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EU Pressure Insufficient to Gain U.S. Visa Waiver for Poles

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In a communication of 12 April, the European Commission assessed the potential political and economic consequences of suspending visa exemption for U.S. citizens. Lacking pressure from individual EU Member States, the Commission discouraged such a move and gave the EU Council and European Parliament three months to take an official position. It seems almost certain that the measure of applying pressure on a non-EU country will not be used to help Poland and four other Member States obtain visa-free travel to the United States or other countries with a similar restriction. However, if current trends continue, Poland should join the U.S. Visa Waiver Programme in five years.

Citizens of all but five European Union countries (Poland, Bulgaria, Romania, Croatia and Cyprus) can travel to the United States for 90 days for non-immigrant purposes without needing to apply for a visa. However, U.S. citizens may travel to all EU Member States visa-free. This lack of reciprocity in visa policy is one of the relics of the Cold War that is a thorn in Poland-U.S. relations not only from the political perspective, but regarding business as well.

On 12 April 2014, the European Commission published notifications from five EU Member States concerning the lack of reciprocity in visa-free travel for their citizens,¹ launching the visa-reciprocity mechanism. It gives two years for a political dialogue between EU countries, the EC and third-party countries, the latter being, in this case, the U.S. in reference to five EU countries, and Canada, Australia, Japan and Brunei for a few of them. At the end of that time, the U.S. (as well as Canada and Brunei) had still not resolved the issue. As a result, the European Commission is bound to propose that the EU Council and the European Parliament suspend visa-free travel to the EU for citizens of the U.S., Canada and Brunei.² In its Communication of 12 April 2016, the EC urged its co-legislators to take a position by 12 July, because these bodies can reject such a measure.³ With this notice, the Commission has avoided taking such a step

¹ Information from the Commission about notifications by the Member States of cases of non-reciprocity in accordance with Article 1(4)(a) of Council Regulation (EC) No 539/2001 as amended by Regulation (EU) No. 1289/2013 of the European Parliament and of the Council, OJ EU C111/1, 12 April 2014.

² Article 1, paragraph F of the Regulation of the EU Council and EU Parliament from 11 December 2013, no. 1289/2013 changing Regulation 539/2001

³ "Communication from the Commission to the European Parliament and the Council," COM (2016) 221, 12 April 2016.

itself and put the pressure back on Member States. Taking into account the potential consequences as assessed by the EC, and the vulnerability of transatlantic relations, there is little chance that visa-free travel for U.S. citizens will be implemented.

A Missed Opportunity for Poland

The U.S. Visa Waiver Programme (VWP) was established in 1986, and enables citizens of participating countries to travel to the U.S. for business, tourism or medical treatment purposes for 90 days without the need to apply for a "B-visa." There are currently 38 countries participating in the programme (23 from the EU).⁴ Although their citizens do not have to apply for a visa, they have to register their journey in the Electronic System of Travel Authorisation (ESTA) and pay a \$14 fee (which is valid for two years). On the other hand, those who cannot travel under the VWP must apply for a B-visa, costing \$160 plus administration costs (estimated by the EC at \$200),⁵ and wait while the application is processed. If one is granted a visa, it entitles a stay of up to six months, and is valid for 10 years. Neither registration in ESTA nor obtaining a B-visa guarantees entry to the United States because Department of Homeland Security (DHS) officers have the authority to refuse admission at U.S. borders.

To be included in the VWP, a country has to meet number of requirements. These include offering reciprocal visa-free movement, issuing machine-readable, biometric passports, sharing security-related data with the United States, having a system for reporting lost and stolen passports, maintaining a high level of counter-terrorism activity, meeting law enforcement and border control and document security standards, and having a non-immigrant visa refusal rate below 3%. In addition, any country wishing to join the VWP, needs to receive designation from the U.S. government.

Of the Central European countries that joined the EU in 2004, Poland is the only that is not a participant of the VWP. Estonia, Latvia, Lithuania, the Czech Republic, Slovakia and Hungary joined the programme on 17 November 2008, on the basis of a law signed by George W. Bush in 2007, which changed the B-visa refusal rate criteria from 3% to 10% for allies cooperating with the U.S. on counterterrorism.⁶ However, this law was suspended in 2009 due to lack of implementation of an exit system that could verify the departure of foreign nationals from the United States, and the 3% threshold was reinstated.⁷ Thus Poland missed an opportunity, as its refusal rate exceeded 13% in 2008 and 2009.

