The EU-Russia readmission
and visa facilitation agreement
in a comparative perspective

A comparative analysis
with a focus on visa facilitation

LLM Paper

by

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Examine all things; hold fast to what is good.

— 1 Thessalonians 5:21
When strolling the tables of the annual second-hand book market of my local library in September last year, my eyes fell upon a little orange book with the strange title ‘Het Land van GOS’. I bought the book and read it during my September holiday. It was the diary from Dirk Tieleman, a Belgian journalist who had visited the states that previously formed the Soviet Union in 1992. I was fascinated by the changes in legislation that opened up the previously inaccessible inland of the Russian Federation for foreign travellers. Some remnants of the old Soviet Union still remained in 1992: for instance, it was still possible to access all the countries of the ex-Soviet Union with only one single visa. Anecdotes like these triggered my interest in the topic of visas.

The conclusion of the readmission agreement and visa facilitation agreement between the EU and Russia are two of the most important accomplishments in the last ten years between the two parties. Despite the linkage between the two agreements and their respective importance for the process of visa liberalisation, only a limited number of authors have assessed the impact of the agreements and have compared them with similar agreements concluded by the EU. Combined with the current day difficulties between the two parties, it was an intellectual challenge to write my LLM paper on this topic.

I would like to take the opportunity to thank the persons who helped me in writing this dissertation. First of all, I would like to thank my promoter, Prof. Dr. Peter Van Elsuwege. His lectures on EU external relations in general and on the relations between the EU and Russia in specific were an exciting mix of juridical problems and current day events. He enthusiastically welcomed the topic and gave me valuable instructions for the writing of the paper. I would also like to thank my parents, Marnic and Lucette, and my sister Sarina for their continuous support. I particularly wish to show my gratitude to my brother Robin, who was an enormous help to find my way through the maze of footnotes, chapters and spreadsheets. Lastly, I want to thank my friends for their good advice and the necessary diversion after the long days of work.

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<td>AFJT</td>
<td>Area of Freedom, Security and Justice</td>
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<td>CAC</td>
<td>Common Application Centre</td>
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<td>Common Steps</td>
<td>Common Steps towards visa-free short term travel of Russian and EU citizens</td>
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<td>COREPER</td>
<td>Comité des Représentants Permanents</td>
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<td>ENP</td>
<td>European Neighbourhood Policy</td>
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<td>FRTD</td>
<td>Facilitated Railway Transit Document</td>
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<td>FTD</td>
<td>Facilitated Transit Document</td>
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<td>EC</td>
<td>European Community</td>
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<td>ESP</td>
<td>External Service Provider</td>
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<td>EU</td>
<td>European Union</td>
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<td>TCN</td>
<td>Third Country National</td>
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<td>Treaty on the EU</td>
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<td>VC</td>
<td>Visa Code</td>
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INTRODUCTION

With the entry into force of the Treaty of Amsterdam a new title was introduced in the Treaties, with the ambitious goal of establishing a new project with prestigious and high-sounding name of the ‘Area of Freedom, Security and Justice’. With the inclusion of the AFSJ in the Treaties, the Community gained new competences in the fields of immigration, asylum and border controls. Inextricably linked to this internal competence is the external competence, or the competence to conclude international agreements on the subject.

To limit illegal immigration, the Union introduced a visa policy, while the return policy was drafted to tackle the situation of persons who were already illegally staying in the Union. The multi-annual programme of Tampere, but especially the ones of The Hague and Stockholm all provide for the conclusion of international agreements with regard to the AFSJ. One of the preferred partners for such agreements is the Russian Federation. With the collapse of the Soviet-Union, the Union and the Member States expected large-scale migration from Russia and other ex-Soviet countries. Even several years after the transition, the fear was still high in some Member States.

The Union already had relations with the Soviet Union since the Gorbatsjov-era. After the end of the Cold War, the Union also concluded agreements with the several states rising from the ashes of the Soviet Union. A new specific type of agreements was called into life to regulate the relations with these states: the ‘Partnership and Co-operation agreements’ (or PCAs). The PCA with Russia was concluded in 1994 and entered into force in 1997, for an initial period of an initial period of ten years. The agreement is automatically renewed each year, unless one of the parties denounces it at least six months before the expiry date. It soon became clear that the PCA ‘was insufficient to handle the multifaceted challenges of EU-Russia cooperation.’ Moreover, the agreement is hopelessly outdated due to internal developments in the

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8 Agreement on Partnership and Cooperation establishing between the European Communities and their Member States, of one part, and the Russian Federation, of the other part [1997] OJ L327/3 (PCA EU-Russia).
EU and Russia, causing the level of co-operation to gradually extend beyond the scope of the PCA.\textsuperscript{10} One of the areas where the PCA lacks provisions concerns illegal migration and visa. Another point that shows the limits of the PCA is the absence of a possibility to adopt legally binding decisions. As some authors describe it: ‘Accordingly, progress in EU-Russia relations is essentially based upon the conclusion of specific bilateral agreements or joint statements with a purely political value.’\textsuperscript{11} This is why the Council gave a mandate to the Commission in September 2000 to negotiate on a separate agreement on readmission with Russia.

The Union and Russia were aware of the problems inherent to the PCA and decided at the May 2003 St.-Petersburg EU-Russia Summit to strengthen the Strategic Partnership between the two by creating four Common Spaces.\textsuperscript{12} These Common Spaces were worked out and at the May 2005 Moscow EU-Russia Summit roadmaps were adopted for each Common Space.\textsuperscript{13} Especially the Roadmap for the Common Space of Freedom, Security and Justice is of importance, because it envisaged in short term the conclusion of parallel negotiations on an agreement on visa facilitation and an agreement on readmission. Moreover, it was agreed ‘to examine the conditions for a mutual visa-free travel regime as a long-term perspective.’\textsuperscript{14} The agreements on readmission and visa facilitation were signed in 2006, while the negotiations on visa liberalisation are still ongoing.

In this LLM paper I will analyse both the readmission agreement and the visa liberalisation agreement the EU concluded with Russia. Next to that, also the progress in the negotiations concerning the visa liberalisation agreement will be assessed. The focus will not only lie on the specific agreements the EU concluded or intends to conclude with Russia. It is the aim to compare the agreements concluded with Russia with other similar agreements the EU has concluded with other third countries, in order to assess the similarities and the differences between these agreements.

In Chapter I, I will analyse the readmission agreement concluded with Russia by comparing the with similar agreements the EU has concluded. The linking with visa liberalisation will be assessed, next to the content of the readmission agreements. I will also investigate the implementation of the agreement with Russia in more detail, since that plays a major role in the current process of visa liberalisation.

Chapter II will look into the rules that normally apply to a visa application for a Schengen visa. I will investigate the rules of the Visa Code and the difficulties a visa applicant might encounter when he applies for such a visa.

In Chapter III the focus lies on the visa facilitation agreements. The facilitations of the agreements will be assessed in a comparative perspective, while I will also assess the possible solutions the facilitation

\textsuperscript{11} ibid 7.
\textsuperscript{12} EU-Russia Summit, ‘Joint Statement St.-Petersburg 31 May 2003’ 9937/03 [2003].
\textsuperscript{13} EU-Russia Summit, ‘Road Maps Moscow 10 May 2005’ 8799/05 ADD 1 [2002].
\textsuperscript{14} ibid 21.
agreements might offer for the problems one may encounter in a visa application. Furthermore a distinction will be made between the first and second generation of visa facilitation agreements. Lastly, I will look at the actual effects these agreements have on the issuance of visas.

Lastly, Chapter IV will focus on the topic of visa liberalisation, since this is one of the long term objectives of the EU-Russia relations. The conditions for the installation of a visa free regime will be examined and compared to the conditions in similar processes with other third countries. Also the progress made today, or the lack of it will be looked into.
CHAPTER I: READMISSION AGREEMENTS

1. INTRODUCTION

The signing of the readmission agreement between the EU and Russia on 25 May 2006 was an important step in the implementation of the Common Space of Freedom, Security and Justice. Six years after the Commission received a mandate from the Council to negotiate, the readmission agreement (or EURA) with Russia conclude was the fifth proper agreement ever concluded by the EU. The negotiations were certainly no ‘walk in the park’ for the EU, as they had to offer a tangible counter-part to Russia before they were willing to accept the agreement. This was found in the conclusion of a visa facilitation agreement (or VFA). The Union only started thinking about the conclusion of VFAs when the conclusion of readmission agreements with countries as Russia and Ukraine was blocked. In the mean time, a VFA is considered to be a crucial incentive to persuade the certain countries to agree with the conclusion of a readmission agreement and an almost automatic linkage between the two types of agreements has been installed.

In this chapter, we will first of all, discuss the concept of a readmission agreement and the relevant competences of the Union. Secondly, we will also focus on the linkage between the EURAs and VFAs. Next to that, the content of the readmission agreements will be discussed, taking note of the common features and the differences between the agreements. Lastly, we will discuss the implementation of the agreement with Russia in more detail.

2. WHAT ARE EURAs?: SCOPE, COMPETENCE AND INSTITUTIONAL ISSUES

Readmission agreements are described as agreements that ‘impose reciprocal obligations on the contracting parties to readmit their nationals and also, under certain conditions, third country nationals and stateless persons’\textsuperscript{15}, next to ‘facilitating the expulsion of unauthorised immigrants by establishing obligations and procedures regarding readmission between the contracting parties.’\textsuperscript{16}

Both the Union itself and the Member States have concluded readmission agreements, although the EU only has the competence to do so since 1999. With the Treaty of Amsterdam, the Union gained the competence to conclude EURAs, based on article 63(3)(b) TEC which read as follows: ‘The Council [...] shall [...] adopt [...] measures on immigration policy within the [area of] illegal immigration and illegal residence, including repatriation of illegal residents.’ The Council decided that the competence of the EU to

\textsuperscript{15} European Commission, ‘Evaluation of EU Readmission Agreements (Communication)’ COM (2011) 76 final, 1.

\textsuperscript{16} Nils Coleman, \textit{European readmission policy: third country interests and refugee rights} (Martinus Nijhoff 2009) 1.
conclude EURAs was inherent to the term ‘repatriation’. This posed however problems as the EURAs also deal with the readmission of persons to transit countries and stateless persons. Therefore it was best to refer to article 63(3)(b) TEC in its entirety as the legal basis for readmission agreements, as this can also include the readmission of persons in transit and stateless persons. With the entry into force of the Treaty of Lisbon, the conclusion of EURAs has a clear legal basis in the Treaties, with article 79(3) TFEU stating that ‘[t]he Union may conclude agreements with third countries for the readmission to their third countries of origin or provenance of third-country nationals who do not or who no longer fulfil the conditions for entry, presence or residence in the territory of one of the Member States.’

On the nature of competence of the Union to conclude readmission agreements, there is the lingering discussion between the Commission on the one side, claiming the competence exclusively for the Union, and the Council at the other side, insisting on the shared nature of the competence. The outcome of this discussion can have a grave impact on the Member States’ practice of individually concluding bilateral readmission agreements. If the competence lies exclusively with the Union, the Member States would have to abstain entirely from any new readmission negotiations, even if the Commission is not engaged in readmission negotiations with the third-country in question. There are both arguments in favour and against the exclusive nature of the competence, all relying on the doctrine of implied powers. But until the Court of Justice has to decide on the matter or the Treaties are changed to provide more clarity, the current practice of Member States negotiating readmission agreements in parallel with the Commission, shows that the powers are shared between the Union and the Member States.

Special attention has to be given to the position of the UK, Ireland and Denmark. These three countries have an opt-out in respect of the AFSJ, with the possibility for the UK and Ireland to opt in, whereas Denmark has no such option. With regard to the Common Visa Policy, the UK and Ireland have not opted in. It is remarkable that with regard to the readmission policy, these countries have decided to make use of the possibility to opt in. Apparently, they have no problem to participate in the AFSJ when it provides leverage for sensitive topics such as the return of illegal immigrants. The UK even goes a step further as it has regularly decided to notify the Council of its intention to participate also in the earlier stages of the negotiating process.

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19 Hereafter abbreviated as ‘TCN’.
21 For academical discussions on the topic of the implied competences to conclude readmission agreements, see Nils Coleman (n 16) 75-80; Schieffer (n 20) 350-351; Dennis Porrez, ‘De doctrine van de Implied Powers in de EU Externe Betrekkingen’ (Master thesis, Universiteit Gent 2013) 126-131.
23 Schieffer (n 20) 350.
So far, the EU has concluded EURAs with sixteen countries. The mandates to negotiate on the first ones date back to the year 2000, while the first agreement with Hong Kong\textsuperscript{24} was signed on 27 November 2002 and entered into force 1 March 2004. More agreements have so far been signed with Macao,\textsuperscript{25} Sri Lanka,\textsuperscript{26} Albania,\textsuperscript{27} Russia,\textsuperscript{28} Ukraine,\textsuperscript{29} FYROM,\textsuperscript{30} Bosnia and Herzegovina,\textsuperscript{31} Montenegro,\textsuperscript{32} Serbia,\textsuperscript{33} Moldova,\textsuperscript{34} Pakistan,\textsuperscript{35} Georgia,\textsuperscript{36} Cape Verde,\textsuperscript{37} Armenia\textsuperscript{38} and Azerbaijan.\textsuperscript{39} The last of these agreements have not yet entered into force, as for some of them ratification is still pending. The negotiations on these agreements were not always easy\textsuperscript{40} and several incentives, including visa facilitation had to be offered to the third countries to move ahead.\textsuperscript{41}

\textsuperscript{29} Agreement between the European Community and Ukraine on the readmission of persons [2007] OJ L332/48 (EURA-Ukraine).
\textsuperscript{30} Agreement between the European Community and the former Yugoslav Republic of Macedonia on the readmission of persons residing without authorisation [2007] OJ L334/7 (EURA-FYROM).
\textsuperscript{31} Agreement between the European Community and Bosnia and Herzegovina on the readmission of persons residing without authorisation [2007] OJ 334/66 (EURA-Bosnia and Herzegovina).
\textsuperscript{34} Agreement between the European Community and the Republic of Moldova on the readmission of persons residing without authorisation [2007] OJ 334/149 (EURA-Moldova).
\textsuperscript{35} Agreement between the European Community and the Islamic Republic of Pakistan on the readmission of persons residing without authorisation [2010] OJ 287/52 (EURA-Pakistan).
\textsuperscript{36} Agreement between the European Union and Georgia on the readmission of persons residing without authorisation [2011] OJ L52/47 (EURA-Georgia).
3. **THE READMISSION AGREEMENT BETWEEN THE EU AND RUSSIA DEMONSTRATES THE LINK BETWEEN READMISSION AGREEMENTS AND VISA FACILITATION AGREEMENTS**

3.1. **The linking of EURAs with VFAs**

Since the end of the First World War, the possibilities for free travel have been severely limited and often the possession of a visa is required to travel from one country to another. Also in the EU Visa Policy, visas are used as a main instrument to select ‘worthy’ from ‘unworthy’ guests, thus preventing illegal immigration. With the introduction of Regulation 539/2001, the EU made clear that the citizens of the countries placed on the ‘blacklist’ are considered as a possible security risk. However, this blacklisting contributed significantly to the image of ‘fortress Europe’. The consensus grew that illegal migration could not be effectively prevented with visa rules alone. Even the Commission recognised that the visa procedures did not do much more than creating obstacles to legitimate travel. The EU started to look for other instruments to reduce illegal migration, which it found in an effective return policy, including the signing of readmission agreements. The Council granted the Commission the first mandates to negotiate readmission agreements in 2000 and by 2002, the first readmission agreement, the one with Hong Kong, had been concluded.

When the Commission received its first mandates for negotiating EURAs, it expected to finish negotiations on such an agreement with a given country within one year. As a quick look at the state of play shows, this was too optimistic a deadline: negotiations can take more time than initially expected. The 2002 Seville European Council made clear the the Member States were not entirely satisfied with the slow pace of

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42 More on the EU Visa Policy: text to n 185 in ch II.
44 Council Regulation (EC) 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 [2001] OJ L81/1.
46 Florian Trauner and Imke Kruse (n 45) 6. Commission officials compare the relation between illegal immigration and visa policy with the prohibition and drinking beer. It is not because immigration becomes illegal that people will stop coming.
49 ibid 13.
51 EURA EU-Hong Kong.
the negotiations of the readmission agreements. The European Council more or less criticised the Commission when it asked to speed up the conclusion of readmission agreements.\textsuperscript{53}

The Commission understood the criticism of European Council and agreed that the progress was indeed slow. However, the Commission partially dismissed the criticism in a 2002 Communication.\textsuperscript{54} There it was argued that the time needed to negotiate readmission agreements should not be underestimated and that no quick results could be expected. The Commission identified two main causes for the difficulties in the negotiating process: a lack of incentives the Commission can use as leverage, and a lack of flexibility on the side of the Council and the Member States on the technical issues.\textsuperscript{55} These two points are important given the reluctance of countries to conclude readmission agreements with the Union. One can hardly blame them for not being that excited about EURAs, as facing the return of migrants from all the Member States is a rather ‘daunting prospect’.\textsuperscript{56} The benefit of an EURA is clearly on the side of the Member States, with almost no need on the side of the third country to sign such agreements, as illegal immigration from the EU to such countries is virtually non-existent. The main reason why third countries do not look positively on the EURAs is the fact that the Council insist on the inclusion of readmission of TCNs and stateless persons, while international customary law only provides for the readmission of the own nationals.\textsuperscript{57} The European Union insists on the inclusion of TCNs and stateless persons to change international customary law.\textsuperscript{58} This is rather strange, given the fact that bilateral readmission agreement only seldom contain comparable clauses.\textsuperscript{59}

To persuade third countries to conclude EURAs with a TCN-clause, the Commission contended that, next to financial assistance, ‘supplementary types of incentives’ should be considered, such as economic incentives as better market access, but also compensatory measures in the field of migration policy. The Commission thinks about a more generous visa policy or increased quotas for migrant workers. The Commission repeats its call for more leverage in 2003 and even blames the Member States, when calling for a greater level of political and diplomatic support.\textsuperscript{60} As a result of these public quarrels between the Commission and the Council, the third countries with whom the EU was negotiating also started to make counter-demands which allows them to determine the pace of the negotiations.\textsuperscript{61} In meeting these counter-demands the Commission was always careful with the granting of benefits, as they might create precedents

\textsuperscript{54} COM (2002) 703, 25.
\textsuperscript{55} COM (2011) 76 final, 6.
\textsuperscript{56} Nils Coleman (n 16) 184.
\textsuperscript{57} Kay Hailbronner, ‘Readmission Agreements and the Obligation of States under Public International Law to Readmit their Own and Foreign Nationals’ [1997] Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 1, 31.
\textsuperscript{58} Florian Trauner and Imke Kruse (n 45) 9.
\textsuperscript{59} COM (2011) 76 final, 9.
\textsuperscript{60} COM (2003) 323 final, 14.
\textsuperscript{61} Nils Coleman (n 16) 184-185.
for other countries making similar requests for future negotiations. The Commission proposed several possible incentives to be offered to third countries to persuade them to sign EURAs.62

The slow progress in the readmission agreement negotiations lead to a crisis in 2003, when some Member States even threatened the Commission with the withdrawal of the issued negotiating directives.63 In attempt to de-block the situation, the Commission was invited by the European Council to identify the problems that caused the slow pace of negotiations.64 In a classified document the Commission identified the problems and proposed the necessary solutions.65 The Commission clearly was aware of the possible slowing-down effect and proposed to the Commission to drop the requirement of readmission of TCNs to achieve more progress.66 The Commission repeated its call for more leverage and mentions the prospect of visa facilitation as an incentive for third countries to conclude readmission agreements. But besides recognising the possible use of VFAs, the Commission stresses that there is no direct link between visa regimes and the conclusion of a readmission agreement. It considered such a linkage a possibility in exceptional cases only and if needed, such a link could be formally established.67 The Council however put down the idea from the Commission to exclude TCNs and stressed ‘once more the importance of concluding Community readmission agreements with third countries of origin and transit, which also includes an obligation for these countries to readmit third-country nationals and stateless persons who have passed through their territories before illegally arriving in the EU’68

The idée fixe of the Council to include third-country nationals and stateless persons left the EU with no other option than to give in to the counter-demands of the third countries to push ahead in the conclusions of EURAs. The Council finally agreed with the Commission and stated that any proposal to start negotiations on a EURA ‘should be accompanied by an assessment of the appropriate strategy and necessary measures, which may include measures in all Community areas, to conclude a specific readmission agreement within a desirable timeframe.’69 The European Council also clearly heard the proposed solution of the Commission and in the The Hague Programme, the Council and the Commission were invited to “examine, with a view to developing a common approach, whether in the context of the EC readmission policy it would be opportune to facilitate, on a case by case basis, the issuance of short-stay visas to third-country nationals, where possible and on a basis of reciprocity, as part of a real partnership in external relations, including migration-

63 Nils Coleman (n 16) 146-147.
66 SEC (2004) 946 final/2, 9
67 See moreover COM (2002) 564 final; COM (2002) 703. An example of such a successful coupling could be found in the agreements with Macao and Hong Kong; see COM (2002) 175 final, 23.
69 ibid 21.
related issues”. In 2006, when most mandates for the negotiation of readmission agreements were received, the link between readmission agreements and visa facilitation had been that clearly established, so that the negotiations of the agreements started at the same moment and were conducted at the same time. The problem with the linkage is that also third countries are aware of it. They might automatically consider visa facilitation and readmission as a ‘package deal’, where the Union might still have a different view.

