreement between the parties on the personal scope of the visa waiver for ordinary passport holders, on 23 September 2009 COREPER adapted the mandate to negotiate the visa waiver agreement with Brazil.

According to the conclusions of COREPER, the Commission had to negotiate a visa waiver agreement with Brazil which provides:

– short-stay visa-free travel for visits of up to three months in a six months period to the Schengen area and to Romania, Bulgaria and Cyprus for Brazilian nationals and to Brazil for EU citizens on a reciprocal basis with a more limited scope than the existing visa regime at present under Regulation 539/2001, i.e. the agreement would basically only apply to tourists and business people;

– a clause maintaining the existing bilateral visa waiver agreements in so far as they establish visa-free travel to Brazil for the categories of persons not covered by the EU agreement;

[1] OJ L 81, 21.3.2001, p.1

– and that as far as Brazilian nationals are concerned, the agreement can only cover visits to the Schengen area and to Romania, Bulgaria and Cyprus, and should apply irrespective of their point of departure and their place of residence. As far as EU citizens are concerned, the agreement should apply irrespective of their point of departure and their place of residence when travelling to Brazil.

At the fourth round of negotiations, held in Brasilia on 29 September – 1 October 2009, the text of a short-stay visa-waiver agreement for ordinary passport holders between the EU and Brazil could be finalized and thus the negotiations were concluded.

With regard to the visa waiver agreement for ordinary passport holders, preserving the bilateral agreements, in so far as they establish visa-free travel for categories of persons not covered by the EU-Brazil agreement, is part of the overall package deal with Brazil, which was agreed in Brasilia, in accordance with the mandate.
Given the specific circumstances, in order to pass a clear message to Brazil and to safeguard the existing bilateral agreements, a unilateral declaration has been made by the EU and sent to Brazil in form of a letter on 5 February 2010 that the *European Union might suspend the agreement if Brazil starts denouncing the existing bilateral agreements.* This approach has been endorsed by Member States as well at the Visa Working Party of 20 January 2010.

In its reply dated 14 April 2010 to the EU's letter, Brazil confirmed its intention to renegotiate some of the old bilateral agreements with the Member States. The two letters are attached to this proposal in Annexes II and III.

The Member States have been informed and consulted several times in the Visa Working Party of the Council and at COREPER.

The Agreement was initialled on 28 April 2010.

On the part of the Union, the legal basis for the Agreement is Article 77 (2) (a), in conjunction with Article 218 of the TFEU[2].

The attached proposals constitute the legal instruments for the signature and conclusion of the Agreement. The Council will decide by qualified majority. The European Parliament will have to give its consent on the conclusion of the Agreement, in accordance with Article 218 (6) (a) (v) of the TFEU.

2. OUTCOME OF THE NEGOTIATIONS

The Commission considers that the objectives set by the Council in its negotiating directives – including the adaptation of the mandate by COREPER on 23 September 2009 – were attained and that the draft visa waiver agreement is acceptable to the Union.

The final content of the visa waiver agreement for ordinary passport holders can be summarised as follows.

Purpose and Scope

The EU-Brazil agreement gives a reciprocal visa waiver for travel for the purpose of tourism and business for all Brazilian and EU citizens, including the nationals of the four Member States not enjoying visa-free travel to Brazil at present.

[2] Treaty on the Functioning of the European Union, OJ C 115, 9.5.2008, p. 47

The two purposes "tourism" and "business" are widely defined in the agreement, including e.g. sportsmen and artists provided that no remuneration is received for their activity, and also certain disputed categories, such as family visits or official meetings, which will also be covered by the categories of "tourists" and "business people" respectively. These two categories covered by the EU-Brazil agreement would cover 90-95 % of all the travelers.
A series of categories (e.g. students, researchers, artists, religious people etc., which are defined by the Brazilian national law) are excluded from the scope of the agreement. The agreement provides that the bilateral agreements concluded between Brazil and the Member States covering such other categories not covered by the EU-Brazil agreement continue to apply insofar as they provide for visa waiver for those categories. This way EU citizens falling under other categories (than tourism and business) covered by the bilateral agreements, can continue to benefit from the visa waiver under these bilateral agreements.