To change the 3% refusal rate or to override this criteria, the U.S. Immigration and Nationality Act has to be changed. Since 2009 there have been numerous attempts to address the Polish case, but no regulatory proposal has entered into force. Most recently, in June 2015, Senator Barbara Mikulski and Senator Mark Kirk, big supporters of Poland's position in the United States, added a direct provision to a bill on the Department of Homeland Security, enabling it to designate Poland as part of the programme notwithstanding the criteria. However, no action was undertaken by the Senate to accept the whole legislation.⁸ Neither did other initiatives of these senators, such as changing the refusal rate criteria for overstays in the United States, pass through Congress. It is worth noting that, after her current term, Mikulski will retire from the Senate⁹ and Kirk may have problems getting re-elected in Illinois.¹⁰ It means

⁴ U.S. Department of State, Bureau of Consular Affairs, <https://travel.state.gov/content/visas/en/visit/visa-waiver-program.html>.

⁵ "Communication from the Commission...", COM (2016) 221.

⁶ "Implementing Recommendations of the 9/11 Commission Act of 2007," *Public Law*, 110-53, 3 August 2007.

⁷ A. Siskin, *Visa Waiver Program*, Congressional Research Service, 11 December 2015.

⁸ S.1619, *Department of Homeland Security Appropriations Act, 2016*

⁹ See more: K. Cheney, L. French, "Mikulski's retirement starts Maryland scramble," *Politico*, 2 March 2015, www.politico.com/story/2015/03/barbara-mikulski-no-reelection-2016-115650.

¹⁰ See more: A. Palmer, B. Everett, "The most endangered Republican in the country," *Politico*, 27 October 2015, www.politico.com/story/2015/10/mark-kirk-senate-2016-republicans-illinois-215070; N. Cohn, "Republicans Risk Five Key Senate Races With Supreme Court Stance," *New York Times*, 15 February 2016, www.nytimes.com/2016/02/16/upshot/supreme-court-vacancy-looms-over-five-key-senate-races.html?_r=0.

that any bills on Poland's inclusion in the VWP might encounter more difficulties in the future, lacking their biggest supporters.

U.S. Law Getting Stricter

Despite pressure from the EU, any prospects of U.S. immigration laws being loosened have seemed rather bleak recently. The current situation in the U.S. legislative body hints that, in the wake of terrorist attacks in Paris, San Bernardino and Brussels, any changes may in fact lead to stricter rules. In November 2015, DHS Secretary Jeh Johnson announced security changes to the VWP in regard to information capturing and sharing, and accelerating the review process of VWP participating countries. In December, Congress and the President accepted legislation that prohibits citizens of these states to travel to the U.S. without a visa if, since March 2011, they have travelled to Iraq or Syria, countries designated by the Secretary of State as having repeatedly provided support for acts of international terrorism, or to any other country that the Secretary deems appropriate (subject to making a declaration 60 days in advance). If a person has dual citizenship of a VWP participating country and one of abovementioned, they may not enter the U.S. within the framework of the VWP.¹¹

This legislation is mainly a response to the Paris attacks. Although, accepted six days after the San Bernardino shooting, it could not address this issue. After the Brussels attacks in March, it can be expected that U.S. lawmakers will again debate how to strengthen security issues in the programme, which would not suggest plans to loosen the eligibility criteria.¹²

The U.S. presidential and congressional elections are factors that should also be taken into account. Because of the latter, all bills introduced to Congress but not signed into law will be terminated and may re-introduced in the new year, so the time for immediate legislative action is narrowing. Among the presidential candidates one might hear anti-immigration sentiment, along with concerns on U.S. openness and the risks posed by terrorists. From the Republican candidates in particular, Donald Trump has called for suspension of the Visa Waiver programme, while Ted Cruz has urged "serious scrutiny".¹³ In the coming months of the congressional and presidential campaigns, there is little chance that Congress will take the initiative to loosen VWP criteria on its own, without external pressure. The U.S. presidential race may also have an impact on the decisions made in the EU on the suspension of visa-free movement, as such an act could hamper the EU's image and can help more radical opinions in the campaign.

The EU "Atomic Bomb" in Visa Policy

The EU has already protested against the tightening of the U.S. Visa Waiver Programme, describing it as an unnecessary discriminatory action for dual nationals of the EU and for business people, journalists, and humanitarian and medical workers (according to U.S. rules, restrictions may be waived for people in these categories).¹⁴ The EU delegation to the U.S. described in a letter¹⁵ the new VWP restrictions as disproportionate and unfair to EU citizens, and offered a reminder of the EU's reciprocity mechanism, which obliges the European Commission to propose suspension of visa exemption for U.S. citizens.