3.2. The example of Russia

The simultaneous conclusion of the visa facilitation agreement and the readmission agreement between the EU and Russia are a clear illustration of the linkage between visa facilitation and readmission. The European Union was not blind for the impact the eastward enlargement could have on migration from Russia. Although Russia was already a neighbour of the EU, sharing a border with Finland, the enlargement of the Union considerably expanded the border between Russia and the EU, with Poland and Lithuania also directly bordering Russia. But Russia did not only come closer in geographical, but also in political terms and the topic of migration was on top of the agenda of the EU-Russia relations. The Union was keen to conclude a readmission agreement with Russia for a number of reasons, but mainly because Russia is a main country of origin and transit of migrants.

The possibility of cooperation on the field of readmission was already contained in the PCA agreement. Also the, now long-forgotten, Common Strategy on Russia mentioned the conclusion of a readmission agreement with Russia. In September 2000 the Commission received the mandate from the Council to start the negotiations with Russia for the conclusion of a readmission agreement.

In Russia, the sentiment towards the conclusion of a readmission agreement was the complete opposite. Given the limited or even non-existing illegal migration from the EU to Russia and the numbers of migrants either originating from Russia or passing through Russia, the obligation to readmit own nationals and third country nationals would mainly rest on Russia, placing the financial burden of the agreement largely on Russia. Russia considered that the conclusion of a readmission agreement, inspired on a EU

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71 For example Algeria has already made clear that it considers visa facilitation and readmission to be linked. See European Commission, ‘Non-paper Expanding on the Proposals Contained in the Communication to the European Parliament and the Council on “Strengthening the ENP” — COM (2006) 726 final of 4 December 2006’ 3.
72 This in contrast with the neglect of the Kaliningrad issue as discussed below. Text to n 309 in ch III.
73 Nils Coleman (n 16) 161.
74 For a Russian view on the scale of the problem, see Golunov (n 4) 84-88.
75 PCA EU-Russia, article 84.
77 Annabelle Roig and Thomas Huddleston (n 41) 372.
78 Nils Coleman (n 16) 162.
79 Golunov (n 4) 90.
draft, was not in its interest and started to delay the negotiations. Russia asked for extra financial support to better secure its borders and made the negotiations dependent upon a solution for the Kaliningrad issue and the progress of the negotiations on a readmission agreement with Ukraine. During the talks on a solution for the Kaliningrad problem, it became clear that the Russian side wanted visa free travel or at least visa facilitation as a compensatory measure.

Although the EU had used visa concessions before, to conclude the readmission agreements with Macao and Hong Kong, the conclusion of visa agreements was not envisaged as a general counterpart of readmission agreements and certainly not in the relations with Russia. The PCA contained not a single provision relating to visa facilitation, let alone visa liberalisation. The Common Strategy only mentioned the adjustment of the Russian visa policy to that of the Union. As seen above, the Kaliningrad issue was solved without the EU having to accept visa free travel. The Council did however agree to start talks on the matter, while in the mean time stressing that the resolving of the Kaliningrad issue and visa free talks are separate issues. However, on the matter of visa facilitation, nothing was decided yet. But with Russia refusing to open up negotiations on a readmission agreement, there was little choice but to give in to the Russian demand of concluding a visa facilitation agreement at the same time. The EU did not have enough leverage to enforce the European model readmission agreement on Russia, an agreement which was not considered a legitimate demand by Moscow without the necessary compensation.

Notwithstanding the fact that both Russia and the EU agreed to negotiate on the readmission agreement in 2003, without linking it to the conclusion of a visa facilitation agreement, the Commission finally gave in to the Russian demands in October 2003 to link the two agreements. The negotiations on both agreements finally took off and in April 2004 the Commission formally requested negotiating directives to the Council, so that the negotiations could proceed in parallel. These were adopted by the Council in July 2004. What is more, the two agreements were also intricately linked, as article 23(2) of the readmission agreement states that it can only enter into force once the visa facilitation agreement is concluded. Thus, the link between readmission agreements had been established. Since the establishment of the Russian

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80 Nils Coleman (n 16) 165.
81 Text to n 311 in ch III.
82 Annabelle Roig and Thomas Huddleston (n 41) 376.
83 It should however be noted that a joined declaration to the PCA mentioned visa facilitation of businessmen. It is even all the more striking that the progress with regard to this facilitation is made dependent upon the conclusion of readmission agreements. See PCA EU-Russia — Joint Declaration in relation to Articles 26, 32 and 37 [1997] OJ L327/57.
85 Council, ‘General Affairs and External Relations Council meeting 22 October 2002’ 12945/02 [2002].
87 EU-Russia Summit, ‘Joint Statement St.-Petersburg 31 May 2003’ 9937/03 [2003], 4.
89 Council, ‘List of “A” items’ 11251/04 [2004].
precedent, a readmission agreement with a neighbouring country has been systematically concluded in combination with a visa facilitation agreement.\footnote{ibid 70; Juris Gromovs, ‘EC Visa Facilitation Agreements and Readmission Agreements — State of Play and Future Perspectives’ in Marleen Maes and others (eds), External Dimensions of EU Migration and Asylum Law and Policy (Bruylant 2011) 226.}

### 3.3. A package deal

As a result, when the EU envisages the conclusion of an EURA, the Commission now offers a “package deal” to the third country, including the EURA and a “carrot” to make the EURA more easy to “digest”.\footnote{Nils Coleman (n 16) 192.} The EU currently uses three types of positive incentives: financial assistance in the implementation of the readmission agreements,\footnote{ibid 191.} the linkage with VFAs\footnote{Unfortunately for the Union, the linking has proven to be almost automatic, with all possible negotiating partners asking for VFAs, thus confirming the fear of the Commission.} and more recently the conclusion of other agreements with the third country. If the third country is willing to conclude a readmission agreement, the Union might think of concluding another agreement, that offer economic or other benefits to that country. One can think of Association Agreements, FTAs and SAAs.\footnote{Council 13588/1/04 REV 1, 21} This last incentive can also be used in the negative sense: if a third country refuses to conclude an EURA with the EU, a possible punitive measure from the EU side can be to suspend the negotiations on the other agreements. But one should not limit the incentives to these three and also think of other incentives. One example of additional incentive can be concessions in the field of labour immigration, as used in a successful way by Italy.\footnote{COM (2004) 412 final, 8-9} But which concrete incentives will exactly be offered to each specific third state depends on how far the Council and the Member States are willing to go, as they determine the mandate given to the Commission.

### 4. CONTENT OF EURAs

The content of the EURAs can differ widely, which is logic if one looks at the geographical diversity of the countries the EU has concluded agreements with. Nevertheless, the Commission pursues a standard approach in the negotiations with third countries to ensure some homogeneity between the agreements concluded with the different countries. Therefore, all negotiations start from the same informal standard draft agreement, with minor differences depending on the third country concerned.\footnote{Florian Trauner and Imke Kruse (n 45) 9; Carole Billet (n 90) 67.} Further adjustments are possible during the negotiations with the third country, with the degree of variation in wording and substance depending on
the difficulty of the negotiations. I will analyse the content of the EURAs in a comparative way, to stress the similarities and the differences between the several agreement.98

All EURAs are divided in seven or eight sections and contain twenty-one to twenty-five articles, with the latest agreements containing more sections and articles, resulting from the experience from the Commission. Each agreement starts with a preamble stating the general objective of effectively combatting illegal immigration and the special objective of establishing rapid and effective procedures for the identification and return of persons who do not, or no longer, fulfil the conditions for entry to, presence in, or residence on the territories of the member States and the third country. The preamble also mentions a spirit of cooperation and the principle of reciprocity.99 Article 1 of each EURA sets out the definitions that are to be used in the agreement, such as national, Member State, requesting state and requested state. The notion of requesting state means the state submitting a readmission application, while the notion of requested state indicates the state to which an application for readmission is addressed. In the latest EURAs concluded by the Union, article 2 lists the international agreements on fundamental rights that will be respected during the application of the readmission agreements.100 Another novelty to be found in this article is the preference of voluntary return over forced return: the requesting state should give precedence to the former if it does not undermine the return of the person to the requested state.

4.1. People to be readmitted

Section I and II set out the respective readmission obligations of the third country on the one part and the Union on the other part. In a normal EURA, two different groups of people have to be readmitted. The first group of people a state has to readmit are its own nationals, former nationals,101 These nationals have to be readmitted if they ‘do not, or no longer, fulfil the conditions in force for entry to, presence in, or residence on the territory of the requesting [state]’.102 These people do not have to be readmitted once they have acquired the nationality of the requesting state. This category does not pose real problems, as an readmission obligation exists under customary international law.

Secondly, the contracting parties must also readmit third country nationals and stateless persons who are equated with TCNs.103 TCNs are person who holds a nationality other than that of one of the Member States or of the other contracting party, while stateless person hold no nationality at all. These persons have to be readmitted if they do no longer fulfil the conditions to stay in the territory of the requesting country. The requesting state must however provide certain evidence: either the person to be readmitted must hold a

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98 For a short overview of the similarities and differences, see Florian Trauner and Imke Kruse (n 45) 20-21.
99 On the concept of reciprocity in EURAs, see text to n 108.
100 EURA EU-Azerbaijan, EURA EU-Armenia.
101 For example EURA EU-Russia, article 2(1).
102 ibid.
103 EURA EU-Russia, article 3.
visa or residence permit of the requested state, or must have unlawfully entered the requesting state directly by transit through the requested state. In some cases, the requested state shall not be obliged to readmit these persons, for example when the transit through its territory was only an airside transit, when they are issued a visa to stay on the territory of the requesting state (or other Member States, in case of the EU) or when they enjoy visa free travel. Often the agreements contain an ‘unless’-clause, stating that the readmission obligation does not apply, unless there is a visa issued by the requested state with a longer period of validity or when the visa issued by the requesting state was obtained on that basis of falsified documents.

EURAs are reciprocal agreements, meaning that they impose reciprocal obligations on the parties. This means that both parties have to readmit the same categories of persons. The only reason why the obligations on the part of the Union are contained in a separate section, is because of the rules that indicate the responsible Member State on the side of the Union. The concept of reciprocity looks nice and gives the impression the burden lies not only with the third country, but also with Union. Reality makes clear however that the burden mostly lies with the third country. As a consequence of the reciprocity, all the contracting states must be prepared to readmit not only their own citizens, but also third country nationals on the same time. The Union should however be aware that this might not backfire: the question is whether the Union is also willing to readmit TCNs on its territory, since the third countries would have no problems in sending TCNs to the Union.

4.2. Readmission procedure

Section III defines the readmission procedure, with the readmission application, the evidence, time limits, transfer modalities and readmission in error. The articles concerning the readmission generally have the same content, although differences in lay-out exist in the different agreement. It is first determined that the requesting state must submit a readmission application to the requested state. In some cases an accelerated procedure is in place, meaning that the requesting state may submit an application within two days after the apprehension of the person to be readmitted, if that person was apprehended in the border region of the

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104 For example, see EURA EU-Russia article 3(1).
105 These are the grounds mentioned in the EURA EU-Russia. The grounds however vary from agreement to agreement.
106 EURA EU-Russia, article 3(2)(b).
107 EURA EU-Albania, article 3(2)(b).
108 EURA EU-Russia, article 5(3).
109 The problems faced by third countries in the readmission agreements are far bigger than the ones the Union faces. See Florian Trauner and Imke Kruse (n 45) 29.
110 Council, ‘Readmission Agreements concerning third-country nationals’ 7669/99 [1999].
111 The EURA EU-Russia contains articles titled ‘readmission application’ and ‘content of readmission applications’, while in the one with Montenegro the same content is spread over articles titled ‘principles’ and ‘readmission application’.
112 EURA EU-Russia, article 6.
requesting state. A request must contain the particulars of the person to be readmitted, the requested evidence concerning the nationality, unlawful entry, the grounds for readmission, and to the extent possible, also information about the person’s state of health, need for medical assistance and the degree of danger the person might pose must be communicated. To make things easier for the contracting parties, a standard application form in annexed to each agreement. The latest EURAs determine that the request may be communicated by any means possible.

Section III also lays down the means of evidence, with the means of evidence regarding nationality on the one hand, and the means of evidence regarding TCNs and stateless person on the other. Annexed to the agreements are different lists, determining what documents can be used for evidence. The lists of evidence are extremely important, as they determine when requested state has to accept the readmission and when it can oppose to it. However, a number of difficulties remain, especially when the person to be readmitted has hidden or destroyed the document that may serve for the purpose of evidence. In such a case, the options for evidence are extremely limited: an apprehension at the border or a confession by the immigrant are among the few options left. If no other option is available, the EURAs provide for an interview by the requested state to establish the nationality. This means that the effective functioning of an EURA depends for a large degree on the goodwill of the requested state. An unlawful entry can be proven by the mere fact that the person does not hold the necessary travel document, visa or residence permit.

The EURAs also set out a number of time limits. The requesting Member State must submit an application for readmission within a certain deadline, after the detection of the presence of a person. These deadlines vary enormously depending on the agreement, with a minimum of six months in the agreement with Moldova and a maximum of twelve months in the agreement with Albania. Some agreements provide for a prolongation of the limit in case of legal or factual obstacles. A requested state also has to respect a deadline, which can vary from ten calendar days to thirty calendar days after the receipt of the application. That deadline may be extended up to sixty calendar days. If the agreement provides for an accelerated procedure, the requested state must reply within a shorter deadline. If the requested country

113 ibid article 6(3). But not all agreements contain provisions on such an accelerated procedure.
114 ibid article 7.
115 EURA EU-Armenia, article 8(4).
116 EURA EU-Russia, article 9(4).
117 ibid article 10(4).
118 For an overview of the time limits, see Carole Billet (n 90) 69.
119 For example EURA EU-Georgia, article 10(1). But article does not explain what is understood by ‘legal or factual obstacles’. The EURA EU-Russia does not provide for a prolongation of the deadline.
120 EURA EU-Serbia, article 10(2).
121 EURA EU-Pakistan, article 8(2).
122 EURA EU-Russia, article 11(2).
123 For example EURA EU-Russia, article 11(3).
does not reply within these time limits, the ‘readmission shall be deemed to have agreed to’. The person also has to be transferred to the requested state within a certain period, the deadline being dependent on each agreement and on the fact whether it concerns a accelerated procedure. This deadline might be extended due to legal or factual obstacles. Before the actual transfer takes place, the parties have to make practical arrangements in writing regarding the transfer date, the border crossing points and the possible escorts. The means of transportation should be as wide as possible an include transport by air, land or sea.

Some agreements contain provisions on the readmission in error, also called the re-readmission clause. Such a provision helps to deal with the situations where a person has wrongfully been subject to readmission. It makes sure that the requesting state shall take back persons transferred to the requested state when the conditions from the EURA had not been met. The requested state must ask the re-readmission within three months after the initial readmission. As such a provision is mostly to the benefit of the requested states, a re-readmission clause can be used as leverage in the negotiations by the Commission.

4.3. Transit operations

Besides setting the rules on readmission between the contracting parties, the EURAs also contain provisions on transit operations, meaning ‘the passage of a TCN or a stateless person through the territory of the requested state while travelling from the requesting state to the country of destination’. The inclusion of such a provision widens the possibilities for the contracting parties to expel persons from their territory, as they can also make use of indirect means such as return via another country. The rules on transit operations are contained in two articles: one on the principles and one on procedure.

According to the article on the principles, the transit is limited to cases where the readmission cannot take place directly. The same article also lists grounds on which the requested state can refuse the transit. It is remarkable that the refusal is not obligatory, meaning that the requested state must not refuse the transit, even in the case of risk of torture. If the grounds for transit are no longer fulfilled, the requested state may revoke its authorisation. The requested state must inform the requesting state of its acceptance or refusal of the request. If the former accepts the transit operation, she must inform the requesting state and

124 ibid article 11(4). This might cause problems, when for example a refusal is not received by the requesting state due to a technical malfunction.
125 For example EURA EU-Russia, article 11(4) sets the deadline at ninety calendar days, while the deadline is set at two working days for the accelerated procedure.
126 EURA EU-Russia article, 13(1).
127 For example EURA EU-Montenegro, article 12. The EURA EU-Russia does not contain such a clause.
128 Nils Coleman (n 16) 102.
129 EURA EU-FYROM, article 1(n).
130 EURA EU-Russia, article 14(1).
131 EURA EU-Bosnia and Herzegovina, article 13(3).
132 EURA EU-Russia, article 14(3).
confirm the elements contained in the application form.\textsuperscript{133} For the transit operation, the readmitted person and the persons escorting him are exempted from transit visa requirements.\textsuperscript{134} The requested state must support the transit operation and offer assistance.\textsuperscript{135}

\subsection*{4.4. Other provisions: costs, data protection, non-affectation}

Section V on the costs contains only one article that simply states that the requesting state is responsible for all the transport costs, without prejudice to the right to recover the costs from the readmitted persons.\textsuperscript{136} The first part of Section VI concerns data protection and makes sure that the communication of personal data only takes place when necessary. The parties must moreover abide with their respective regulations on data protection,\textsuperscript{137} meaning that the third country must respect its own national laws, while the Member States must respect Directive 95/46/EC.\textsuperscript{138}

The second part of Section VI\textsuperscript{139} contains the ‘non-affectation clause’ or the ‘without prejudice clause’\textsuperscript{140}, that regulates the relation between the agreement and other international obligations and other readmission arrangements of the contracting parties. Generally, the article starts with the statement that the agreement shall be ‘without prejudice to the rights, obligations and responsibilities of the [Union], the Member States and the [third country] arising from International Law’.\textsuperscript{141} The agreement with Hong Kong stops there.\textsuperscript{142} Due to pressure of NGOs and the European Parliament, the following agreements started to mention certain international agreements in particular.\textsuperscript{143} As a result, the later EURAs contain a plethora of international conventions. Because of the geographical diversity of the countries whom the Union concluded EURAs with, these lists tend to vary considerably, especially because third countries do not want to include international agreements to which they are not a party.\textsuperscript{144} It should be noted that in the first EURAs only one article determined the relationship with other international agreements. But as seen above,\textsuperscript{145} the two latest EURAs also contain an article on fundamental principles referring to a number of international obligations to

\begin{flushleft}
\textsuperscript{133} ibid article 15(2).
\textsuperscript{134} ibid article 15(3).
\textsuperscript{135} ibid article 15(4).
\textsuperscript{136} ibid article 16.
\textsuperscript{137} ibid article 17.
\textsuperscript{139} Section VII in the EURA EU-Russia.
\textsuperscript{140} See EURA EU-Cape Verde, article 17.
\textsuperscript{141} EURA EU-Russia, article 18(1).
\textsuperscript{142} EURA EU-Hong Kong, article 16.
\textsuperscript{143} For a deeper analysis of this evolution, see Florian Trauner and Imke Kruse (n 45) 26.
\textsuperscript{144} Nils Coleman (n 16) 105.
\textsuperscript{145} Text to n 100.
\end{flushleft}
be respected, especially those relating to human rights. They nevertheless also contain a non-affectation clause, which refers to the international obligations contained in the articles on fundamental principles.\footnote{EURA EU-Armenia, article 18(1); EURA EU-Azerbaijan, article 18(1).}

4.5. Implementation and application, final provisions

Section VII first of all contains rules on the Joint readmission committee. Each EURA determines that the parties of the agreement are to set up such a committee.\footnote{EURA EU-Russia, article 19.} In the same article also the tasks of the committee are spelled out, such as the monitoring of the application of the agreement, the exchange information on implementing protocols and decisions on implementing arrangements.