The category of persons travelling for the purpose of carrying out a paid activity is also excluded from the scope of the Agreement. For this category, each Member State and also Brazil remain free to impose the visa requirement on the citizens of the other Party in accordance with the applicable Union or national law, or in accordance with bilateral agreements, which cover this category.

In consequence, the EU-Brazil agreement does not reduce the access to visa free travel to Brazil for the citizens of Member States having a bilateral agreement with Brazil, but basically maintains the status quo for these citizens.
The above arrangements on the scope constitute the best compromise which could be achieved by the Contracting Parties within the given special circumstances and they are in line with the mandate as amended by COREPER on 23 September 2009.

Duration of stay

The duration of stay is limited by the agreement to three months during a six-month period in the Schengen area. Thus, this agreement puts an end to the possibility provided to Brazilian nationals by the bilateral agreements to cumulate the three months stays per Member State in the Schengen area.

The agreement takes into account the situation of the Member States that do not yet apply the Schengen acquis in full. As long as they are not part of the Schengen area without internal borders, the visa waiver confers a right for the nationals of Brazil to stay for three months on the territory of each of those Member States (Cyprus, Bulgaria, Romania), independently of the period calculated for the whole Schengen area.

Territorial application

As the overseas territories of France and the Netherlands do not form part of the Schengen area and the visa rules (e.g. Regulation 539/2001) do not apply there, the EU-Brazil agreement cannot cover these territories. On the other hand, EU nationals residing in any third country or an overseas territory of a Member State should be covered by the visa waiver (eg. a Dutch national residing in the USA or in Aruba, or a French residing in French Polynesia) in accordance with their nationality.

> The Agreement provides for visa-free travel for the citizens of Brazil when travelling to the European territories of the Member States and should apply irrespective of their point of departure and their place of residence.

As far as EU citizens are concerned, the agreement provides for visa-free travel when travelling to Brazil, irrespective of their point of departure and their place of residence.

Nevertheless, such rules on the territorial application are not pronounced explicitly in the Agreement, but the existing rules under Union law and Brazilian national law continue to apply, including bilateral agreements between Brazil and France and the Netherlands covering the non-European territories.

This approach has been accepted by Member States at the meeting of the JHA Counsellors of 5 October 2009.

Other provisions

In order to safeguard equal treatment of all EU citizens, a provision has been included in the Agreement stating that Brazil may suspend or terminate the Agreement only in respect of all the Member States of the European Union and, reciprocally, the Union may also suspend or terminate the Agreement only in respect of all of its Member States.

The Agreement sets up a Committee of experts for the management of the Agreement.

The specific situation of the United Kingdom and Ireland is reflected in the preamble.

A clause on the exchange of specimen of the passports has been inserted to the agreement.
A joint declaration has been made on full dissemination of information for the smooth implementation of the agreement.

3. CONCLUSIONS

In the light of the above-mentioned results, the Commission proposes that the Council

– decides that the Agreement be signed on behalf of the European Union and authorise the President of the Council to appoint the person(s) duly empowered to sign on behalf of the Union.

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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), in conjunction with Article 218 (5) thereof,

Having regard to the proposal from the Commission[3],

Whereas:

(1) In order to harmonise their visa policy with the provisions of Regulation (EC) No 539/2001, Member States granted visa waiver to the nationals of the Federative Republic of Brazil (hereinafter: Brazil) prior to their accession to the European Union, as Brazil figures on the list of third countries whose nationals are exempt from the visa requirement.

(2) For constitutional reasons, Brazil cannot grant visa waiver for the Member States unilaterally; it is necessary to conclude a visa waiver agreement to be ratified by its Parliament.

(3) Brazil has bilateral visa waiver agreements with most of the Member States, concluded prior to their accession to the European Union or prior to the establishment of the common visa policy. However, there are still four Member States, with whom a bilateral visa waiver agreement was not concluded in the past, consequently Brazil still requires a visa from the nationals of these Member States for short stays.

(4) It stems from the nature of the common visa policy and the exclusive external competence of the European Union in this area that only the Union can negotiate and conclude a visa waiver agreement, and not the individual Member States.

(5) In view of the non-reciprocal treatment of Brazil towards certain Member States, by its decision of 18 April 2008, the Council authorised the Commission to negotiate an agreement between the European Union and Brazil on short-stay visa waiver in order to ensure a full reciprocal visa waiver.