¹¹ *H.R. 2029, Consolidated Appropriations Act, 2016*, signed by President of the U.S. on 18 December 2015; Iran, Sudan, Libya, Somalia and Yemen were added to the list of countries subject to these restrictions. For more, see: "DHS Announces Further Travel Restrictions for the Visa Waiver Program," www.dhs.gov/news/2016/02/18/dhs-announces-further-travel-restrictions-visa-waiver-program.

¹² See more: M. Lillis, "Congress struggles to respond to new terror attacks," *The Hill*, 3 March 2016.

¹³ See more: *Foxnews.com*, 22 March 2016, <http://www.foxnews.com/politics/2016/03/22/presidential-candidates-react-to-brussels-attacks-trump-cruz-call-for-policy-changes.html>.

¹⁴ Open Letter of the EU Ambassador John O'Sullivan and 28 EU MS Ambassadors to the U.S., "What the Visa Waiver Program means to Europe," *The Hill*, 14 December 2015.

¹⁵ Letter of the EU delegation to the U.S. dated 26 January 2016 to NIAC Action, published on 1 February on the NIAC Website, www.niacaction.org/eu-responds-to-niac-action-concerns-on-visa-waiver-reciprocity.

The European reciprocity mechanism, as originally created in 2001, was meant to be a response to countries that stopped visa exemption for EU citizens.¹⁶ The aim was to dissuade third-party countries from imposing restrictions, as such moves would backfire at their own citizens. In the wake of EU enlargement in 2004 the mechanism was loosened, because nine out of 10 Central and Eastern Europe countries (Slovenia joined in 1997) were not receiving full reciprocity with extra-EU partners such as the United States, Canada, Australia and Japan. The reciprocity mechanism was again tightened in 2013, with a clause referring directly to countries that were not included in reciprocal visa-free movement with third-party countries at that time.¹⁷ Such countries had to notify the European Commission about the lack of reciprocity at the beginning of 2014. Poland, Croatia, Bulgaria, Romania and Cyprus issued notifications about the United States. Over a 24-month period, the European Commission supported dialogue aimed at resolving the issue, and published progress reports. In none of the reports did any of the five countries excluded from the VWP request the temporary suspension of the visa exemption (up to six months) for U.S. citizens,¹⁸ as they did not wish to hamper the ongoing dialogue and instead chose to wait for Congress to loosen VWP criteria. As no progress was made, and little willingness shown by the U.S. authorities during these two years, the EC is now obliged to issue a delegated act suspending visa exemption for U.S. citizens.

The European Commission Discourages Suspension of Visa-Free Movement

As the process is subject to a political decision by the European Council and European Parliament, the EC decided in its communication of 12 April to delay issuing the act, and asked the Council and Parliament to take positions on the issue. Although the Commission stated that “granting visa waiver to the nationals of these five countries would not pose an increased migratory or security threat to the U.S.,” it assessed the risks of suspending visa exemption for U.S. citizens as significant. Moreover, the Commission, despite never mentioning it during the 24 months of trilateral dialogue, invited the U.S. authorities to consider taking a minor step towards loosening the restrictions, based on the measures taken by Canada.¹⁹ Such a move would make nationals of the five countries “who have lawfully used a U.S. visa in the past, for example, 10 years,” eligible for ESTA and therefore not subject to visa restrictions. The Commission also noted that none of the EU Member States issued notifications of recent U.S. changes to VWP restrictions.²⁰

The Commission recalled the position of the U.S. representative during trilateral dialogue between the EC, the U.S. and the five EU Member States, who stated that the U.S. would re-introduce visa requirements for EU nationals as a response to suspension of visa exemption for its own citizens. The Commission estimated the cost of visas for European citizens (at least 8 million of them) at \$2.5 billion. It also noted that the Member States would not be prepared to issue visas for U.S. citizens in a timely and orderly manner.

The EC also presented an impact assessment of the re-introduction of visas for U.S. citizens, and the possible reciprocal visa waiver suspension. Most affected by this “visa war” would be tourists and business travellers. Almost 14 million EU citizens visited the United States, spending \$48 billion, in 2014. In the same year, 12 million U.S. citizens visited Europe, spending \$43 billion.²¹ The European Commission estimates

¹⁶ “Council Regulation no 539/2001 of 15 March 2001.”

¹⁷ “Regulation (EU) No 1289/2013 of the European Parliament and of the Council of 11 December 2013.”

¹⁸ Under Regulation No 1289/2013, Art. 1, point E, every six months the European Commission assesses progress of the dialogue and can, on its own initiative or at the request of a Member State, issue an implementing act temporarily suspending the exemption from visa requirements.