For a correct implementation of the agreement, detailed arrangements might be needed. Next to the arrangements made by the committee, these arrangements may also take the form of bilateral implementing protocols between a given Member State and the third state. The normal article on implementing protocols determines that an implementing protocol will be drawn up between one of the Member States and the third country, on request of either of the parties.\footnote{EURA EU-Montenegro, article 19(1).} In the later EURAs a specific clause is added that this shall not prejudice the direct application application of the EURA.\footnote{EURA EU-Armenia, article 20(1).} The EURA with Russia differs from the others with regard to the implementing protocols: the conclusion of implementing protocols seems mandatory, as it is clearly stated that the parties ‘shall conclude implementing protocols’.\footnote{EURA EU-Russia, article 20(1).} Regardless of the fact whether such a protocol is mandatory or optional, the freedom of the parties is limited, as only a limited number of details can be arranged by these protocols.

Section VII also contains a provision on the relationship of the EURA with the bilateral readmission agreements concluded by the Member States: it states that the EURA takes precedence over the bilateral readmission agreements and the implementing protocols. This means that the Member States may continue to apply their own readmission agreements, as long as they are compatible with the EURA. Given the fact that the implementing protocols are mentioned alongside, some authors suggested to consider the bilateral agreements as implementing protocols,\footnote{Nils Coleman (n 16) 108.} although the Commission does not seem to agree.\footnote{COM (2011) 76, 4}

The last section of each agreement contains the Final Provisions. First of all, the territorial application is settled. The agreements determine that the agreement applies in the territory in which the TFEU applies. Next to that, a clause is included that the agreement does not apply to the territory of Denmark. In some agreements, an extra article is included on the position of the UK and Ireland. As indicated above,\footnote{Text to n 22.} these countries sometimes participate in the negotiations of the agreement, but that is not always the case. If they
do not decide to participate in the negotiations, it in not clear whether they will apply the agreement. That is why in some of the EURAs a clause is inserted stipulating that the agreement might apply to these countries once they notify.\footnote{For example EURA EU-Armenia, article 22(2).}

Normally EURAs enter into force ‘on the first day of the second month following the date on which the Parties notify each other’ of the ratification.\footnote{EURA EU-Russia, article 22(2).} The agreement with Russia is special in this regard for two reasons. First of all, the linkage between the VFA and the EURA becomes once more clear, since the readmission agreement clearly stipulates that it can only enter into force together with the VFA if the conclusion of the VFA takes place later than that of the EURA.\footnote{ibid.} Secondly, the provisions relating to readmission of third country nationals and stateless person shall become applicable only three years after the date on which the agreement normally enters into force. The provisions are however applicable ‘to stateless persons and nationals from third-countries with which the Russian Federation has concluded bilateral treaties or arrangements on readmission.’\footnote{ibid article 22(3).} This demonstrates how important it is from the Union’s point of view that Russia concludes readmission agreements with third countries.

5. EVALUATION AND IMPLEMENTATION OF THE EU-RUSSIA READMISSION AGREEMENT

Generally speaking the evaluation of the EURAs gives a mixed image. This is also the conclusion of the Commission, when it published a Communication in which it evaluated the EURAs.\footnote{COM (2011) 76} The Commission tried to evaluate the EURAs on the basis of data concerning the number of readmission applications and the person readmitted. This was not entirely successful due to the lack of available data.\footnote{ibid 3.} The analysis of the Commission brought about the problems set out above, such as the lack of incentives, the lack of flexibility, and human rights concerns. Moreover it became clear that the application of the agreements by the Member States was inconsistent, that the use of the accelerated procedures was low and that the third countries hold a deep aversion to the clause which obliges them to readmit TCNs and stateless persons. This is not entirely illogical, since the interest of the third counties are seldom taken into account during the negotiations.\footnote{Carole Billet (n 90) 67.}

Focussing on the readmission agreement with Russia, the verdict is more positive. With the conclusion of the readmission agreement, and the VFA linked to it, the single most important policy objective of the Road Map for the Common Space of Freedom, Security and Justice is fulfilled.\footnote{EU-Russia Summit, ‘Road Maps Moscow 10 May 2005’ 8799/05 ADD 1 [2002].} Moreover, the
implementation of the EURA is one of the important conditions for the talks on visa liberalisation. The agreement entered into force on 1 June 2007, together with the VFA, and Russia started implementing the agreement in October 2007. At the time of the conclusion of the agreement, the expectations were however pessimistic. It was expected that the implementation of the agreement would be too big a burden for Russia, especially the obligation to readmit third country nationals and stateless persons.

The fear that Russia might not be able to implement the agreement properly, combined with the relatively strong negotiation position of Russia, was one of the reasons to grant Russia the three-year transitory period during which it only had to readmit its own nationals. In this transitory period Russia had to prepare to be ready to fully apply the EURA by 2010. First of all, it had to change its internal legislation. The term ‘readmission’ only appeared in the Russian federal legislation by the year 2006. Besides that, additional implementing legislation was needed to divide the powers in implementing the readmission procedure among the interested Russian authorities, such as the Federal Migration Service, the Ministry of Interior and the Federal Security Service. The EU played an important role in this regard, as it drafted the necessary legal acts, offered technical and financial assistance and implemented EU-funded projects. Secondly, Russia had to make serious efforts to secure its porous and lengthy borders with its southern neighbours.

Thirdly, Russia had to prepare itself for the readmission of TCNs that had passed through Russia before entering the EU. Article 22(3) of the EURA mentions that during the transitional period Russia already has to readmit TCNs and stateless person if they come from countries with whom Russia itself already concluded readmission agreements. This provision was an empty shell, since Russia did not have readmission agreements with any of the potential countries of origin. To be fully capable of applying the EURA by 2010, Russia had to conclude readmission agreements with its neighbours. This was realised by the Russian government, which started concluding readmission agreements with its neighbours from Central Asia and its other neighbours. The conclusion of the EURA EU-Russia really caused a ‘domino-effect’ in the region, with Russia having concluded readmission agreements with several countries such as Armenia, 

162 Text to n 477 in ch IV.


164 Although it must be noted that Russia had already concluded a bilateral readmission agreement with Lithuania, since this was a precondition for the Kaliningrad transit. See Vladimir Mukomel, ‘Readmission, Return and Reintegration: the Russian Federation CARIM-East Explanatory Note’ (2013) CARIM-East Explanatory Note 02/2013, 1 <http://www.carim-east.eu/media/exno/Explanatory%20Notes%202013-02.pdf> accessed 15 August 2014. On the Kaliningrad issue see text to note in ch III.


167 Oleg Korneev (n 163) 618.

168 ibid 617.
Uzbekistan and Ukraine. Moreover agreements have been signed with countries such as Kazakhstan, Kyrgyzstan and even Turkey.\textsuperscript{169} With a string of other countries negotiations are ongoing.\textsuperscript{170} It is noteworthy that Russia even envisages readmission agreements with third countries with whom the EU never tried to conclude EURAs to this date.

Fourthly, the Russian Federation had to prepare for the reception of the readmitted persons coming from the EU. This includes the establishment of centres for readmitted immigrants; and improved and strengthened infrastructure for migrants’ accommodation.\textsuperscript{171} Such centres have been set up with the support of the EU. It is through legislation drafted by the EU that the notion of special centres for persons awaiting readmission was introduced in the legislation of Russia, thus replicating the longstanding practices of the EU Member States.\textsuperscript{172} Three of such centres haven been constructed in Russia, in the Moscovskaya and Permskaya oblasts and the Krasnodarskiy krai, which have an occupancy rate of around 70%.\textsuperscript{173}

As the agreement with Russia is the only agreement that provides for the compulsory conclusion of implementing protocols, also these are important to assess the implementation of the EURA EU-Russia. Although the possibility was considered to look at bilateral readmission agreements as implementing protocols, this was not the way that was chosen in relation to Russia and therefore each Member State had to conclude a protocol with Russia. By 2011 the number of protocols concluded was disappointingly low.\textsuperscript{174} To encourage both the Member States and Russia to speed up the negotiations on the protocols, this was included as one of the commitments in the Common Steps Toward Visa Free Travel.\textsuperscript{175} Things improved over the years and by the end of 2013 almost all of the implementing protocols had been concluded.\textsuperscript{176}

Generally speaking some Member States only make limited use of the EURAs and preferred the reliance on their bilateral readmission agreements. This is partially linked to the limited number of implementing protocols that have been concluded, but is nonetheless considered a real problem by the Commission. Despite the lack of such protocols, the EURA EU-Russia has been one of the exceptions. The implementing protocols merely fulfilled the role of facilitators in the implementation of the agreement.\textsuperscript{177} Overall the evaluation of the agreement is ‘satisfactory’\textsuperscript{178} with no real problems in the application of the

\textsuperscript{169} This is remarkable given the historical relations between Turkey and Russia. Even the EU did not yet succeed in negotiating an EURA with Turkey.

\textsuperscript{170} Vladimir Mukomel (n 164) 1.


\textsuperscript{172} Raül Hernández i Sagrera and Oleg Korneev (n 166) 5.

\textsuperscript{173} Raül Hernández i Sagrera and Olga Potemkina (n 165) 9.

\textsuperscript{174} European Commission, ‘Implementing protocols signed/concluded by the MS under the EU readmission agreements in force (Commission Staff Working Document)’ SEC (2011) 212.


\textsuperscript{177} COM (2011) 76, 4

\textsuperscript{178} COM (2013) 923 final, 8
agreement. The adherence by Russia to the agreement is even described as ‘instrumental in stimulating the EU Member States to use this legal mechanism in stead of other bilateral means.’ Russia has insisted on the application of the EURA, to the detriment of bilateral readmission agreements, in its relations with the Member States. Russia clearly wants to convince the EU that it properly implements the EURA to show its good will. This is most likely linked to the fact that the implementation and application of the EURas is one of the commitments of the Common Steps to achieve visa-free travel. As will become clear, the latter is the real objective for Russia in its relations with the EU.

Looking at the number of readmitted persons, one has to conclude that the readmission agreement with Russia works relatively well. There is however a big problem in assessing the statistics about the application of the EURAs. The data coming from the Member States is not complete, while the data EUROSTAT provides differs from the data provided by the Member States. The differences in the number of return decisions with regard to Russian nationals is astonishing. While according to the EUROSTAT data the EU Member States took 8075 decision on return of Russian nationals and effectively returned 3605 of them in 2008, the data provided by the Member States only mention 986 applications for readmission by the Member States to Russia. The data provided by the Russian Federal Migration Service more or less lie in line with the data provided by the Member States. The differences between the available data do not allow me to make a very detailed analysis, but some general trends can be noticed. First of all, the number of persons readmitted to Russia gradually increases over the years, as the agreement becomes better implemented. Around 50% of the requests issued by the Member States received a positive reply. Most people that are readmitted to Russia are Russian nationals. Although Russia also has to accept TCNs and stateless persons, the number of requests for readmission of these persons remains extremely low. The number of people of this category actually readmitted also lies around 50%. What is however striking is the fact that the accelerated procedure has never been used. Compared with other countries that have concluded an EURA, the number of persons readmitted lies relatively high, which is partly explained by scale of Russia. The number of readmissions to Albania is higher compared to the readmissions under the agreement with Russia even though Russia has a population fifty times that of Albania.

Nevertheless the implementation of the readmission agreement is one of the fields of the Road Maps in which progress is not called into question. Some even call it the only EURA that has been effectively used in the EU Readmission Policy. If Russia can keep this positive track record in the implementation of the readmission agreement, this will surely be taken into account in the dialogue on visa free travel.

180 Peter Van Elsuwege and others, ‘State of Play’ (n 171) 39.
181 COM (2011) 76, 1
184 Raül Hernández i Sagrera and Olga Potemkina (n 165) 28.
CHAPTER II: 
EU NORMATIVE FRAMEWORK ON VISA ISSUANCE

1. INTRODUCTION

Chapter II will analyse the rules applicable on the issuance of Schengen visas. With the installation of the EU Visa Policy, the Union is competent to determine who can travel freely to the Union and who needs to apply for a visa. Citizens of the Russian Federation have to apply for a visa before they are allowed to enter the Schengen area. Russian are however a privileged category of applicants, since they benefit from a VFA.

Before assessing this VFA, the first logic step is to assess the normal visa rules. In order to assess whether a VFA really facilitates the attainment of a visa, it is necessary to briefly discuss the normal visa rules applicable in absence of a VFA. In this chapter the origins of the EU visa policy will be discussed. Secondly, the relevant EU rules, both primary and secondary, on visas will be discussed. Thirdly, we will pay attention to the problems encountered in the issuing of visa.

2. ORIGINS OF THE EU VISA POLICY

The EU competence with regard to visa is the result of a gradual development. The basis of the EU Visa Policy is to be found in the Schengen acquis, consisting of the 1985 Schengen Agreement and the 1990 Convention implementing the former agreement, providing for the removal of systematic border controls between the participating countries. The Schengen Agreement envisaged a harmonisation of visa policies, focussing on three essential elements: common arrangements relating to third states whose nationals were subject to a visa requirement, the notion of a uniform visa valid for the entire territory of the contracting parties and uniform criteria for issuing visa. This policy was developed outside the EC framework by only five states. Even with the establishment of the European Union with the Treaty of Maastricht the visa policy remained largely outside the EU framework. Only article 100c TEC Maastricht dealt with visa.190

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188 The states being Belgium, the Netherlands, Luxembourg, France and Germany. Jill Troch, ‘Toegang tot en kort verblijf in België’ (2011) 2 Tijdschrift voor Vreemdelingenrecht 90, 91.


190 It provided that the EC could determine the countries of which nationals have to be in possession of a visa to cross the Schengen borders. From 1996 onwards that provision even would be implemented by qualified majority voting.
It was only with the entry into force of the Treaty of Amsterdam on 1 May 1999, that the Schengen *acquis* was integrated in the *acquis communautaire* of the EU\(^{191}\), with the aim of establishing the Area of Freedom, Security and Justice. Amsterdam also moved the visa policy from the third to the first pillar. According to article 63 TEC the Council was to adopt: ‘[...] rules on visas for intended stays of no more than three months [...]’. The integration of the Schengen acquis in the framework of the EC with the Treaty of Amsterdam, had an important impact. The Community became exclusively competent for the issuance of Schengen short stay visa, being the once for a period up to 3 months within half a year, which later became the period up to 90 days in a period of 180 days.\(^{192}\) *A contrario*, long term visa are excluded from the Union’s competence and remain within the realm of national sovereignty of the member states.

Under the Treaty of Lisbon the article 63 TEC is renumbered to article 77 TFEU. Especially article 77(2) is of importance. The wording of the article has been changed compared to the previous article 63 TEC. This does not entail a major change in substantive terms, but it is noteworthy that the explicit reference to the 3 months period has been dropped. The importance of this should however not be exaggerated, since the secondary legislation still mentions *unisono* the 90 days period. The implementation of the common visa policy will be done according to the ordinary legislative procedure\(^{193}\), hence involving both the Council and the European Parliament.

### 3. SECONDARY LEGISLATION

A legal basis in the Treaties on visa is not enough to have a fully fledged visa policy. Already under the framework of the Schengen agreement implementing legislation was adopted, which was later on updated. Under this heading we will analyse in closer detail the most important secondary legislation for our analysis: Regulation 539/2001 and Regulation 810/2009 establishing the Visa Code.\(^{194}\) But before going into detail, it is important to know what a visa is. The best definition can be found in the EU Visa Code where it is stated that a visa is ‘an authorisation issued by a Member State with a view to: (a) transit through or an intended stay on the territory of the Member States of a duration of no more than 90 days in any 180-day period; or (b) transit through the international transit areas of airports of the Member States.’\(^{195}\) In other words, visas

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\(^{191}\) Today, the integration of the Schengen acquis in the EU framework can be found in TFEU Protocol No 19 on the Schengen *acquis* integrated into the framework of the European Union [2012] OJ 326/290. This Protocol also contains specific provisions on the situation of the United Kingdom and Ireland. For a scope of the *acquis communautaire*, see Ben De Temmerman, ‘De EU en Cyprus in het licht van de Anastasiou en Orams rechtspraak: Noord-Cyprus binnen een Europees juridisch kader’ (Master thesis, Universiteit Gent 2013).

\(^{192}\) The definition of the period of ‘short stay’ used to be identified in terms of months. Because of a 2006 CJEU ruling, the period is now calculated in terms of days in stead of months. See Case C-241/05 *Nicolaë Bot v Préfet du Val-de-Marne* [2006] ECR I-09627. See also Jill Troch (n 188) 90.

\(^{193}\) Article 77(2) TFEU.


\(^{195}\) Visa Code, article 2(2).
are tools to manage and control the entry of third country nationals in the Schengen Area.\textsuperscript{196} We will focus on the visas that are issued for a stay of no more than 90 days.