(6) Negotiations on the agreement were opened on 2 July 2008 and concluded on 1 October 2009.

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[3] …….

(7) Subject to their possible conclusion at a later date, the Agreements initialled in Brussels on 28 April 2010, should be signed.

(8) This Decision 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*[4]. The United Kingdom is therefore not taking part in its adoption and is not bound by it or subject to its application.

(9) This Decision 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*[5]. Ireland is therefore not taking part in its adoption and is not bound by it or subject to its application.

HAS DECIDED AS FOLLOWS:

Article 1

The signing of the Agreement between the European Union and the Federative Republic of Brazil on short-stay visa waiver for holders of ordinary passports (hereinafter referred to as the Agreement) is hereby approved on behalf of the Union, subject to its conclusion.

The text of the Agreement is attached to this Decision.

Article 2

The President of the Council is hereby authorised to designate the person(s) empowered to sign the Agreement on behalf of the European Union, subject to its conclusion.

Done at Brussels,

For the Council
The President

[4] OJ L 131, 1.6.2000, p. 43.
[5] OJ L 64, 7.3.2002, p. 20.

ANNEX I

AGREEMENT

between

the European Union and the Federative Republic of Brazil

on short-stay visa waiver for holders of ordinary passports

The European Union, hereinafter referred to as "the Union"

and

the Federative Republic of Brazil, hereinafter referred to as "Brazil"

hereinafter referred to as the Contracting Parties;

(1) Desiring to safeguard the principle of reciprocity and to facilitate travel by ensuring visa free entry and short stay for the citizens of all Member States of the European Union and for the nationals of Brazil;

(2) Reiterating their commitment to ensure reciprocal visa-free travel swiftly, fully respecting the completion of the respective parliamentary and other internal procedures;

(3) With a view to further developing friendly relations and continuing to strengthen close ties between the Contracting Parties;

(4) Taking into account the Protocol on the position of the United Kingdom and Ireland and the Protocol integrating the Schengen acquis into the framework of the European Union, annexed to the Treaty on European Union and the Treaty establishing the European Community and confirming that the provisions of this agreement do not apply to the United Kingdom and Ireland;

Have agreed as follows:

Article 1

Purpose

Citizens of the European Union and citizens of Brazil, holders of a valid ordinary passport, are allowed to enter, transit through and stay without a visa in the territory of the other Contracting Party for tourism and business purposes only for a maximum period of stay of three months during a six months period in accordance with the provisions of this Agreement.

Article 2

Definitions

For the purpose of this Agreement:

(a) "Member State" shall mean any Member State of the European Union, with the exception of the United Kingdom and Ireland;

(b) " a citizen of the European Union" shall mean a national of a Member State as defined in point (a);

(c) "a national of Brazil" shall mean any person who holds the Brazilian nationality;

(d) "Schengen area" shall mean the area without internal borders comprising the territories of the Member States as defined in point (a) applying the Schengen acquis in full;

(e) “Schengen acquis” shall mean all measures aimed at ensuring the free movement of persons in an area without internal borders, in conjunction with directly related flanking measures with respect to external border controls, asylum and immigration and measures to prevent and combat crime.

Article 3

Scope of application

1. For the purposes of this Agreement tourism and business purposes shall mean:

- touristic activities;
- visiting relatives;
- prospection of commercial opportunities, attending meetings, signing contracts and financial, management and administrative activities;
- attending meetings, conferences, seminars provided that no remuneration is received for from respective Brazilian/EU sources for those activities (other than the cost of stay directly or via a daily income);
- participation in sports competitions and artistic contests, provided that the participants do not receive any remuneration from respective Brazilian/EU sources, even if they compete for prizes, including prizes with money reward.

2. Citizens of the European Union and nationals of Brazil who wish to carry out remunerated activities or be employed, engage in research, traineeships, studies and social work, as well as undertake technical assistance, missionary, religious or artistic activities, are not covered by this Agreement.

Article 4

Conditions of visa waiver and stay

1. The visa waiver provided by this Agreement shall apply without prejudice to the laws of the Contracting Parties relating to the conditions of entry and short stay. The Member States and Brazil reserve the right to refuse entry into and short stay in their territories if one or more of these conditions are not met.