¹⁹ These measures, though, do not grant full reciprocity for Bulgarian and Romanian citizens. The latter country is said to have threatened not to ratify the CETA agreement because of the visa requirement for its nationals. For more, see: G. Gotev, “Romania will veto the EU-Canada trade deal”, *EurActiv*, 15 April 2016, www.euractiv.com/section/trade-society/news/romania-will-veto-the-eu-canada-trade-deal.

²⁰ “Communication from the Commission...,” COM (2016) 221.

²¹ Source: U.S. Department of Commerce, International Department of Trade and U.S. Department of Commerce, National Travel and Tourism Office from the Bureau of Economic Analysis.

that potential losses due to the new restrictions could amount to \$1.8 billion for the EU tourism industry, mostly in France, Germany, Italy, Spain, Greece and the Netherlands.²²

Furthermore, the EC cautioned decision-makers that the ongoing Transatlantic Trade and Investment Partnership negotiations, which are entering their closing stages and need the maximum political determination to be concluded before the end of the Barack Obama's term as President, could be jeopardised, as could good and strategic transatlantic relations.

As a result, there is only a small possibility that the EU countries and European Parliament will accept all the risks stemming from a "visa war" with the United States. According to the reinforced qualified majority, 19 out of the 26 Member States subject to a visa reciprocity mechanism (the United Kingdom and Ireland opted out from it), representing 65% of the overall EU population (excluding the UK and Ireland in this case), will be needed in order to reject the delegated act. It means that five Member States not participating in the VWP would have to find three additional allies in order for visa suspension to come into force. As it is a political process, decision-makers from all the 26 voting countries will be also subject to pressure from the U.S. government not to take so drastic a step, although it can promise little progress on adding the five remaining EU countries to the VWP.

First Things First: Military, Political and Economic Considerations

The reciprocal visa mechanism theoretically gives the five EU Member States, including Poland, the best opportunity in recent years to press U.S. Congress to provide reciprocity in visa-free movement. It is also the last chance to use this EU measure, as, once the procedure is closed, it cannot be invoked again in the same case. But the huge political and economic costs of possible tensions with the U.S. mean there is lack of determination on the EU side. Even the five countries directly concerned are, due to military, political and economic ties with the United States, resistant to take the lead and lobby in Europe for re-imposing visa requirements for Americans. The European Commission itself has tacitly warned against exerting the pressure on the U.S. in the coming months by issuing its discouraging communication.

Poland, the last EU Schengen country (until Croatia joins) to be excluded from the VWP, has a different priority this year, as it will host of the NATO summit on 8-9 July, just a few days before the 12 July deadline set by the EC. Its most strategic interest lies in securing a successful outcome of the summit, which in this case would be a decision to strengthen NATO's eastern flank. Poland will not be able to lobby successfully for suspension of the visa exemption for the U.S., on the one hand, while requesting greater U.S. military presence in Europe, on the other.

Although the VWP is high on the agenda, Polish authorities did not and do not wish to bring matters to a head prioritising abovementioned strategical political and military interests, economic issues and taking care of the Polish diaspora worldwide (Polonia). Along with the four other Member States, and despite lack of progress on the American side, Poland did not request suspension of visa exemption throughout the two years of the visa reciprocity mechanism discussions.

Poland is the sixth biggest EU economy (and the biggest in Central and Eastern Europe), and yet it is still excluded from the VWP. With Polonia amounting to 9.5 million people in the U.S. (about 3% of the population²³), the lack of visa-free reciprocity will remain a serious issue in bilateral relations. Almost every high-level visit in recent years has had to address this topic. However, presidential promises to solve the

²² "Communication from the Commission...", COM (2016) 221.

²³ According to the American Community Survey, people reporting ancestry, 2010–2014 estimates, http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_14_5YR_B04006&prodType=table.