3.1. The visa black list: which nationalities are subject to a visa requirement?

The first legal instrument of importance is Regulation 539/2001,\textsuperscript{197} which lists the countries whose citizens are required to be in possession of a visa to cross the external borders and enter the Schengen area and those whose nationals are exempted from that requirement. The lists contained in the regulation are not just a ‘line-up’ of states, but are the result of a considered, case-by-case assessment of a variety of criteria relating to illegal migration, public policy and security and to the EU’s external relations with third countries and regional coherence and reciprocity.\textsuperscript{198}

This concept of reciprocity is important with regard to the lists contained in the annexes and is explained in article 1(4) in more detail. If a third country that is exempted from the visa requirement, decides to introduce a visa requirement for nationals of an EU member state, this can lead to the reintroduction of a temporary or definitive visa requirement on the side of the EU for the nationals of that third country. The reintroduction of the visa required used to be automatic in the original version of the regulation. But, this would have lead to problems in 2004 with the ‘big bang enlargement’ of the EU, since this a lot of third countries had a visa requirement for the new EU member states. The old version of the regulation would have triggered the reciprocity article immediately. To avoid this, article 1(4) was amended, providing for a much more elaborate procedure, involving the Commission.\textsuperscript{199}

Article 1 of the regulation defines that the nationals of countries listed in Annex I must be in possession of a visa, while the once listed in Annex II are exempted. If the EU decides to lift the visa requirement for nationals of certain third countries, this entails an amendment of Regulation 539/2001. It should be noted that the annexes have been amended several times, shifting countries from Annex I to Annex II and vice versa.\textsuperscript{200} Two elements are important to mention for the further analysis in this dissertation. First off all, Russia is on the EU’s ‘black list’, meaning that Russians planning to come to the Schengen area for a short term visit have to apply for a visa. Secondly, it should be noted that even if a country is mentioned in Annex II, this does not automatically mean that all nationals are entitled to visa free travel. As the footnotes in the consolidated version of the regulation indicate, the exemption is, in some cases, made dependent upon

\begin{itemize}
\item[197] Reg 539/2001. It replaces the former Regulation 549/1999.
\item[198] ibid recital 5.
\end{itemize}
the conclusion of a visa liberalisation agreement between the EU and the listed country, or the visa free travel is limited to holders of biometric passports only.

A last element worth mentioning with regard to the regulation, is the amendment of the regulation of 11 December 2013. This amendment introduced article 1a, or so-called safeguard or suspension mechanism, which allows the temporary suspension of the exemption from the visa requirement. Because of this new article, visa free travel can be suspended even if a third country can be found on the ‘white list’. This suspension mechanism can be applied “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”.201

3.2. The EU Visa Code

3.2.1. Adoption of the Code

The conditions and procedures for issuing short stay visas are currently set out in Regulation 810/2009 establishing the Visa Code. Before the adoption of the Visa Code, the rules on the conditions and procedures could be found in articles 9-17 the Schengen Convention and in the Common Consular Instructions.202 However, as the Commission stated, the issuance of short-stay visas was governed by various legal instruments203 and each Member State had its own provisions regarding visa issuing.204 To reinforce the coherence of the common visa policy, by incorporating all legal instruments in one Code, enhancing transparency and legal certainty, strengthening procedural guarantees and reinforcing the equal treatment of visa applicants205, the Commission made a proposal in 2006 to replace the CCI by a regulation on a Visa Code. The negotiations on the regulation progressed slowly206 but the Visa Code was finally adopted on 13 July 2009 and entered into force on 5 April 2010, thus establishing ‘a “common corpus” of legislation,

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202 The Common Consular Instructions (or CCI), were originally a guidebook adopted by the Schengen Committee. The last informally consolidated version can be found in the official Journal; see Common Consular Instructions on Visas for the Diplomatic Missions and Consular Posts [2005] OJ C326. The CCI were amended several times. The last amendment, which was in force before the entry into force of the Visa Code, was adopted in 2009; see Council Regulation (EC) 390/2009 of 23 April 2009 amending the Common Consular Instructions on visas for diplomatic missions and consular posts in relation to the introduction of biometrics including provisions on the organisation of the reception and processing of visa applications [2009] OJ L131/1.


205 COM (2006) 403 final, 2

particularly via the consolidation and development of the *acquis*.\footnote{Visa Code, recital 3. For the provisions in the Visa Code taken over from the CCI or the provisions explicitly not taken over, see: COM (2006) 403 final.} From 2010 onwards, all short term visa applications have to be processed, in accordance with the Visa Code.

3.2.2. Provisions of the Code

The Visa Code\footnote{Hereafter abbreviated as “VC”.} intends to consolidate the *acquis*, which explains why several provisions of the CCI have been copied into the Code. On the other hand it also develops the *acquis*. Before going into detail, it is important to mention that there are several types of visas. We will focus on the so called ‘short stay visas’\footnote{These are also called ‘Schengen-visas’ or ‘C-visas’.} and not investigate the airport transit visas, which are dealt with in article 3 VC. But even the short stay visas, can be divided in two subcategories. There are visas for a single or double entry and visas for multiple entries. The provisions for the subcategories differ, but only in minor details.\footnote{For example, article 15 VC on travel medical insurance lays down different rules, depending on whether the visa is intended for one or two entries or for multiple entries.}

3.2.2.1. Application for a visa

Although the Visa Code lays down one set of provisions on the basis of which the Schengen visas are issued, they remain partially ‘national’: they are issued by the consulates of the member states, since there is no European mechanism to issue visas. However, the form in which the visas are issued, is subject to European rules, which are laid down in two regulations.\footnote{Council Regulation (EC) 1683/1995 of 29 May 1995 laying down the uniform format for visas [1995] OJ L164/1; Council Regulation (EC) No 333/2002 of 18 February 2002 on a uniform format for forms for affixing the visa issued by Member States to persons holding travel documents not recognised by the Member State drawing up the form [2002] OJ L53/4.} Article 5 VC sets out the principles to determine which Member State is responsible for the processing of visa applications. Visa applicants are not free to choose in which consulate they will apply for a visa. The main rule is that the Member State whose territory constitutes the sole destination of the visit is the competent state to examine visa application. If the applicant intends to travel to more than one destination, he has to determine the main destination of the visit, in terms of length or terms of purpose of stay. If no main destination can be determined, it is the Member State whose external border the applicant intends to cross in order to enter the territory of the Member States. The Visa Code Handbook\footnote{See Commission Decision C (2010) 1620 final of 19 March 2010 establishing the Handbook for the processing of visa applications and the modification of issued visas [2010] (Handbook Visa Code). The Visa Code Handbook dates back to 2010 and lays down operational instructions for the consular staff responsible for the handling of the visa applications.} contains a specific chapter on the determination of the competent Member State. The visa applicant has to apply for a visa before he travels to the European Union. The applicant might be required to
make an appointment with the competent consulate to lodge his application.\textsuperscript{214} Article 10(1) VC moreover stipulates that the applicant should appear in person.

The lodged application will be admissible, according to article 10(3) VC, when the application form is filled in, a travel document (i.e. a passport) and a photograph are submitted and the visa fee is paid. A harmonised form already exists since 2001, but with the entry into force of the Visa Code, it was amended and streamlined.\textsuperscript{215} Article 14 VC provides that a visa applicant has to present a number of supporting document when he applies for a visa, to allow the authorities to assess whether the applicant fulfils the entry conditions and to assess the risk of illegal migration.\textsuperscript{216} The notion of ‘supporting document’ is explained in article 14 VC and is further elaborated on in Annex II of the Visa Code. The list included in Annex II is a non-exhaustive one, since the Member States could not agree on a complete list. The documents vary widely, from documents proving the purpose of the stay (e.g. an invitation from a firm for an event for a business trip, a certificate of enrolment at an educational establishment, ...), to documents allowing the assessment of the applicant intention to leave the territory of the member states before the expire of the visa.\textsuperscript{217} Member States may also require the applicant to present proof of sponsorship and/or private accommodation. The visa applicant must also be able to prove that he is in the possession of adequate and valid travel medical insurance or TMI, to cover repatriation and emergency treatment for unforeseen health problems during the stay of the visa holder. Some persons are however excluded from the TMI requirement.

Lastly, article 16 VC foresees that a visa fee has to be paid by the applicant, to cover the administrative costs of processing the visa application. The general fee is fixed at EUR 60 for all applicants, but the Visa Code foresees a future revision to reflect future cost changes. Such a revision has however not taken place yet. Next to the general fee, the Visa Code also foresees mandatory and optional visa fee waivers. It should be noted that it is only the fee that is waived and not the visa requirement in total. The visa fee waiver is mandatory for children under six years, pupils and students, certain researchers and young representatives of NGOs. The fee may be waived for children between six and twelve years, holders of diplomatic and service passports and young participants in events organised by NGOs. Above that, Member States may also waive or reduce the visa fee in individual cases.

\textsuperscript{214} Article 9 VC; Jill Troch (n188) 94.


\textsuperscript{216} Handbook Visa Code (n 213) 42.

\textsuperscript{217} ibid 43 et seq.
3.2.2.2. Examination of the visa application

Once the application has been lodged, the consulate will first of all verify whether it is competent. If the consulate is competent, article 19 VC stipulates that it will investigate whether the application is admissible. If the application is admissible, it should be stamped according to article 20 VC, indicating that the applicant applied for a visa. After this, the examination of the entry conditions takes place. The substantive grounds for deciding on a visa application can be found in article 21 VC. The consulate thus investigates the authenticity and reliability of documents and statements, and investigates the validity of the travel document again. Also the purpose of the intended stay, the conditions of the intended stay, the means for leaving the territory of the Member States, the means of subsistence for the stay, the security risk, the TMI, the length of previous and intended stays and the risk of illegal immigration are investigated.

According to article 22 VC Member State may ask the authorities of another Member State to consult it during the examination of applications lodged by nationals of a specific third state, prior to the issuing of a visa, to have the chance to object to the issuing of a visa. Similarly, article 31 VC provides that Member States can request other Member States to be informed about visas issued to nationals of certain third states. This does not allow for a Member State to object to the issuing of a visa, but gives information about the number of visas issued which might be of concern to that Member State.

Once the documents have been examined, the decision on the visa application can be taken. A real novelty here are the deadlines that have been inserted in the Visa Code to take a decision on an application. Before that, the CCI did not contain any time frame to take the decision. Article 23 VC introduced a general maximum deadline of fifteen days, but according to the Handbook, the decision should be taken as soon as possible. To that end, information about the requirements should be made widely available. However, in some cases may be expanded to thirty calendar days, in individual cases where further scrutiny is needed, or even sixty calendar days in exceptional cases, when additional documentation is needed. The consulate can decide to issue a visa or refuse the visa.

3.2.2.3. Positive decision

If the consulate takes the decision to issue a visa, this will happen in accordance with article 24 VC, which mentions the notions ‘period of validity’ and ‘period of stay’. The period of validity is the period during which the visa holder may use his visa and is based on the examination of the information provided by the applicant. There might however be unexpected changes in the planning of the journey, in which case the period is automatically extended with a reasonable number of days: the so-called ‘period of grace’, normally

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218 Article 18 VC.
219 For more details in each specific element of the investigation, see Handbook Visa Code (n 213) 52-62.
220 ibid 64.
221 SWD (2014) 101 final, 22.
fixed at fifteen days. The period of grace should however not be granted for multiple entry visas, because that type of visas already offers the necessary flexibility to the visa holder. The period of stay on the other hand is the number of days the visa holder may stay on the territory of the Member States should be based on the purpose of the visit. The visa is issued for one, two or multiple entries, depending on the request by the applicant. The consulate however is not bound by the number of entries applied for and can decide on the number of entries they grant. More details on the multiple-entry visas can be found in article 24(2) VC. They can be issued with a validity up to five years\textsuperscript{222}, but if such visas are issued with a validity between six months and five years and the duration of authorised stay is always ninety days per one hundred and eight days-period.\textsuperscript{223}

After the decision to issue the visa is taken, the visa sticker will be filled in according to the rules of article 27 VC. The sticker has to comply with international ICAO-norms, but national comments are allowed. The visa-sticker is than affixed to the passport. The procedure is now complete and the holder of the visa can proceed to the external border of the EU during the period of validity. It should however be noted that the mere possession of a visa does not confer an automatic right of entry. The visa only allows the holder to present himself at the EU border. The border control authorities can still check whether the entry conditions are fulfilled at that time.

3.2.2.4. Negative decision

The consulate can on the other hand also decide that the entry conditions are not fulfilled. In such cases a visa will normally be refused. The consulate can however decide to issue a visa with limited territorial validity (LVT), but only in exceptional circumstances such as humanitarian grounds.\textsuperscript{224} If an LVT-visa is not considered justified, the visa has to be refused. The Visa Code and the Handbook contains a long list of situations when the consulates “shall” refuse to issue a visa.\textsuperscript{225} Taking into account the uniform format of the Schengen visas, it is most likely that the Member States cannot invoke any other grounds to refuse the issuing of a visa.\textsuperscript{226} The most significant novelty with regard to the refusal of a visa is article 32 VC, which provides the applicant with a right to an effective remedy. Before the entry into force of the Visa Code, the national laws of the member states governed the rules on refusal.\textsuperscript{227} Some Member States gave the reasons

\begin{itemize}
  \item \textsuperscript{222} Handbooks Visa Code (n 213) 69.
  \item \textsuperscript{223} The period in the Handbooks has been changed from months to days only last April. See Commission Decision C (2014) 2727 final of 29 April 2014 on amending Commission Decision C (2010) 1620 of 19 March 2010 establishing the Handbook for the processing of visa applications and the modification of issued visas as amended by Commission Implementing Decision C (2011) 5501 final of 4 August 2011 [2014].
  \item \textsuperscript{224} We will however not dwell on this any longer.
  \item \textsuperscript{225} Article 32(1) VC and Handbooks Visa Code (n 213) 76. For example when a false travel document is presented, when the applicant has no justification for the intended stay or when the applicant cannot prove that he holds adequate TMI. The list is however longer than these examples.
  \item \textsuperscript{226} Peers (n 206) 125.
\end{itemize}
for the refusal and some even provided the applicant with information about the appeal options. Others however did not and in some cases an appeal was even not available. This changed with the Visa Code. The applicant should now be informed about the refusal by the Member State and there is a mandatory motivation duty: the Member State has to explain the applicant why the visa is refused. This has to be done using the standard form contained in Annex IV of the Visa Code. If a visa has been refused, the applicant has a right of appeal. A similar right of appeal also exists if the visa has been annulled or revoked.228 The Member State that has taken the negative decision, has to inform the applicant regarding the appeal procedure. The appeal is carried out against the Member State that has taken the final decision.

4. PROBLEMS WITH THE ISSUING OF VISAS

When the Visa Code was adopted, the expectations were high. The Code was welcomed as the next step towards an EU Common Visa Policy229 and several new elements were praised.230 The Code solved some problems that were encountered with the previous rules under the CCI. With the Code a uniform procedure is installed, which takes away part of the sovereignty of the member states and thus tackles the differences in implementation of the CCI. Moreover, the Code also deals with the problem of ‘consulate shopping’,231 Also the setting of clear time limits and a fixed visa fee, thus limiting the possibility of the Member States to ask supplementing fees232, are great improvements. If the issuing of a visa is refused, the Member State now has to inform the applicant about it and provide the necessary procedural guarantees to enable the applicant to appeal the decision. The Commission is of the opinion the the Visa Code “greatly modernises and standardises the visa”, if they are correctly implemented.233

However, a lot of problems still remain, even with the adoption of the Visa Code. The mere existence of a visa requirement limits the short term migration into the EU. This is important to consider, given the fact that tourism is “one of the biggest generators of employment and earnings in the European Union and a key driver for economic growth and development”.234 But since visas are considered as indispensable to limit irregular migration235, it is not likely that the overall visa requirements will be eliminated in the near future.

228 Article 34(7) VC.
229 Kownacki (n 204) 255.
230 Peers (n 206) 130.
231 See Jérôme Boniface and others, Visa Facilitation versus tightening of control: Key aspects of the ENP (European Parliament 2008) 19. By consulate shopping, I mean that visa applicants try to choose a consulate with a higher issuance rates. A uniform procedure does not take the problem away completely, but al least limits it.
232 ibid 20.
234 See COM (2012) 649 final, 2. In this Communication we can find astonishing figures: tourism is good for 18.8 million EU jobs in 2011 and tourists nearly spend USD 500 billion.
But also the Visa Code itself causes some problems, especially with regard to the procedure to apply for a visa. In April 2014, the Commission released its report on the implementation of the Visa Code, where it becomes clear that the implementation of the Visa Code does not go as smoothly as foreseen. But already in November 2012 it became clear that there were problems with the implementation of the Visa Code. However, there are not only problems with the implementation of the Visa Code. On some points, the Code provides a procedure that looks nice on paper, but causes practical difficulties on the field. It is necessary to study these problems to allow us to assess whether the visa facilitation agreements concluded by the EU, especially the one with Russia, are capable of tackling these problems in an effective way.

4.1. Consular presence

4.1.1. Problem

A first problem encountered by the visa applicants is the consular coverage and accessibility of the visa procedure. The competent country to decide on the visa application is the Member State whose territory constitutes the sole or main destination. Article 40(1) VC makes clear that each member State is responsible for organising the procedures relating to applications. However, the consular network of the Member State differs greatly: not all Schengen Member States have consular posts in all third countries where people apply for a visa or are represented in each part of every country. The list of the Member States’ consular presence indicates that there are numerous situations where a Member State does not have a consulate in a third country or is not represented in some way. The same list also makes clear that even if a Member State is represented in a third country, this might still be problematic, especially in geographically large countries like Russia. Given the fact that the Visa Code requires the applicant to appear in person, this adds seriously to the total costs of lodging a visa application.

4.1.2. Possible solutions embodied in the Visa Code

The Commission, Council and European Parliament were not blind for the problem: the Visa Code orders the Member States to cooperate in order to reduce costs for the Member States and to ensure better consular

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237 COM (2012) 649 final
238 The rules contained in article 5 VC have been discussed in detail, text to n 213.
241 The obligation to cooperate can be found in Visa Code, recital 13; in article 5(4) VC; and in article 40(2)(b) VC.
coverage for the good of the applicants.\textsuperscript{242} The Code provides several solutions, dealing with representation, cooperation and outsourcing. The problem can partly be solved by ‘representation arrangements’.\textsuperscript{243} By such an arrangement, a Member State agrees with another Member State that has no consular post in a third country or a certain region of that country, to represent it for examining and issuing visas on behalf of the latter Member State. The Member States consider this form of cooperation to be effective: the most recent figures show that even as the the number of Schengen consulates decreased, the the number of representations by other Schengen States increased.\textsuperscript{244}

Apart from the classic representation agreements, the Visa Code also provides for other forms of cooperation.\textsuperscript{245} These forms mainly focus on the enlargement of the consular coverage and are mainly limited to the collection of applications. A first option is the limited representation for the purpose of the collection of applications and biometric data.\textsuperscript{246} In this form of cooperation, another Member State collects the applications, while the examination and the decision on the application is carried out by the Member State with limited representation.