2. The citizens of the European Union benefiting from this Agreement shall comply with the laws and regulations in force in the territory of Brazil during their stay.

3. The nationals of Brazil benefiting from this Agreement shall comply with the laws and regulations in force in the territory of each Member State during their stay.

4. The visa waiver applies regardless of the mode of transport used to cross the borders open to international passenger traffic of the Contracting Parties.

5. Without prejudice to Article 7, visa issues not covered by this Agreement shall be governed by Union law, national law of the Member States and by national law of Brazil.

Article 5

Duration of stay

1. For the purposes of this Agreement the citizens of the European Union may stay in the territory of Brazil for a maximum period of three months during a six months period following the date of first entry into the territory of the country.

2. For the purposes of this Agreement the citizens of Brazil may stay in the Schengen area for a maximum period of three months during a six months period following the date of first entry into the territory of any Member State fully applying the Schengen acquis. This period of three months during a period of six months shall be calculated independently of any stay in a Member State which does not yet apply the Schengen *acquis* in full.

3. The citizens of Brazil may stay for a maximum period of three months during a six months period following the date of first entry in the territory of each of the Member States that do not yet apply the Schengen *acquis* in full, independently of the period of stay calculated for the Schengen area.

4. This Agreement does not affect the possibility for Brazil and for the Member States to extend the period of stay beyond three months in accordance with national law and Union law.

Article 6

Management of the Agreement

1. The Contracting Parties shall set up a Committee of experts (hereinafter referred to as the "committee").

The committee shall be composed of representatives of the European Union and of Brazil. The Union shall be represented by the European Commission.

2. The committee shall be convened, whenever necessary, at the request of one of the Contracting Parties, to monitor the implementation of this Agreement and settle disputes arising from the interpretation or application of the provisions of this Agreement.

Article 7

Relation between this Agreement and existing bilateral visa agreements between the Member States and Brazil

This Agreement shall be without prejudice to existing bilateral agreements or arrangements concluded between individual Member States and Brazil, in so far as their provisions cover issues falling outside the scope of this Agreement.

Article 8

Exchange of specimen of passports

1. If they have not done so already, Brazil and the Member States shall exchange, through diplomatic channels, specimens of their valid ordinary passports no later than thirty (30) days after the date of signature of this Agreement.

2. In case of introduction of new ordinary passports or modification of the existing ones, the Parties shall convey to each other, through diplomatic channels, specimens of these new or modified passports, accompanied by detailed information on their specifications and applicability, not later than thirty (30) days prior to its application.

Article 9

Final provisions

1. This Agreement shall be ratified or approved by the Contracting Parties in accordance with their respective internal procedures and shall enter into force on the first day of the second month following the date on which the Contracting Parties notify each other that the procedures referred to above have been completed.

2. This Agreement is concluded for an indefinite period of time, unless terminated in accordance with paragraph 5 of this article.

3. This Agreement may be amended by written agreement of the Contracting Parties. Amendments shall enter into force after the Contracting Parties have notified each other of the completion of their internal procedures necessary for this purpose.

4. Each Contracting Party may suspend in whole or in part this Agreement, the decision on suspension shall be notified to the other Contracting Party not later than two months before its entry into force. The Contracting Party that has suspended the application of this Agreement shall immediately inform the other Contracting Party once the reasons for suspension no longer exist.

5. Each Contracting Party may terminate this Agreement by giving written notice to the other Party. This Agreement shall cease to be in force 90 days after the date of such notification.

6. Brazil may suspend or terminate this Agreement only in respect of all the Member States of the European Union.

7. The Union may suspend or terminate this Agreement only in respect of all of its Member States.

Done in Brussels, on…… 2008, in duplicate each in the Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish and Swedish languages, each of these texts being equally authentic.

For the European Union For the Federative Republic of Brazil

Joint Declaration on the information of the citizens about the visa waiver agreement

Recognising the importance of transparency for the citizens of the European Union and Brazil, the Contracting Parties agree to ensure full dissemination of information about the content and consequences of the visa waiver Agreement and related issues, such as the travel documents valid for visa-free travel, the territorial application, including the list of Member States fully implementing the Schengen acquis, the allowed period of stay and the entry conditions, including the right of appeal in case of refusal.