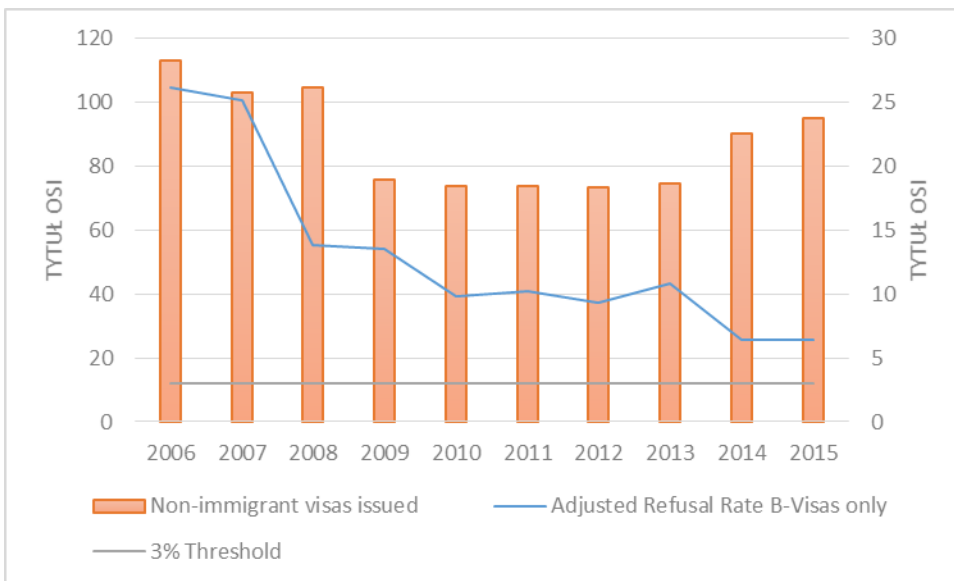
problem (for example, the one made by Obama in 2010²⁴) proved unreliable, as visa policy is the responsibility of Congress, which is resistant to loosening the criteria.

Poland’s Alternative Opportunities

As there is little chance that the EU will decide to re-introduce visas for U.S. citizens and show a united front with the other affected Member States, there are few other possibilities. It is most likely that the problem will be solved by the countries themselves, but only when they meet the VWP criteria. Among the five EU countries that are still not included in the programme, Cyprus is closest to gaining VWP approval, having signed in December 2015 a bilateral agreement with the U.S. on enhancement of cooperation in preventing, detecting, combating and investigating serious crime. For years Cyprus had a refusal rate below 3%, but since 2013 it has exceeded the threshold (it was 3.53% in 2015). Croatia’s rate was 5.29%, Romania’s 11.16% and Bulgaria’s was the highest, at 17.26%.²⁵

Poland’s all-time low B-visa refusal rate (6.37%) came in 2015, but this was still twice higher than the U.S. requirements. The refusal rate dropped rapidly in 2008, but then the trend slowed with the next decline in 2014. The average drop for the last seven years was about 1%, but viewed over the past five years the refusal rate decreased by only 0.7% a year. If this trend continues, Poland should reach the 3% threshold in four or five years’ time.

U.S. Non-immigrant Visas Issued to Polish Citizens and B-visa Refusal Rate



Source: U.S. Department of State, Bureau of Consular Affairs: www.travel.state.gov.

In order to promote the continuation of that trend, Poland’s Ministry of Foreign Affairs can further cooperate with the U.S. embassy and consulate in Poland on information campaigns for potential travellers, about how to apply for a visa and the circumstances in which refusal may be expected.

²⁴ Barack Obama promised to “make this a priority” and to solve the issue “before very long. My expectation is that this problem will be solved during my presidency”. See more: “Obama: Poland will be admitted to the visa waiver program,” *Foreign Policy*, December 8 2010, <http://foreignpolicy.com/2010/12/08/obama-poland-will-be-admitted-to-the-visa-waiver-program>.

²⁵ U.S. Department of State, Bureau of Consular Affairs.

Moreover, even if visa restrictions are not to be lifted in coming months, there are prospects that the TTIP agreement will provide for visa-free movement for professionals providing services. However, this possibility is in the very distant future, as negotiations have to be concluded and an agreement signed and ratified before it can enter into force. In the best case scenario, this could happen in 2018 or 2019. But this visa exemption would allow Polish and other EU citizens to compete more easily on the U.S. services market.

Furthermore, the European Commission's suggestion of Canadian-style rules for those who lawfully used visas in the last 10 years might help business people, but will be less useful for tourists and would not represent full reciprocity in visa-free movement. Such a move would require the U.S. Congress to take action close to the elections in November, and may in any case be difficult to accept in the current conditions, particularly when the pressure that the EU reciprocity mechanism imposes on the U.S. authorities is lifted.

The visa reciprocity mechanism shows that the EU has the potential tools to help put the pressure on third-party countries, but in the case of a politically, economically and militarily strategic partner the tools may be insufficient. The political and economic costs of suspending visa-free travel to the EU for U.S. citizens makes this mechanism difficult to accept for Member States and, therefore, not real pressure for the U.S. as a partner. After the global financial crisis (with the state of the Chinese economy threatening another slowdown), as well as conflict in Ukraine, destabilisation in the Middle East and the refugee crisis and terrorist attacks in Europe, not to mention internal hurdles with Brexit at the forefront, the EU cannot agree to take such a radical step.