Next to the limited representation, Member States can also also cooperate through co-location and Common Application Centres.\textsuperscript{247} In the case of co-location, the consular staff of one or several Member States share the consular premises of one Member State, while with CACs, all the relevant resources of two or more Member States are pooled in one neutral building, other than a consulate, in order for applicants to lodge applications. These ideas are not new and were already discussed in 2004.\textsuperscript{248}

In practise, these two forms of cooperation are not often used,\textsuperscript{249} although EU funding is available and the fact that the Stockholm Programme insists on it.\textsuperscript{250} Some cooperations resemble CACs,\textsuperscript{251} but they mostly tend to be made up of ‘multiple’ representation agreements.\textsuperscript{252} In such an agreement a Member State

\begin{thebibliography}{99}
\bibitem{242} COM (2014) 165 final, 13
\bibitem{243} Article 8 VC
\bibitem{244} European Commission, ‘Impact assessment study supporting the review of the Union’s visa policy to facilitate legitimate travelling’ (Publications Office of the European Union 2013) 13.
\bibitem{245} Article 40(2)(b) VC mentions limited representation, co-location and Common Application Centers.
\bibitem{246} Article 8(1) VC.
\bibitem{247} Common Application Centre will hereafter be abbreviated as CAC. More details on these forms of cooperation can be found in article 41 VC. See Sergo Mananashvili, ‘Access to Europe in a globalised world: Assessing the EU’s Common Visa Policy in the Light of the Stockholm Guidelines’ (2013) EUI Working Papers 74/2013, 6 <http://cadmus.eui.eu/bitstream/handle/1814/28257/RSCAS_2013_74.pdf?sequence=1> accessed 10 August 2014. The difference between the two is not that outspoken in the Visa Code. According to the Commission however, in the case of co-location, use is made of an existing consular premise, while in the case of a CAC “a new centre is set up in a place where there is no consular representation issuing visa”: see Council, ‘Summary of discussions Visa Working Party 11-12 July 2007’ 11821/1/07 REV 1 [2007].
\bibitem{248} See EPEC, ‘Study for the extended impact assessment of the Visa Information System: Final Report’ (2004), 31 <http://www.statewatch.org/news/2005/jan/vis-com-835-study.pdf> accessed 10 August 2014. There it is also noted that CACs are not really helpful in third countries where a lot of visa applications are lodged, since the workload would be enormous.
\bibitem{249} SWD (2014) 101 final, 32
\bibitem{252} See European Commission, ‘Impact assessment’ (n 244) 13. The Commission uses the term ‘hybrid CAC’: see COM (2014) 165 final, 13
\end{thebibliography}
agrees with a large number of Member States to represent them in a third country. Currently four such CACs exist: one in Podgorica, Montenegro\textsuperscript{253}, a second one in Chisinau, Moldova\textsuperscript{254}, a third one in Kinshasa, DRC\textsuperscript{255} and a last one in Praia, Cape Verde.\textsuperscript{256} These projects attract a high number of applicants in regions where the Member States’ consular presence is otherwise limited and are therefore considered to be successful.\textsuperscript{257}

Despite the success, the Member States seem to be reluctant to establish more CACs. Already in 2007 a discussion on the feasibility of CACs took place,\textsuperscript{258} where some Member States issued a warning that it cannot be assumed that the establishment of a CAC will completely solve the problem of consular coverage and even might have negative side effects.\textsuperscript{259} Also a lack of initiative became clear: some Member States express their interest in participating in more CACs, but only if another Member State would lead it.

As a last resort, the Member States can also have recourse to outsourcing or external service providers.\textsuperscript{260} Article 40(3) VC makes clear that this is possible if the number of applications in a certain consulate is too high to deal with in a decent manner or to ensure good territorial coverage. Relying on an ESP has advantages for both the applicant and the Member State: it enlarges the consular coverage, makes it possible to deal with growing numbers of visa applicants, solves the problem of inadequate reception facilities, tackles the problem of shortages of consular staff and can be used in regions where security is an issue.\textsuperscript{261} Moreover the place to apply is closer to the applicant, saving him the possibly expensive trip to the competent consulate, it offers comprehensive services, faster procedures, applicants can use online appointment systems and the staff is supposed to be friendly.\textsuperscript{262} But even if Member States decide to make use of an ESP, they still must provide the option to lodge the application directly at the consulate.\textsuperscript{263} In that way the applicant is not forced to pay an extra service fee. ESPs are private companies and their first goal is to make a profit. They are paid by the Member States which they provide the service for. But the Visa Code

\textsuperscript{253} In Podgorica, the CAC is located at the Slovenian embassy and receives the visa applications for Belgium, Denmark, Estonia, Spain, France, Latvia, Lithuania, Hungary, The Netherlands, Austria, Poland and Slovakia.

\textsuperscript{254} In Chisinau, the CAC is located at the Hungarian embassy, which receives the visa applications for itself, Belgium, Denmark, Estonia, Greece, Latvia, Luxembourg, The Netherlands, Austria, Slovenia, Slovakia, Finland, Sweden and Switzerland.

\textsuperscript{255} In Kinshasa, the CAC is called ‘Maison Schengen’ and Belgium there represents the Czech Republic, Germany, Estonia, France, Latvia, Lithuania, Hungary, Luxembourg, The Netherlands, Austria, Portugal, Slovenia, Slovakia, Finland, Sweden and Norway.

\textsuperscript{256} In Praia, the CAC is called Centro Commun de Vistos or CCV and is operated by Portugal and represents Belgium, the Czech Republic, Germany, Spain, France, Italy, Luxembourg, The Netherlands, Austria, Slovenia, Finland and Sweden.

\textsuperscript{257} Mara Wesseling and Jérôme Boniface, ‘New Trends in European Consular Services: Visa Policy in the EU Neighbourhood’ in Jan Melissen and Ana Mar Fernández (eds), Consular Affairs and Diplomacy (Martinus Nijhoff 2011), 131.

\textsuperscript{258} Council, ‘Summary of discussions Visa Working Party 11-12 July 2007’ 11821/1/07 REV 1 [2007].

\textsuperscript{259} See, for example, Geert Tiri, Visa policy as migration channel in Belgium (European Migration Network 2011), 54 <http://www.emnbelgium.be/sites/default/files/publications/study_be_20120214_visapolicy_final1.pdf> accessed 10 August 2014. There it is said that the establishment of CACs can lead to an increase of visa applications in the consulates of Member States who do not participate in the CAC but maintain a separate representation in the same location as the CAC.

\textsuperscript{260} External service provider will be abbreviated as ‘ESP’.

\textsuperscript{261} SWD(2014) 101 final, 32

\textsuperscript{262} European Commission, ‘Impact assessment’ (n 244) 13.

\textsuperscript{263} Article 17(5) VC.
also provides for a service fee to be charged to the visa applicants. The fee is limited to a maximum of EUR 30 and must be proportionate to the cost incurred by the ESP.

Despite the advantages, some concerns have also been raised relating to the use of ESPs. The quality of services of some ESPs has been questioned, the service fee tends to differ in specific third countries for delivering the same service in the same location on behalf of different Schengen States. Moreover, most ESPs are active in places where there is already consular presence: the ESPs are in reality not used to enlarge the consular coverage, but to ease the burden on the existing consulates. Looking at these issues related to the use of ESPs, it is not at all a surprise that the Visa Code stipulates that recourse to ESPs should be a last resort measure. However, in reality Member States simply opt for cooperation with an ESP, without investigating other forms of cooperation. Outsourcing is considered to be the cheapest, quickest and most efficient way to deal with an increasing number of visa applications. Some Member States consider it even to be the only viable option.

Despite the fact the Visa Code tries to tackle the problem of consular coverage, this has not been an undivided success. Representation agreements and outsourcing are indeed widespread and contribute to a better consular coverage. However, they are often concentrated in the capital of a country or a few big cities. In nine countries subject to the visa requirement of Regulation 539/2001, not a single Member State was represented and around nine hundred so-called ‘blank spots’ remain to be filled in the list of consular coverage. This can be a serious problem given the economic importance of tourism. The Commission even considers the introduction of the principle of mandatory representation.

4.2. Costly visa procedures

A second possible problem a visa applicant may be confronted with, is the cost of the visa procedure. The Visa Code only mentions two possible concrete costs a visa applicant may encounter when lodging a visa application: these are the visa fee and the possible service fee that can be charged by the external service provider. However, a visa applicant also faces a number of indirect costs, such as travel costs, which can add seriously to the total cost of a visa application. These costs can in some case amount to EUR 750.

The obligation to lodge the application in person might represent a cost, especially where the applicant lives in a country where the Member States have limited consular coverage or in large third countries.

\[264\] The rules on the visa fee can be found in article 17 VC.
\[265\] European Commission, ‘Impact assessment’ (n 244) 14.
\[266\] SWD (2014) 101 final, 32
\[268\] See European Commission, ‘Impact assessment’ (n 244) 13. In 2012, for example, 331 locations made use of ESPs.
\[269\] COM (2014) 165 final, 13
\[270\] ibid 13.
\[271\] See table 1 in European Commission, ‘Impact assessment’ (n 244) 13.
\[272\] One can think of China, India or indeed Russia. For some examples, see Mananashvili (n 247) 8.
where the applicants will have to spend time and money on travelling. The use of the appearance in person is limited, as more Member States make use of ESPs for visa applications, taking away the traditional added value of having applicants appear in person: the first impression the consular staff gets of the applicant.273 Recent figures show that 70% of the applicants considers the obligation as burdensome and unnecessary.274 Luckily for applicants, some signs indicate that in the future the appearance in person can become the exception: in some consulates only 30% of the visa applications are lodged in person.275

Secondly, visa applicants can also face relatively high costs for providing the requested supporting documents. Often it is required that the documents are translated and are certified, adding seriously to the costs.276 Beside that, the applicant also needs to provide proof of TMI. This can mean losing money spent on insurance if the visa is refused or if the stay granted is shorter than requested.277 The costs of the TMI are often not refunded in case the visa is refused. This is all the more striking, because in some cases TMI is useless: even with such insurance, Schengen States have sometimes not been able to claim costs incurred for the provision of healthcare to travellers back from insurance companies.278

4.3. Burdensome and lengthy visa procedures

Next to the cost of the supporting documents the fact mere that supporting documents are asked, can be a burden for the applicant. Questions can be raised to the long list of supporting documents that has to be provided. This list is a non-exhaustive one, which means that a Member State can decide to ask for more documents,279 leading to varying documentary requirements by consulates of different Schengen States.280 Some studies show the irrationality of some requirements, as it is known that the requirements can easily be circumvented.281

The length of the visa procedure is another often heard point of criticism. It is true that the Visa Code constitutes a major improvement compared to the past, as deadlines have been introduced for the Member States to decide on the visa applications. The deadlines are however not always met, especially in peak periods, or in consulates with al low number of visa applications.282 Next to that article 23 VC provides that

273 SWD (2014) 101 final, 9
274 ibid 9.
275 COM (2014) 165 final, 9
276 SWD (2014) 101 final, 13-14
277 ibid 14.
278 European Commission, ‘Impact assessment’ (n 244) 7.
279 Mananashvili (n 247) 4.
280 European Commission, ‘Impact assessment’ (n 244) 9; COM (2014) 165 final, 10
282 European Commission, ‘Impact assessment’ (n 244) 10.
in individual cases the deadlines may be extended to thirty days, or to a maximum of sixty days if additional information is needed. This can lead to the situation where a Member State may ask additional supporting documents to extend the timeframe to investigate the visa application. Another element that can further delay the decision on a visa application is the prior consultation. Also the prior consultation can lead to delaying the decision with another week. The length of the visa application procedure can even cause tourists to abandon plans of making last minute travels to the EU.283

Linked to this, there are also other practical complaints about the visa procedure. A first problem in this regard is the perceived treatment at the consulate by the consular staff. Apparently this is even conceived as a bigger problem than the result of the application.284 Often people do not dare to complain, because they fear for a negative outcome of their visa application. Combined with the sometimes limited staff skills, this can add to the burdensomeness of the procedure.285 Also the number of visits needed to complete the procedure and collect the visa is problematic. Not a single Member State manages to issue a Schengen short-stay visa within one day.286 Also the time spent queuing to be able to lodge the visa application is a burden. In some consulates people had to spend up to twelve hours before they could apply for a visa.287 To tackle these issues, it would at least be recommendable to provide some shelter for the applicants standing in line and to train the staff in receiving visa applications.288

4.4. Facilitation of mobility of bonafide and frequent travellers

The Visa Code sets the goal of providing a simplified procedure for applicants known to the consulate for their integrity and reliability and issuing MEVs for frequent or regular travellers to facilitate smooth travel and lessen the administrative burden for the consulates.289 This goal is however hindered by a number of problems, which either make the intended facilitations redundant, since the Member States don’t know how to make use of them or lead to different interpretations in the different Member States.

The first problem encountered is the lack of an official definition of a bona-fide traveller. Several Member States have indicated that they would welcome further clarifications and guidance as to what these concepts meant.290 Articles 24(2)(b) and 26(4)(b) VC only lift a tip of the veil: they stipulate that an applicant can prove his integrity and reliability by lawful use of previous Schengen visas, his economic situation in his country of origin and his genuine intention to leave the territory of the Member States before the expiry of

\[\text{EU NORMATIVE FRAMEWORK ON VISA ISSUANCE}
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283 ibid 10.

284 See Boratyński and others, ‘Monitoring Report’ (n 227) 9-15. This study analyses the perceived treatment in the finest details.


286 ibid 32 and 67.

287 Boratyński and others, ‘Monitoring Report’ (n 227) 21; Chajewski and others (n 285) 30-31.

288 Chajewski and others (n 285) 53 and 57.

289 Visa Code, recital 8.

290 European Commission, ‘Impact assessment’ (n 244) 11.
the visa applied for. This rather vague concept is not good for legal certainty and leaves a lot of discretion for the Member States, leading to unilateral approaches by some Member States, causing confusion for the applicant and even giving rise to visa shopping.

Secondly, the three intended facilitations can give rise to problems. Article 10(2) VC first of all provides that the requirement on lodging in person might be waived for this category of travellers. Secondly, article 14(6) states that the consulates may wave the requirement of certain supporting documents. Thirdly, the MEVs shall be issued with a validity-period between six months and five years, according to 24(2)(b) VC. The first two are ‘may-clauses’, meaning that a lot of discretion is left to the Member States to decide on how they apply them, causing uncertainty with the applicants. Next to that, the increasing use of ESPs in the visa procedures limits the application of the facilitation provisions. ESPs cannot be trusted with the task of assessing whether the applicant is bonafide or cannot judge whether an applicant is known to the consulate.

The third facilitation, the provision that providing for the issuance of MEVs, on the other hand is a ‘shall-clause’. This means that the consulates have to grant MEVs to bonafide or frequent travellers, which can mean significant savings and efficiency gains. However, also this provisions poses a number of difficulties. Again, the degree of discretion left to the Member States, could undermine the facilitating objective of the provision. The list of beneficiaries is exemplary and not intended to be exhaustive, but the Member States tend to interpret the list restrictively. Combined with the requirement of proving the economic situation in the country of origin, this can lead to other categories of applicants being deprived from the chance of obtaining an MEV. Also the condition of proving previous use of visas can be a reason why bonafide travellers might be refused a MEV. And although Member States have to issue MEVs if the conditions are fulfilled, they seem reluctant to issue MEVs with a validity longer than one year.

5. FUTURE PROSPECTS

These problems show that despite the major improvements introduced in the Common Visa Policy by the adoption of the Visa Code, there is a lot of room left for improvement. The Commission is aware of this and

292 For some examples, see European Commission, ‘Impact assessment’ (n 244) 11-12.
293 SWD (2014) 101 final, 10.
294 ibid 10.
295 ibid 13.
296 Mananashvili (n 247) 5.
297 Often Member States require reciprocity from the third country. The category of people that seems to profit most from the facilitation, are businesspeople, since they bring additional economic activity. See European Commission, ‘Impact assessment’ (n 244) 11.
298 Mananashvili (n 247) 5.
already in 2012 stated that a review of the Visa Code might be necessary,\textsuperscript{300} while the report from April this year sets out the revision of the Visa Code.\textsuperscript{301} From the proposals the Commission highlights, it becomes clear that they are aware of the problems and they clearly try to tackle them.

The Commission envisages a recast and amendment of the Visa Code,\textsuperscript{302} while maintaining the innovations of the Visa Code. In a proposal, a number of policy options was worked out, ranging from a status quo to a regulatory action.\textsuperscript{303} Not all regulatory solutions possible for the problems mentioned above, are equally viable from a legal, political or practical point of view.\textsuperscript{304} To make the choice for policy makers easier, the possible policy options to solve each problem were grouped together in possible packages, according to their level of ambition: a minimum, intermediate and maximum option.

To solve the problems of lengthy, costly and cumbersome procedures, an easing of the administrative burden is proposed, especially for bonafide and frequent travellers, including the issuing of MEVs with long term validity and procedural facilitations. \textit{In concreto} the Commission proposes\textsuperscript{305}, amongst others, to:

- abolish the principle of lodging the application for certain people;
- abolish the requirement of TMI;
- make the list of supporting documents exhaustive;
- introduce a distinction between ‘unknown travellers’, ‘VIS registered applicants’ and ‘VIS registered regular travellers’ to improve the issuing of MEVs.

All these elements are to be linked together, leading to a real facilitation for frequent travellers.\textsuperscript{306} For example, a person who is considered a VIS registered regular traveller, meaning that he is registered in the VIS and has obtained two visas within the 12 months prior to his application,\textsuperscript{307} would not have to appear in person to lodge his application, would only have to provide proof of the travel purpose and would have an automatic right to a MEV with a validity of three or five years.

The Commission also tries to tackle the problem of consular coverage.\textsuperscript{308} The Commission opts for the introduction of Schengen Visa Centres and ‘mandatory representation’, meaning that when a Schengen State competent to process the visa application is not present nor represented in a certain third country, any other Schengen State present in that country would be obliged to process visa applications on its behalf.

\begin{itemize}
  \item \textsuperscript{300} COM (2012) 649 final, 4-5.
  \item \textsuperscript{301} COM (2014) 165 final, 15.
  \item \textsuperscript{303} European Commission, ‘Impact assessment’ (n 244) 22.
  \item \textsuperscript{305} COM(2014) 164 final, 4.
  \item \textsuperscript{306} ibid 5-6.
  \item \textsuperscript{307} ibid 32.
  \item \textsuperscript{308} SWD (2014) 67 final, 4-5.
\end{itemize}
If the proposal would be accepted by the Parliament and Council, this would mean that most of the problems would be solved. The procedural gains are clear for the category of bonafide and frequent travellers. But for persons who apply for the first time, not much changes. They would still have to lodge their application in person, although the document requirements would be clearer and the requirement of TMI would be dropped. The solution to the problem of consular coverage seems to be able to tackle the problem in a rather effective way. However, the adoption of the new regulation will not happen very soon, given the sensitive nature of the topic. It is also questionable whether the Member States and the Parliament will just accept what the Commission proposes. Given the time needed to adopt the Visa Code, a long debate seems more likely than a swift adoption of the proposal.
CHAPTER III:
VISA FACILITATION AGREEMENTS

After having studied the Visa Code in more detail, it is time to turn to the notion of visa facilitation. Applying for a visa can be a burdensome task for the applicant and even be a deterrent to travel to the EU. For that reason, the EU started to conclude so-called visa facilitation agreements with certain third countries. The visa facilitation agreement concluded between the EU and the Russian Federation was the first VFA ever concluded by the EU and several others followed afterwards. However, the VFA with Russia was not drawn out of thin air. The EU had already developed some experience with visa facilitation: in 2002 an agreement was concluded between the Russia and the EC on transits between the Russia and the Kaliningrad region over Schengen territory. Next to that the EC in 2004 also concluded an agreement with the People’s Republic of China. These two agreements form the real start of the series of international agreements concluded by the EU in the field of visa facilitation.

In this part, we will discuss concept and the conditions for the conclusion of a visa facilitation agreement. After that, the impact of the Visa Code on the conclusion of visa facilitation agreements will be discussed, which lead to the concepts of first and second generation visa facilitation agreements, which will both be examined in more detail. Finally, we will investigate whether visa facilitation agreements actually facilitates the issuance of visas.

1. THE ORIGINS OF VISA FACILITATION: THE PRELUDE

1.1. The Kaliningrad issue

The legal regime applicable to the transit of Russians between the Kaliningrad enclave and the rest of Russia is strange thing. But it is important for our further analysis, since it is in this context that visa facilitation and even visa liberalisation was first mentioned. The regime adopted to facilitate the transit is a special one, since it is exempted from the normal application of the Visa Code.

1.1.1. The specific situation of Kaliningrad and the transit problem

The Russian oblast Kaliningrad is geographically situated between Lithuania and Poland. The capital of the region is also called Kaliningrad. Before and during World War II, the city and its surroundings were part of Germany and was known as Königsberg. The Germans abandoned it after World War II and as part of the

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post war settlement, the city and its immediate surroundings became part of Russia and the Soviet Union and were henceforth known as the *oblast* Kaliningrad. During the Cold War period, the situation was relatively stable: the region was of strategic importance for the Soviet Union and a significant numbers of military personnel were based there. Things began to change with the collapse of the Soviet Union. Since the region had been repopulated after World War II with ethic Russians, the region became part of the Russian Federation. The region however lost its link with the Russian motherland, since Lithuania regained its independence, along with the other Baltic States. This posed a problem: Russians living in Kaliningrad could no longer travel freely to the rest of Russia and vice versa.

Although the relations between the Baltic States and Russia have not been good, Lithuania understood that the transit of Russians over its territory could be a problem and sympathised with the Russian side. In 1991 Lithuania and the Soviet Union agreed that a comprehensive agreement on the issue had to be concluded. Long and harsh negotiations followed, but in 1995 a compromise was reached. An agreement laid down legal foundations for the travel of nationals of both countries and the transit procedure through Lithuania. The agreement was considered to install a very liberal visa procedure, since Russian nationals living in the Kaliningrad region had the right to visa-free travel, when passing through Lithuania.

1.1.2. **Accession of Lithuania to the EU poses new problems**

A new problem arose with the the accession of Lithuania to the EU for which negotiations started in 2000. The Treaty of Amsterdam integrated the Schengen agreement into the EU framework. As of than, all new acceding states also had to comply with the Schengen acquis, including Regulation 539/2001, which blacklisted Russian nationals, meaning that they needed a visa to enter or transit the Schengen area. This meant that when Lithuania would join the EU, it would have to install visa requirements for Kaliningradians.

The EU side at first seemed to be blind for the problems this would pose. In 2001, the Commission urged Lithuania to bring its visa policy in line with the EU *acquis*. Lithuania had to abolish the preferential visa regime for Kaliningradians, or it would not be able to join the EU. Accordingly, Lithuania denounced the agreement with Russia in 2002 and therefore ended on 1 January 2003. As of that date, Lithuanian visas were needed to travel to and from Kaliningrad. With the accession of Lithuania and the application of the Schengen *acquis*, the visas issued would be Schengen visas. The Russian side however predicted huge challenges and wrote a letter to EU expressing its concern. This apparently served as a wake-up call in the EU, since suddenly there was attention to the problem. The Commission first recognised the impact of enlargement on Kaliningrad in January 2001, but still was of the opinion that the situation would not necessarily impede the movement of people between Kaliningrad and the rest of Russia, and was not willing to provide for exemptions to the *acquis* for Kaliningrad.

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Russia was not satisfied with the response of the EU. If the regime of the agreement with Lithuania could not be maintained, the Russians even went as far to propose visa free travel for all Russians travelling to the EU, a proposal greeted with little enthusiasm at EU side. During the summer of 2002, the first negotiations took place on the Kaliningrad issue, where Russia repeated its calls for visa-free travel. The EU continued to reject this as a short term objective, but accepted that a special solution was needed for Kaliningrad. In September 2002, the Commission issued a Communication that for the first time mentioned the introduction of a special document, the Facilitated Transit Document or FTD, that would serve as a sort of MEV, allowing for transit to and from Kaliningrad over Lithuanian territory. This clearly opened up the way to an agreement between the EU and Russia. At the EU-Russia Summit in Brussels in November 2002, an agreement was reached on the Kaliningrad issue.

1.1.3. The result of negotiations: FTD and FRTD

The agreement reached in November 2002 is relatively short and comprises only three pages. It introduces next to the above mentioned FTD also the Facilitated Rail Transit Document, or FRTD. These mechanisms realise the transit of Russian nationals on a relatively simple and affordable way, without having to change the EU Visa Policy. The introduction of the FTD and FRTD schemes had to go relatively fast, since the EU and Russia agreed that it would enter into force 1 July 2003. In a Protocol to the Accession Treaty, Lithuania received guarantees that it would be allowed to participate in the Schengen acquis, even if the Kaliningrad regime is not yet implemented by the agreed date and that the EU would help Lithuania financially in the implementation of the regime. The basic functioning of the regime for facilitated transit was incorporated in the EU acquis in April 2003 with the adoption of EU Regulations 693/2003 and 694/2003, which form an integral part of the Schengen acquis. It is noteworthy that neither of these documents makes an explicit reference to the Kaliningrad issue. If the provisions of the regulations are studied in more detail however, it is clear that they were adopted to implement the agreement with Russia.

312 Golunov (n 4) 90.
317 This becomes clear from the recitals of these regulations. See also European Commission, ‘Report from the Commission on the functioning of the facilitated transit for persons between the Kaliningrad region and the rest of the Russian Federation’ COM (2006) 840 final 6.
The FTD is a specific authorisation allowing for a facilitated transit, which may be issued by Member States\textsuperscript{318} for multiple entries by whatever means of transport, including transport by rail.\textsuperscript{319} The FTD is valid for a maximum of three years and the transit time may not exceed 24 hours.\textsuperscript{320} The second and more limited facilitating document is the FRTD, which allows a facilitated transit, but only for a single entry and return by rail.\textsuperscript{321} It also has a maximum validity of three years and allows for a transit time that does not exceed 6 hours. Moreover, the Lithuanian and Russian governments agreed on fixed transit routes for the use of an FRDT, severely limiting the field of application of the FRTD. The use of FRTD is, contrary to the FTD which provides more freedom, only allowed in the case of a direct transit, meaning that the Russian nationals making use of an FRTD may not leave the train in Lithuania.\textsuperscript{322}

Next to establishing the instruments, the regulations also lay down the conditions to be entitled to the facilitated transit and the procedure to obtain the documents.\textsuperscript{323} To be entitled to an FTD or FRTD the applicant has to possess a valid travel document and may not be considered a threat to public policy or national security. Specifically for an FTD, the applicant must have valid reasons to travel between Kaliningrad and mainland Russia. More detailed rules are on the conditions are laid down in Lithuanian legislation. The procedure to apply for an FTD more or less resembles the visa application procedure: an application for an FTD needs to be presented at the consulate of Lithuania. To apply for an FRTD one can directly apply for an FRTD at the consulate, in which case the case the same procedure is followed as for the FTD, or opt for an indirect application. In that case the applicant applies for the FRTD at the moment of the purchase of his ticket. The booking clerk in that case has to transmit the passenger data and the intended train via an electronic system to the competent Lithuanian authorities, who have 24 hours to decide whether they will issue the FRTD or not.\textsuperscript{324} If the FRTD is granted, the applicant receives the positive answer and can get on the train, where he will receive his FRTD.

An FTD or FRTD can also be refused, the grounds of which are subject to the national laws of Lithuania.\textsuperscript{325} The grounds for refusal have to be communicated to the applicant, if this is required by the national law.\textsuperscript{326} The Lithuanian law provides several grounds to refuse the issuing of an F(R)TD. In some cases, it is even possible to cancel the document. For an FRTD, this may even be done on the train. If the

\textsuperscript{318} The Regulation does not explicitly mentions Lithuania, but in practice Lithuania is the only Member State that issues FTDs and FRTDs. Reg 693/2003, article 12 however provides that also other Member States in the future might issue these documents. Until today however, no other Member State decided to issue FTDs or FRTDs. It might however be possible that Latvia or Poland in the future start issuing these documents, given their geographical situation and the railway infrastructure.

\textsuperscript{319} Reg 693/2003, article 2(1).

\textsuperscript{320} Reg 693/2003, article 3(2).

\textsuperscript{321} Reg 693/2003, article 2(3).

\textsuperscript{322} This clearly demonstrates the fear on EU side of being faced with illegal migration. This already became clear in the 2002 Commission Communication. See Golunov (n 4) 90; COM(2002) 510 final.

\textsuperscript{323} Reg 693/2003, article 4-5.

\textsuperscript{324} Reg 693/2003, article 6(1).

\textsuperscript{325} Reg 693/2003, article 8(1).

\textsuperscript{326} This clearly offers less legal certainty than is the case under the Visa Code.
FRTD is applied for in the indirect way, the applicant is informed of the refusal before his journey, or if he could not be contacted, at the latest before entering the train.

1.1.4. Later developments: Local Border Traffic

Despite the fact that the system in place for transit over the territory of Lithuania is considered to be working well, its field of application remain relatively limited. People who want to enter or leave the territory of Kaliningrad through the territory of Poland cannot rely on the FTD/FRTD regime since Poland does not wish to apply it as it does not consider itself a transit country.

The introduction of Regulation 1931/2006 on Local Border Traffic Agreements has brought some change to this problem. The regulation foresees in the issuing of special cross-border permits, or LBT permits, for residents on both side of the border to encourage ‘local border traffic’, i.e. simplified border crossings for residents for social, economic and cultural exchange or for family reasons. On the basis of this regulation, EU Member States can conclude bilateral agreements with their neighbouring non-EU countries allowing for local border traffic, for residents, living in principle no more than 30 km (or exceptionally 50 km) from the border. Persons living within that area can apply for an LBT permit, which has a validity from 1 up to 5 years. The requirements to obtain an LBT permit are easier to fulfill than under the Visa Code. One does not have to prove sufficient means of subsistence, the permit can be issued free of charge, separate lanes and border crossings could be installed and all residents would be entitled to make use of the scheme.

This at first sight seems interesting for Kaliningradians: they would not gain the right to travel to mainland Russia, but they would have the right to cross the borders of their neighbouring countries. There is however a major problem with the regulation, as the maximum range of application is limited to 50 km, meaning, that measuring from the Polish border, the city of Kaliningrad itself falls outside the field of application of the LBT regime. Thus, the Kaliningrad Oblast would fall apart in three region: one region with the possibility of LBT with Poland, another region with the possibility of LBT with Lithuania and a region, including the city of Kaliningrad, falling outside the scope of the LBT Regulation. This problem was solved in 2011 by amending the LBT Regulation, a change that nominated the whole of the Kaliningrad Oblast as falling inside the concept of border region, opening up the entire territory of the oblast for the possible

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application of the LBT regime. This possibility was effectively used by Russia to conclude an agreement with Poland, next to agreements with Norway and Latvia on Local Border Traffic. An agreement with Lithuania is envisaged, but is not yet into force.

1.1.5. Evaluation of the regime

Regulation 693/2003 already foresaw that the Commission should evaluate the FRD and FRTD system, which happened in December 2006. Looking at the number of travellers between mainland Russia and Kaliningrad, the FTD/FRTD scheme is considered a success. Each year, around 1.5 million persons travel to and from Kaliningrad, in 70% of the cases by train. FTDs are mainly used by inhabitants of mainland Russia, while Kaliningradians mostly use FRTDs. The popularity of the FRTD by far exceed that of the FTD, which is logic given the fact that an FTD does not give the right to visit Lithuania, but only to transit it. In total between 2003 and 2006, more than 1.3 million FRTDs have been issued, while the number of FTDs in the same period did not exceed 10000. Both the EU and Russia are of the opinion that the system runs smoothly and are in general satisfied with the system. The Commission therefore could not see any major problems and no need to change the system. Although Lithuania feared that the Kaliningrad issue might have delayed the full participation in the Schengen area, Lithuania was able to fully join the Schengen area in 2007.

In the beginning of 2014, the Commission published a report in which the 2011 amendment of the LBT regulation was assessed. The amendment to enable the conclusion of the agreement between Poland and Russia was considered a success: by October 2013, more than 140 000 LBT permits had been issued and 300 000 crossings had been registered. Only a limited cases of abuses had been registered. Although the assessment on the implementation and functioning of the system was limited, given the fact that the agreement between Russia and Poland only came into force in July 2012, the Commission considers the LBT regime in the specific case of Kaliningrad to be functioning well, as it contributes to an increase in the border crossings of people living in the border area.

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331 LBT Regulation, article 3(2).
332 Hernández i Sagrera, 'The Impact of Visa Liberalisation' (n 196) 10-11.
333 Golunov (n 4) 92.
334 Reg 693/2003, article 13.
336 ibid 5.
337 A lot of Russians apply for a Schengen visa, even if they intend to travel to Kaliningrad, since this offers them the possibility to affectively stay in Lithuania.
Although both the FTD/FRTD and LBT regime represent a major facilitation compared to the normal Schengen visa procedure, they cannot be considered as real visa facilitation agreements. While FTD and FRTD allow for a transit over the territory of a Schengen state, they do not cover a stay in the Schengen area. The holder of an FRTD cannot leave his train and the FTD only allows for a transit to be completed in less than 24 hours. The LBT permit on the other hand only allows for border traffic in a certain area close to the border.

1.2. ADS Agreement with China

The first real agreement negotiated in the field of visa facilitation that actually facilitates the stay on the territory of a Schengen State, is the Authorised Destination Status (or ADS) agreement concluded between the EC and China, which entered into force in 2005. As a legal basis, current article 77(2)(A) TFEU is used. Although the agreement is entitled as ‘Memorandum of Understanding’, it is a fully-fledged international agreement, as it is clearly stipulated in article 8(6) that it is legally binding on the parties. Therefore it forms an integral part of EU law. This means that, although the Visa Code applies to all visa applications, the provisions of the ADS prevail over the corresponding Visa Code provisions.

The agreement aims to facilitate organised touristic group travel from China to the EU, by strengthening the touristic sectors both in the EU and in China. To achieve this goal, the agreement establishes a simplified procedure to grant Schengen visas to tourists. The Chinese authorities establish the list of travel agencies that may operate under the ADS scheme. The EU Member States than decide which of these they accredit. The accredited agencies hereby obtain the right to lodge visa applications on behalf of Chinese group travellers. The main facilitation feature of the agreement is the dropping of the requirement to lodge the application in person. Apart from that, no real facilitations can be found. This is not entirely surprising, since the relations with China are not that good, combined with the fact that this agreement represents the first step of the EU in the field of visa facilitation.

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341 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) [2004] OJ L83/14 (ADS Agreement EU-China).
342 ADS Agreement EU-China, preamble. Apparently, the need for the agreement was great: the enormous influx of Chinese caused professor Maresceau to say during his 2011 EU External Relations course: “Chinese tourists, they come in group and there are so many of them!”
343 SWD (2014) 101 final, 10.
344 ADS Agreement EU-China, article 4(1)(a).
345 ADS Agreement EU-China, article 4(3)(b).
2. VISA FACILITATION AGREEMENTS: CONCEPT AND CONDITIONS

After these first cautious steps in the field of visa facilitation, the EU apparently became more self-confident. From 2006 onwards, the EU has concluded several visa facilitation agreements. The VFA with Russia was the first ever VFA concluded by the EU. However, the EU was not that much in favour of concluding VFAs: its main focus lay with the conclusion of readmission agreements. To make any progress in the field of readmission, the EU had to offer its partners an incentive, which took the form of visa facilitation.

Before going into detail on the content of visa facilitation agreements, it is necessary to determine what a VFA is. A VFA is an agreement aimed at simplifying the visa application procedure between the EU and a non-EU country whose citizens are under visa obligation. Put otherwise, the main purpose of visa facilitation agreements is to facilitate, on the basis of reciprocity, the issuance of short stay visa. As the Council and the Commission have stressed, the process of visa facilitation is to be distinguished from visa liberalisation or visa free travel. Visa facilitation leaves the requirement of obtaining a visa unchanged and focuses on the issuing procedure. Visa liberalisation on the other hand waives that requirement, sometimes subject to certain condition. Visa facilitation might however be considered as a first step towards visa liberalisation. The rest of this chapter will focus on visa facilitation, while visa liberalisation will be dealt with below.

From the analysis in the previous chapter, it is clear that visa facilitation agreements are used to persuade third countries to conclude readmission agreements with the EU. The concept of visa facilitation agreements is relatively new. The Treaties do not expressly state the external competence of the Union to conclude this type of agreements, let alone the nature of the competence. The Council was afraid, after the experience of the negotiation of the agreement with Russia, that the Union approach on the conclusion of visa facilitation agreements as the counterweight for readmission agreements would we piecemeal and subject to pressure from third countries. To limit this risk, the COREPER agreed on a Common approach on visa facilitation in December 2005, establishing a framework for further visa facilitation measures. Notwithstanding the Common approach, the Council is even in favour of a differentiation, as it ensures that ‘each agreement is tailored to the specific situation and requirements of a third country’, ‘depending on the

346 On the concept of readmission agreements: see text to n 15 in ch I.
348 Florian Trauner and Imke Kruse (n 45) 17.
349 Council, ‘Common approach on visa facilitation’ 16030/05 [2005].
351 Text to n 42 in ch I.
352 The competence to conclude VFAs is assumed to be implied. See Bernd Martenczuk ‘Visa Policy and EU External Relations’ (n 187), 36-42.
353 Council 16030/05
354 ibid 3.
visa policy of the country concerned, the introduction of biometric passports and the existing practical problems’.  

The Common approach lays down the process according to which the negotiations with a third country on a visa facilitation agreement may be opened. Before the start of the negotiations the Commission has to consult the Member State in the Council, and ‘gather the necessary technical information about a third country’s visa system in order to elaborate the negotiating directives’. The Commission has to keep the Member States informed at all stages. In order to ‘ensure the coherence between issues relating to external relations on the one hand, and to freedom, security and justice concerns on the other’, the Common approach moreover stipulates that relevant JHA Council groups will prepare the adoption of negotiating directives in Council. This means that, although the Commissions acts as a negotiator according to article 218 TFEU, the Council maintains a strict oversight over the negotiation of future visa facilitation agreements.

Next to the procedure to initiate the negotiations, the Common approach also sets out the conditions a third country must fulfil to be ‘entitled’ to a VFA. The decision to open negotiations for a visa facilitation agreement with a third country should be based on a case by case assessment of third countries. The Council mainly considers the overall relationship of the EU with candidate countries, countries with a European perspective and countries covered by the ENP as well as strategic partners to determine the potential partners for the conclusion of a visa facilitation agreement. Next to that, the Common approach lists the criteria to be taken into account to decide whether negotiations on visa facilitation should be opened. The following factors are mentioned: ‘whether 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 […] and security concerns, migratory movements and the impact of the visa facilitation agreement.’ Of course, all these conditions are general criteria. If negotiations on a visa facilitation agreement start with a specific third country actually start, the EU will inform the former about the specific conditions it that should be fulfilled for the successful conclusion of the agreement.

These conditions the Council places on the start of negotiations for visa facilitation again stress the link between visa facilitation and readmission: to start talks on visa facilitation, a readmission agreement must be either in place or there must at least be active negotiations on it. The Council even states that a visa facilitation agreement can in principle not be concluded without a corresponding readmission agreement.

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355 ibid 3.
356 ibid 4.
357 ibid 4.
358 Boniface and others (n 231) 16.
359 ENP stands for the European Neighbourhood Policy.
360 Council 16030/05, 3
361 Gromovs and others (n 191) 231.
362 Council 16030/05, 3
It appears that this cautious approach is indeed the one that is followed, given the fact that each visa facilitation agreement concluded is coupled to a readmission agreement. At the time of the adoption of the Common approach, visa facilitation was still considered as a groundbreaking instrument, as the Union had no experience with it. As Commissioner Frattini stated in May 2006, some time was needed to observe how the visa facilitation agreements would work in practice.\footnote{Franco Frattini, ‘The role of internal security in relations between the EU and its neighbours’ (speech held at the Ministerial Conference Vienna on 4 May 2006) <http://europa.eu/rapid/press-release_SPEECH-06-275_en.pdf> accessed 12 August 2014, 5.}

3. VISA FACILITATION AGREEMENTS CONCLUDED BY THE EU

The EU has so far negotiated and concluded visa facilitation agreements with twelve countries. The one with Russia entered into force 2007, and in 2008 the ones with Ukraine\footnote{Agreement between the European Community and Ukraine on the facilitation of the issuance of visas [2007] OJ L332/68 (VFA EU-Ukraine).} and Moldova\footnote{Agreement between the European Community and the Republic of Moldova on the facilitation of the issuance of visas [2007] OJ L334/169 (VFA EU-Moldova).} followed. In the same year also five agreements negotiated with countries of the Western Balkan\footnote{Croatia was not one of them, given the fact it was considered to be part of the Central and Eastern European Enlargement.} (Albania\footnote{Agreement between the European Community and the Republic of Albania on the facilitation of the issuance of visas [2007] OJ L334/85 (VFA EU-Albania).}, Bosnia and Herzegovina\footnote{Agreement between the European Community and Bosnia and Herzegovina on the facilitation of the issuance of visas [2007] OJ L334/97 (VFA EU-Bosnia and Herzegovina).}, FYROM\footnote{Agreement between the European Community and the Former Yugoslav Republic of Macedonia on the facilitation of the issuance of visas [2007] OJ L334/125 (VFA EU-FYROM).}, Montenegro\footnote{Agreement between the European Community and the Republic of Montenegro on the facilitation of the issuance of visas [2007] OJ L334/109 (VFA EU-Montenegro).} and Serbia) entered into force.\footnote{Agreement between the European Community and the Republic of Serbia on the facilitation of the issuance of visas [2007] OJ L334/137 (VFA EU-Serbia).}

The relevance of these last agreements has diminished over the years, as those countries have been moved from the black list to the white list. These agreements are however still relevant, since visa-free travel only applies to holders of biometric passports. Holders of non-biometric passports can still rely on these visa facilitation agreements.\footnote{Hernández i Sagrera, ‘The Impact of Visa Liberalisation’ (n 196) 5.}

After the conclusion of the agreements with Ukraine and Moldova, it remained to be seen whether also other ENP countries would conclude visa facilitation agreements with the EU. Initially the ENP did not contain a clear strategy on visa facilitation, contrary to the pursued policy on readmission agreements, which was considered an essential element.\footnote{European Commission, ‘Wider Europe — Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours (Communication)’ COM (2003) 104 final, 11.} This changed over the years and by 2006 the Commission issued a communication which made clear that more should be done on the field of visa issuing: the Commission stressed that ‘the Union should be willing to enter negotiations on readmission and visa facilitation with each
neighbouring country with an Action Plan in force, once the proper preconditions have been met. The European Parliament also backed the idea of concluding visa facilitation agreement with all ENP countries. Over the years, several other ENP countries succeeded in concluding a visa facilitation agreement with the EU, back-to-back with a readmission agreement. They all had an ENP Action Plan in force. The agreement with Georgia entered into force in 2011. In 2014 the one with Armenia entered into force. VFAs have recently also been concluded with Azerbaijan and Cape Verde. These last two have not yet entered into force.

It should be noted that the existing VFAs between the EU and Ukraine and between the EU and Moldova have been updated in 2013 to bring them in line with the adopted Visa Code. The introduction of the Visa Code and the agreements that have been concluded afterwards, together with the updates of the agreements with Ukraine and Moldova allow us to make a distinction between a first and second generation of visa facilitation agreements.

4. THE VFA WITH RUSSIA AS AN EXAMPLE OF A FIRST GENERATION VFA

The first generation visa facilitation are the agreements the EU concluded with Russia, Ukraine, Moldova the Western Balkans and Georgia. The agreement with Armenia is somewhat special as it is a transitional agreement between the first and second generation. The VFA concluded between the EU and Russia is the schoolbook example of a first generation visa facilitation agreement. The visa facilitation agreements concluded afterwards with other third countries are all modelled to this first agreement and are almost identical in wording. These agreements all focus on four issues: simplified requirements for supporting documents, easier issuance of multiple-entry visas, a visa fee waiver or reduced visa fee and quicker procedures. Below, we will analyse these elements in detail. Although these similarities, minor but nevertheless noteworthy differences can be found between the agreements. Therefore, also a comparison

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380 An update of the agreement with Russia was also envisaged, but did not yet materialise. See more text to note n 418 in ch III.
381 For the introduction of the distinction between first and second generation VFAs, see Mananashvili (n 247) 6. The concept of this distinction is relatively new and the difference between the two types has not yet been assessed in legal doctrine.
382 The agreements with Ukraine and Moldova have been upgraded. If under this heading dealing with the first generation VFAs the ones with Ukraine and Moldova are discussed, these are the original ones and not the amended.
between the different agreements at the respective points will be carried out. After that, also the problems
with the provisions of the visa facilitation agreements will be assessed.

4.1. Facilitations

4.1.1. Simplified requirements for supporting documents

The main part of each visa facilitation agreement concerns the simplification of requirements for
supporting documents proving the purpose of the intended journey. Article 4(1) of each facilitation
agreement sets out a number of categories of visa applicants that can benefit from this facilitation. It provides
in most cases that only one specific document is needed. Article 4(3) stipulates that for the categories listed
in article 4(1) no other justification, invitation or validation is required beyond that document, regardless of
the national laws of the Member States or the third country, in case the agreement is fully reciprocal.

A lot of differentiation can be found, with the different VFAs containing different categories of
persons. To make clear the difference between the different visa facilitation agreements, the table 1 lists the
respective third countries and the categories of persons.

From table 1, it becomes clear that all the visa facilitation agreements of the first generation have a
basic core of categories of people that benefit from simplification of the supporting documents required.
Each VFA provides for the facilitation for members of official delegations; business people; drivers active in
international cargo or passenger transport; journalists; participants in scientific, cultural and artistic activities;
pupils and students; participants in international sport events; participants in official exchange between twin
towns and communities; close relatives and relatives visiting burial grounds. This appears to be the bare
minimum of categories that can benefit from this type of facilitation.

For the rest, the number of categories differs. The nationals of countries located in the geographical
proximity of the Union also benefit from the simplification if they are part of train crew: only the train crew
from Georgia is not entitled to the facilitation. People attending burial ceremonies and those persons coming
to the EU for medical treatment also profit from the facilitation, except if they are nationals of Russia and
Georgia. Professionals participating in international exhibitions, conferences, symposia, seminars can also
benefit from the facilitation, unless they come from Russia or Ukraine. The same can be said for
representatives of civil society organisations. The agreements with the Western Balkan countries moreover
contain provisions that the representatives of religious communities and persons coming to the EU for
touristic reasons benefit from the documentation simplification. On top of that, two agreements contain
references to categories of applicants that are not to be found in any other VFA. The one with Albania states
that person who have been prosecuted under the Communist regime benefit, while in the agreement with
Montenegro also lists judges coming to the EU for certain events. This makes clear that the agreements with
the Western Balkans are the farthest-reaching. The first ones, with Russia and Ukraine clearly do not go as far.
Table 1. Facilitation of documentary requirements.*

<table>
<thead>
<tr>
<th>Requirement</th>
<th>Russia</th>
<th>Ukraine</th>
<th>Albania</th>
<th>Bosnia and Herzegovina</th>
<th>Montenegro</th>
<th>FYROM</th>
<th>Serbia</th>
<th>Moldova</th>
<th>Georgia</th>
<th>Cape Verde</th>
<th>Armenia</th>
<th>Azerbaijan</th>
</tr>
</thead>
<tbody>
<tr>
<td>a. Members of official delegations</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td></td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
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<tr>
<td>b. Business people and representatives of business organisations</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td></td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
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<tr>
<td>c. Drivers (international cargo / passenger transport)</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td></td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
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<tr>
<td>d. Journalists</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td></td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
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<tr>
<td>e. Participants in scientific, cultural and artistic activities</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td></td>
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<tr>
<td>f. Pupils, students</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td></td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
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<tr>
<td>g. Participants in international sports events</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td></td>
<td>x</td>
<td>x</td>
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<td>x</td>
<td>x</td>
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<tr>
<td>h. Participants in exchange programmes (twin cities)</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td></td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
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<tr>
<td>i. Close relatives</td>
<td>x</td>
<td>x</td>
<td>x</td>
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<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
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<tr>
<td>j. Visitors military and civil burial grounds</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td></td>
<td>x</td>
<td>x</td>
<td>x</td>
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<td>x</td>
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<tr>
<td>k. Train, refrigerator and locomotive crews</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td></td>
<td>x</td>
<td>x</td>
<td>x</td>
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<td>x</td>
<td>x</td>
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<tr>
<td>l. Relatives visiting burial ceremonies</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td></td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
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<tr>
<td>m. Persons visiting for medical reasons</td>
<td>x</td>
<td>x</td>
<td>x</td>
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<td>x</td>
<td>x</td>
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<tr>
<td>n. Members of professions participating in international exhibitions,</td>
<td>(x)</td>
<td>x</td>
<td>x</td>
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<td>x</td>
<td>x</td>
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<tr>
<td>conferences, symposia and seminars</td>
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<tr>
<td>o. Representatives of civil society organisations</td>
<td>(x)</td>
<td>x</td>
<td>x</td>
<td></td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
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<td>p. Representatives of religious communities</td>
<td>(x)</td>
<td>x</td>
<td>x</td>
<td></td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
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<td>x</td>
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<tr>
<td>q. Participants in EU cross-border cooperation programs</td>
<td>(x)</td>
<td></td>
<td></td>
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<tr>
<td>r. Persons politically persecuted during communist regime</td>
<td>x</td>
<td></td>
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<td></td>
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<td>s. Persons travelling for tourism</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td></td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
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<tr>
<td>t. Judges participating in exchange programs</td>
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</tbody>
</table>

(x) = category added in the amended VFAs.

* This table is the result of the author’s own elaboration.
Table 2. Facilitated issuance of MEVs.

<table>
<thead>
<tr>
<th>Number of years</th>
<th>Russia</th>
<th>Ukraine</th>
<th>Albania</th>
<th>Bosnia and Herzegovina</th>
<th>Montenegro</th>
<th>FYROM</th>
<th>Serbia</th>
<th>Moldova</th>
<th>Georgia</th>
<th>Cape Verde</th>
<th>Armenia</th>
<th>Azerbaijan</th>
</tr>
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<td>1</td>
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</tr>
</tbody>
</table>

- Members of governments, parliaments and high courts
- Permanent members of official delegations
- Close relatives
- Members of official delegations
- Business people who regularly travel
- Drivers (international cargo / passenger transport)
- Train, refrigerator and locomotive crews
- Participants in scientific, cultural and artistic activities
- Participants in international sports events
- Journalists
- Participants in exchange programmes twin cities

* This table is the result of the author’s own elaboration.
<table>
<thead>
<tr>
<th></th>
<th>Russia</th>
<th>Ukraine</th>
<th>Albania</th>
<th>Bosnia and Herzegovina</th>
<th>Montenegro</th>
<th>FYROM</th>
<th>Serbia</th>
<th>Moldova</th>
<th>Georgia</th>
<th>Cape Verde</th>
<th>Armenia</th>
<th>Azerbaijan</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of years</td>
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<td>2-5</td>
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<td>1</td>
<td>2-5</td>
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<td>2-5</td>
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<tr>
<td>Representatives of civil society organisations</td>
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<tr>
<td>Participants in EU cross-border cooperation programs</td>
<td>(x)</td>
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<td></td>
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<tr>
<td>Representatives of religious communities</td>
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<td>x</td>
</tr>
<tr>
<td>Members of professions participating in international exhibitions, conferences, symposia and seminars</td>
<td>(x)</td>
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<td>x</td>
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<tr>
<td>Persons needing to visit regularly for medical reasons</td>
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<tr>
<td>Students and post-graduate students</td>
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<td>x</td>
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<tr>
<td>School pupils, students and post-graduate students</td>
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<td>x</td>
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<tr>
<td>Judges participating in exchange programs</td>
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<tr>
<td>Mayors and members of municipal councils</td>
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<td>x</td>
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<tr>
<td>Practitioners of a liberal profession participating in international exhibitions, conferences, symposia and seminars</td>
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</tr>
</tbody>
</table>

(x) = category added in the amended VFAs.

x* = only members of the Court of Bosnia and Herzegovina, and of the prosecutor’s office.
4.1.2. **Issuance of MEVs**

Next to the simplification of the supporting documents regarding the purpose of travel, the visa facilitation agreements also want to increase the issuance of MEVs. Given the above noted, traditional reluctance of the Schengen Member States to issue MEVs, this also constitutes a significant facilitation. Article 5 of the first generation VFAs provides for the gradual entitlement to the issuance of MEVs to certain categories of applicants. A rather limited number of categories of persons is entitled to MEVs with a validity up to five years. They can apply for these MEVs either because of their professional status, or because of their family ties with third country nationals residing in an EU Member State. Broader categories of people may apply for these MEVs valid for up to one year, provided they obtained, during the twelve previous months, one (or more) single-entry visas, have made use it in accordance with the laws on entry and stay of the State(s) visited, and that there are reasons for requesting a MEV. The same categories of persons entitled to a MEV with a term of validity of up to one year within each respective VFA, are entitled to MEVs with a term of validity of a minimum of two years and a maximum of five years, provided that during the previous two years they have made use of the one year multiple-entry visas in accordance with the laws on entry and stay of the visited State, and that the reasons for requesting a multiple-entry visa are still valid.

Some authors and the Commission give the impression that the categories of people entitled to MEVs are the same in each VFA, while others do not dwell on the categories entitled to MEVs. My personal analysis of the agreement (see table 2) proves that, although the categories of persons entitled to MEVs are more or less the same in most visa facilitation agreements, there are quite remarkable differences. Some agreements contain are more liberal and provide for more categories of people to benefit from MEVs. There are also differences in the sort of MEV a specific category is entitled to: while in one VFA a certain category of applicant might be entitled to an MEV with a validity of up to five years, in another VFA, that category might be entitled to an MEV with a validity of up to only one year, or might not be entitled to an MEV at all.

The table gives an overview for each visa facilitation agreement of the categories of applicants that are entitled to the different categories of MEVs. It becomes clear that the agreement with Russia is not that far-reaching: permanent members of official delegations are not entitled to MEVs with a validity of up to five years and the categories of people entitled to one-year MEVs is also limited. The agreements with Moldova and Ukraine go further, given the fact that more categories are entitled to five-year MEVs. The one with Moldova even goes further, given that the number of applicants entitled to one-year MEVs clearly surpasses those contained in the VFA with Ukraine. The most liberal VFAs are however the ones with the Western Balkan. Generally speaking they facilitate the issuance of MEVs for a lot more categories of applicants. But

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383 SEC (2009) 1401 final, 14
384 These conditions can be found in article 5(2) of each VFA.
385 This can be found in article 5(3) of each VFA.
387 Mananashvili (n 247) 6.
the listing of the categories contained in the agreements with the Western Balkans show that also in these agreements a lot of differentiation can be found. In some of these agreements, unique and remarkable categories of persons can be found. For example, the agreement with FYROM is the only one that provides for a facilitation for mayors and members of municipal councils.

4.1.3. Visa fee reduction or waiver

Another facilitation contained in the visa facilitation agreements is the general reduction of the visa fee for all the citizens of the partner country. Article 6(1) of the agreements sets the fee for processing visa applications at 35 EUR, a considerable reduction compared to the general fee of 60 EUR. The agreements with Russia and Ukraine contain a provision for an urgency fee, set at 70 EUR, to be charged in case the visa application and the supporting documents have been submitted only within three days before the envisaged departure. This extra charge is however excluded in some cases.

Besides this general fee reduction, all visa facilitation agreements also contain provisions that waive the visa fee for certain categories of people. As is the case with the waiving of the documentary requirements and the issuance of MEVs, the agreements list the categories of people entitled to the visa fee waiver. Likewise, the waiver differs from agreement to agreement, the agreement with Russia being the least comprehensive and the ones with the Western Balkans containing the most categories of people. Apart from the agreement with Russia, most agreements provide a waiver for more or less the same categories, the initial agreements with Moldova and Ukraine being a bit less liberal. Again, some agreements with Western Balkan countries also contain some waivers that can only be found in that specific agreement. The following table (table 3) lists all agreements and the categories of people that benefit from the visa fee waiver. For the sake of completeness, also the fee waivers contained in the Visa Code have been listed, facilitating the comparison between different agreements.
Table 3. Visa fee waivers.*

<table>
<thead>
<tr>
<th>Visa code</th>
<th>Reduction</th>
<th>Optional waiver</th>
<th>Mandatory waiver</th>
<th>Russia</th>
<th>Ukraine</th>
<th>Albania</th>
<th>Bosnia and Herzegovina</th>
<th>Montenegro</th>
<th>FYROM</th>
<th>Sebia</th>
<th>Moldova</th>
<th>Georgia</th>
<th>Cape Verde</th>
<th>Armenia</th>
<th>Azerbaijan</th>
</tr>
</thead>
<tbody>
<tr>
<td>Children between the age of 6 and 12</td>
<td>x</td>
<td>x</td>
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<tr>
<td>Children younger than 6</td>
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<tr>
<td>Pupils and students</td>
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<td>Researchers</td>
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</tbody>
</table>
| Representatives of non-profit organisations aged 25 or less | | | | | | | | | | | | | x
| Holders of diplomatic and service passports | | | | | | | | | | | | | x
| Participants aged 25 or less in events organised by non-profit organisations | | | | | | | | | | | | | (x)
| Close relatives | | | | | | | | | | | | | (x)
| Members of governments, parliaments and high courts | | | | | | | | | | | | | (x)
| Members of official delegations | | | | | | | | | | | | | (x)
| Disabled persons | | | | | | | | | | | | | (x)
| Persons travelling for humanitarian grounds | | | | | | | | | | | | | (x)
| Participants in youth international sports events | | | | | | | | | | | | | (x)
| Participants in scientific, cultural and artistic activities | | | | | | | | | | | | | (x)

* This table is the result of the author’s own elaboration.
<table>
<thead>
<tr>
<th></th>
<th>Visa code</th>
<th>Russia</th>
<th>Ukraine</th>
<th>Albania</th>
<th>Bosnia and Herzegovina</th>
<th>Montenegro</th>
<th>FYROM</th>
<th>Serbia</th>
<th>Moldova</th>
<th>Georgia</th>
<th>Cape Verde</th>
<th>Armenia</th>
<th>Azerbaijan</th>
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<tbody>
<tr>
<td><strong>Visa Reduction</strong></td>
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<td>Mandatory waiver</td>
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</tr>
<tr>
<td><strong>Participants in exchange programmes</strong></td>
<td>twins cities</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Participants in international sports events</strong></td>
<td></td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Journalists</strong></td>
<td></td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td></td>
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<tr>
<td><strong>Pensioners</strong></td>
<td></td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td></td>
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</tr>
<tr>
<td><strong>Drivers (international cargo / passenger transport)</strong></td>
<td></td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
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</tr>
<tr>
<td><strong>Train, refrigerator and locomotive crews</strong></td>
<td></td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
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<td>x</td>
<td>x</td>
<td></td>
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<tr>
<td><strong>Children younger than 18 or 21</strong></td>
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<tr>
<td><strong>Representatives of religious communities</strong></td>
<td></td>
<td>(x)</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td></td>
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<tr>
<td><strong>Members of professions participating in international exhibitions, conferences, symposia and seminars</strong></td>
<td></td>
<td>(x)</td>
<td>x</td>
<td>x</td>
<td>x</td>
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<td>x</td>
<td></td>
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<td></td>
</tr>
<tr>
<td><strong>Representatives of civil society organisations</strong></td>
<td></td>
<td>(x)</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
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<tr>
<td><strong>Participants in EU cross-border cooperation programs</strong></td>
<td></td>
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<td>(x)</td>
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<tr>
<td><strong>Persons politically persecuted during communist regime</strong></td>
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<td>x</td>
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<tr>
<td><strong>Judges participating in exchange programs</strong></td>
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<td>x</td>
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<tr>
<td><strong>Mayors and members of municipal councils</strong></td>
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</tbody>
</table>

(x) = category added in the amended VFAs.

x* = only members of the Court of Bosnia and Herzegovina, and of the prosecutor’s office.
4.1.4. Other facilitations

The visa facilitation agreements also contain other, minor facilitations. A first one is the deadline for the consulates to take a decision on the visa application. According to article 23 of the Visa Code, a decision has to be taken within a maximum of fifteen days. The visa facilitation agreements contain provisions (in most cases article 7(1)) that lower this deadline to ten calendar days. The period starts to run from day of the receipt of the application and the documents required for the issuing of the visa. The agreements provide that this period may be extended to up to thirty calendar days in individual cases, ‘notably where further scrutiny of the application is required’.\textsuperscript{388} If an application is urgent, the agreements provide that the period of time to take the decision might be reduced to three or four working days, or even less.\textsuperscript{389}

In second place, also visa-free travel should be mentioned. Although we have stressed the difference between visa facilitation agreements and visa liberalisation above, the visa facilitation agreements also provide for a complete visa waiver in article 10 of each agreement.\textsuperscript{390} The article however contains a second paragraph that limits the visa-free travel to a period of 90 days in a total period of 180 days, this being the period where the Union is competent for. The visa waiver is however limited to holders of diplomatic passports only. The Union was however thinking, at the time of conclusion of the agreements with the Western Balkan countries, about extending the visa-free travel to holders of service passports. For that reason those agreements contain a declaration of the Union that some years after the agreement, the Union will reassess the situation of these passport holders with a view of amending the agreement. Given the fact that all holders of biometric passports enjoy, at present day, visa-free travel, this declaration became redundant. However, as will be seen below, this intention of the EU has played an important role in the conclusion of the second generation of visa facilitation agreements.

4.2. Reciprocity

As seen above, the Regulation 539/2001, establishing the visa black list, contains an article providing for a reciprocity mechanism.\textsuperscript{391} A similar reciprocity mechanism can be found in the VFAs. The agreements with Russia, Cape Verde and Azerbaijan are special and therefore different from the others: it are fully reciprocal agreements between two equal partners. For that reason, these VFAs do not contain a reciprocity clause. The other agreements however do contain a reciprocity clause. According to that clause, contained in article 1 of each agreement, the facilitations granted by the agreement to the citizens of the third country would also apply to EU citizens concerned, if the third country concerned was to introduce a visa requirement for all EU citizens or certain categories of EU citizens.

\textsuperscript{388} See for example VFA EU-Russia, article 7(2).

\textsuperscript{389} For example, the VFA EU-Russia provides for three working days, while the VFA EU-FYROM provides that the decision can be taken in even two working days.

\textsuperscript{390} In the VFA EU-Russia this can be found in article 11.

\textsuperscript{391} Text to n 198 in ch II. Council, 16030/05
The inclusion of such a provision is positive, since EU citizens would not be in a “disadvantage” compared to third country nationals, if a third country were to introduce a visa requirement for all EU citizens or certain categories of EU citizens. The clause becomes however useless if a third country introduces a visa requirement for EU citizens of a certain Member State. Nationals of an EU Member State can hardly be described as a category of EU citizens and although the difference in treatment of EU citizens based on nationality is unacceptable, the reciprocity clause is not capable to solve such a problem. In 2009, this hypothesis became reality, when Moldova introduced a visa requirement for Romanian citizens. The Commission had to acknowledge that the reciprocity clauses failed “categorically” to rule out the introduction of such visa requirements and proposed the amendment of the clauses in renegotiations of the agreement. In the renegotiated agreement with Ukraine the following paragraph has been added, effectively taking away the possibility of Ukraine to introduce a visa requirement for the nationals of single Member State only:

Ukraine may only reintroduce the visa requirement for citizens or certain categories of citizens of all Member States and not for citizens or certain categories of citizens of individual Member States.

4.3. Problems and difficulties

An overall evaluation of the visa facilitation agreements will follow below. But it can be concluded that the visa facilitation agreements do provide some remarkable facilitations, compared to the normal situation under the Visa Code and the preceding Common Consular Instructions. Despite these facilitations, the visa facilitation agreements also have some weak points. These can concern the VFAs in general or one of the facilitations of the agreements in specific.

4.3.1. General problems

A first and major general disadvantage of the agreements is the fact they divide the society in two groups. The first group would be the privileged few, those who enjoy the facilitations. Those who do not fall in this group form the other group: the ordinary citizens who cannot enjoy the facilitations. In some cases, this might lead to a feeling of discrimination. Some even warn that this might lead to the conclusion of this underprivileged group that the Union is only interested in the elite of the third country, which would reflect badly on the EU. The distinction could also lead to an increase of corruption, since in some of the agreements the categories that would enjoy the facilitations are to include journalists, business people and

392 SEC(2009) 1401 final, 19
394 Florian Trauner and Imke Kruse (n 45) 24.
drivers, such as counterfeiting documents to prove driver or journalist status.\textsuperscript{395} This would be a problem, as the Member States are fearing the widespread use of falsified documents.\textsuperscript{396}

Another problem that might arise concerning the visa facilitation agreements, is ‘visa facilitation awareness’. Although the Commission claims that the third countries who concluded an VFA with the EU have informed their citizens about the existence of the agreements and even might have created excessive expectations\textsuperscript{397}, there are reasons to believe otherwise. In Russia only 38\% of the Russian nationals was aware of the agreement between the EU in Russia. In other countries like Ukraine, the awareness was considerably higher, with 65\% of the people having heard about the VFA.\textsuperscript{398} But even if people know the VFA exists, this might not be enough. The consular staff might not automatically inform an applicant he might fall under the field of application of a VFA and can benefit from the facilitations. This can be problematic since the applicants seem to be afraid to bring up visa facilitation while dealing with consulates. The number of people mentioning facilitation is again relatively low in Russia, where only 10\% of the applicants mention facilitation at the consulate, compared to the higher number of applicants at the consulates in Ukraine, with 33\% mentioning it.\textsuperscript{399}

4.3.2. Specific problems

Next to general problems with VFAs, there are also specific problems relating to the specific facilitations. A first string of problem arises with the simplification of supporting documents. First of all, the agreements are not clear with regard to the question which document should be provided: should it be the originals, or could copies be accepted as well?\textsuperscript{400} The Member States were in favour of requiring the originals, while third countries, and especially Russia pleaded for accepting copies at least in some cases. A compromise was found in the Joint Committee, when the Implementing Guidelines were adopted. There the following can be read:

In principle, the original request or certificate of the document required by Article 4(1) shall be submitted with the visa application. However, the consulate can start processing the visa application with facsimile or copies of the request or certificate of the document. Nevertheless, the consulate may ask for the original document in case of the first application and shall ask for it in individual cases where there are doubts.\textsuperscript{401}

\textsuperscript{395} Boratyński and others, ‘Questionable Achievement’ (n 393) 2; SEC (2009) 1401 final, 11
\textsuperscript{396} SEC(2009) 1401 final, 11.
\textsuperscript{397} ibid 10.
\textsuperscript{398} Chajewski and others (n 285) 44.
\textsuperscript{399} ibid 45.
\textsuperscript{400} SEC(2009) 1401 final, 11
Secondly, there are problems concerning the different categories enjoying the simplified document requirements. The agreements do mention categories of people that can benefit from the simplification, but most consulates consider the provisions to be too vague or to contain inherent problematic requirements. Close relatives for example benefit from the facilitation and only need to present an invitation. However, another document is often needed to prove the family tie. Another problem concerning close relatives is the fact that they must originate from the same third country as the applicant. Journalists can also encounter problems, as they must be able to present a certificate proving their status. If they cannot provide this, they are not considered journalists and cannot benefit from the document simplification. This is of importance, as Russia does not have a journalist organisation that can issue the certificates. International cargo drivers can also face difficulties, as the national associations fail to provide the required information in their written request. This can cause consulates to request extra documents. In Albania business people can encounter problems since some of them cannot provide the consulates with proof of membership of the Chamber of Commerce, as, according to Albanian law, such membership is no longer obligatory.

A second specific problem is related to the facilitated issuance of MEVs. The discretion left to the Member States, combined with the above described reluctance to issue MEVs with a long validity, takes away part of the benefit. This becomes all the more problematic if the Member States refuse to apply the relevant provisions. For example, the agreement with Russia stipulates that MEVs with a validity up to one year are to be issued to certain categories of persons, under above discussed circumstances. The EU and Russia have slightly modified the provision by interpreting: in the Guidelines on the implementation of the EU-Russia VFA, it is stated that:

In principle, multiple-entry visas valid for one year shall be issued to the above mentioned categories if during the previous year (12 months) the visa applicant has obtained at least one visa - i.e. a Schengen visa or a visa issued by a Member State that joined the EU in 2004 or 2007 - and has made use of it in accordance with the laws on entry and stay of the visited State(s) - for instance, the person has not overstayed- and if there are reasons for requesting a multiple entry visa.

Because of the Guidelines, applicants who are normally entitled to MEVs of up to one year according to the agreement, are in fact entitled to MEVs with an effective duration of one year because of the Guidelines. MEVs of a lesser duration become incompatible with the Guidelines. Nevertheless, Member States continue to issue MEVs with a shorter validity. The Commission does not agree with that practice and has urged the Member States to issue MEVs with the proper duration. The same problem can be encountered with the

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402 EC-Russia Joint Committee, ‘Guidelines for the Implementation’ (n 401) 15.
404 ibid 13.
405 ibid 14.
406 EC-Russia Joint Committee, ‘Guidelines for the Implementation’ (n 401) 17.
MEVs with a validity between two and five years. If applicants are entitled to such MEVs, the Member States should not issue visa with a lesser duration.

A third specific category of problems is related to the visa fee. Some categories of applicants can benefit from a reduced fee, but there are interpretational questions about the categories of persons. With regard to pensioners it has asked whether people who have retired at an early age would also be able to benefit. For journalists, it has been asked whether journalists not attached to a professional organisation are entitled to the visa fee waiver, because those journalists are not to benefit from the simplified document requirements. Another problem concerns the people accompanying others. For example journalists are accompanied by camera personnel and technical staff. From the wording of the visa facilitation agreements it is not clear whether they should benefit from the visa fee waiver or not. But a look at other categories of persons can lead to the conclusion they are not entitled to the waiver. For example, with regard to disabled persons it is clearly stated in some agreements that the persons accompanying them should also benefit from the waiver, whilst others do not mention them. This problem is however not limited to the visa fee waiver, but also occurs with regard to the issuance of MEVs and the simplified document requirements.

A second problem with regard to the visa fees is the fee that can be charged by ESPs. At the moment of the entry into force of most VFAs the concept of ESPs was already known, but the CCI did not regulate the fee that could be charged for their services. At that time, the ESP service fee was, according to the Commission, ‘incompatible with the VFA[s]’. With the adoption of the Visa Code a legal framework is now in place for the serviced of ESPs. In the first generation of VFAs, it remains however unclear how the services rendered by an ESP and the fees charged for it are to be reconciled with these VFAs.

A last problem concerning the visa fee rises with the urgency fee. The agreements with Russia and Ukraine provide for such a fee. The ratio legis is to deter people from applying for a visa at the last moment. A problem however arises when people are willing to pay the urgency fee voluntarily ‘for the convenience of having the visa issued within three days even if the departure is foreseen later’. The Member States were aware of this and tried to limit this practice to a minimum, whilst giving the necessary discretion to the individual consulates to decide whether they want to allow it or not, since, for example, the Guidelines on the agreement with Russia state the following:

‘In cases where the visa applicant applies for a visa more than three days before departure but is ready to pay the 70E of the “urgent fee” in order to have the visa issued within 3 days - either because (s)he lives far away from the consulate or because (s)he is travelling somewhere before the envisaged trip to a Schengen Member State- 70 € will be charged if the Consulate accepts to do so.’

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408 ibid 17.
409 E.g. VFA EU-Serbia, article 6(2)(g) mentions the persons accompanying them, while the VFA EU-Ukraine does not mention them.
411 ibid 18.
412 EC-Russia Joint Committee, ‘Guidelines for the Implementation’ (n 401) 7.
Hereby, the possibility to get a faster decision, for a relatively small surplus in the visa fee is maintained.

5. THE SECOND GENERATION OF VFAs FOLLOWING THE ENTRY INTO FORCE OF THE VISA CODE

5.1. Agreements of the second generation

The first generation of visa facilitation agreements clearly had some flaws. The Commission decided to take the problems into account in the negotiations of the future visa facilitation agreements with Georgia, Cape Verde, Armenia and Azerbaijan. The agreement with Georgia is however considered to be an VFA of the first generation, since the mandate for the negotiations was already given in November 2008 and the agreement was signed in June 2010, before the entry into force of the Visa Code. The agreements with Cape Verde and Armenia were signed in 2012, while the agreement with Azerbaijan was only signed November last year. These last three agreements are therefore clearly VFAs of the second generation.

Besides taking the remarks to the negotiating table for the conclusion of new agreements, the EU also sought the renegotiation of the existing visa facilitation agreements, especially the ones with Russia, Ukraine and Moldova. To this end, the Council adopted three Decisions on 11 April 2011, authorising the Commission to open negotiations for the conclusion of three agreements, amending the existing VFAs with those three countries. The negotiations on the amendment of the agreements with Moldova and Ukraine took place in 2011. The amending agreement with Ukraine was signed on 23 July 2012, while the one with Moldova was signed on 27 June 2012. They both entered into force on 1 July 2013.

The Council also foresaw the conclusion of an amending agreement with Russia, but until today, no such agreement has been concluded. There have been negotiations on the topic between the EU and Russia, and in June 2013 an agreement was almost reached. However, the final deal broke off at the June 2013 Yekaterinburg EU-Russia Summit, due to the differences in opinion on visa-free travel for service passport holders. Normally, the VFAs concluded by the EU only provide for visa-free travel for the holders of diplomatic passports. The updated agreements with Moldova and Ukraine extended the visa-free travel to holders of biometric service passports. The EU was not at all in favour of doing the same in the updated

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413 Council, ‘Negotiations for the conclusion of Agreements between the European Union and Russia, Ukraine and Moldova (Note)’ 17517/11 [2012].


416 Peter Van Elsuwege and others, ‘State of Play’ (n 171) 17.

417 This is also the case in the VFA EU-Russia, article 11.
agreement with Russia, but with the Russian side really pressing for such an extension, the Commission gave in and was open to the idea. 418 But the Commission only wants to accept visa-free travel for the holders of service passports under very strict terms, including the limitation to holders of service passports with an electronic data carrier and the exclusion of military and administrative staff from diplomatic representation. 419 Russia was willing to accept both, but a final proposal to push ahead was turned down by Russia, as the EU side demanded to include a public security clause like the one that can be found in the updated agreement with Ukraine. There the EU issued a declaration stating that the EU ‘may invoke a partial suspension of the Agreement [...] if the implementation [of the visa-free travel for the holders of service passports] is abused by Ukraine or leads to a threat to public security.’ 420 Russia most likely turned that proposal down, because the EU would most likely have made immediate use of it in the light of the murder of Sergei Magnitsky. 421 But even if an agreement would have been reached, it can be doubted whether the conclusion on the side of the EU would have succeeded. The conclusion of agreements on visa matters requires the approval by the European Parliament and some MEPs made clear they would not support the new VFA. 422 The distrust from the EU side for a relatively small group of persons casts doubts on the ongoing visa liberalisation process, as the update of the VFA is one of the conditions contained in the Common Steps. 423 Given the current state of the EU-Russia relations and the problems in Ukraine, a deal on the amendment of the VFA does not seem likely for the near future.

5.2. Changes brought by the second generation of VFAs

5.2.1. Service passports

Compared to the first generation of visa facilitation agreements, the second generation embodies some minor and considerable changes. The question is whether these changes are sufficient to remedy some or all of the problems identified above concerning the first generation. A first change is the inclusion of the holders of service passports in the categories that can benefit from visa free travel. It should however be noted that only the amended agreements with Ukraine and Moldova extend the visa-free travel. The agreements with Cape Verde, Armenia and Azerbaijan still limit visa free travel to holders of diplomatic passports only. What can be found in all of the second generation agreements is the declaration by the Union on public security. Apparently, the Union shall not hesitate to limit visa-free travel if the person holding a diplomatic or service passport is a threat to public security.


419 Raül Hernández i Sagrera and Olga Potemkina (n 165) 7


421 Andrew Rettman, ‘EU considers visa-ban-lite on Russian officials’ (n 418).

422 ibid.

423 Text to n 477 in ch IV.
5.2.2. **Beneficiaries**

A second change concerns the number of categories of persons that can benefit from the facilitations. Several VFAs of the second generation add persons regarding all facilitations. A first category of persons concerns persons accompanying the categories of persons benefiting from the facilitation. In all agreements of the second generation, these accompanying persons also enjoy the facilitations, thus leaving only a few agreements, including the one with Russia, where the accompanying persons are not entitled to the facilitations. A nuance is however needed, since in the agreement with Russia not all accompanying persons are excluded from the facilitations. For example, people accompanying disabled persons do benefit from the visa fee waiver.\(^\text{424}\)

With regard to close relatives, the second generation VFAs adds that close relatives visiting their next of kin can also benefit from the facilitation if the persons they want to visit are citizens of the Union, next to third country nationals of the same state as the applicant. One limitation is added however: the EU citizen must reside in the Member State of which he is a national.\(^\text{425}\)

Thirdly, in the updates of the first VFAs concluded, a number of categories of persons is added with regard to all facilitations contained in these agreements. Especially in the updated agreement with Ukraine the field of application *ratione personae* is considerably enlarged, with the comparative tables showing that at least five extra categories of persons can benefit from the facilitation. The most important categories benefiting are representatives of civil society and participants in EU cross border cooperation programmes. These are also added in the updated agreement with Moldova. Compared to the agreement with Moldova, the list of additional categories added to the one with Ukraine is longer. This can be explained by the fact that the personal scope was already bigger in the initial agreement with Moldova, already containing certain categories of persons that have been added to the one with Ukraine only by the update.

5.2.3. **More MEVs**

A third change the second generation of VFAs brings, concerns the MEVs. Besides the fact that more categories of applicants are entitled to MEVs, the second generation also limits the discretion left to the Member States to set the duration of MEVs.\(^\text{426}\) Where the first generation VFAs used the wording ‘up to five years’ and ‘up to one year’, the current generation VFAs states clearly sets the duration of the MEVs to be issued at five years or one year.\(^\text{427}\) If an applicant fulfils the conditions for an MEV, that MEV must at least be valid for five years or one year: the Member States can, for these categories of applicants, not decide to issue MEVs with a shorter duration. This change should however not be exaggerated, since the Member

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\(^{424}\) VFA EU-Russia, article 6(3)(c).

\(^{425}\) For example VFA EU-Armenia, article 4(1)(a).

\(^{426}\) Mananashvili (n 247) 17.

\(^{427}\) Of course it also remains possible to issue MEVs with a validity between one and five years.
States were not willing to give away all of their power: they installed some safeguard clauses which empowers them to limit the validity of the MEVs nonetheless. According to these clauses, the validity of an MEV shall be limited, if the need or the intention to travel frequently or regularly is manifestly shorter than the period of validity entitled to.\(^\text{428}\)

5.2.4. Visa fee

A forth area of change concerns the visa fee. First of all, the new generation of visa facilitation agreements clearly takes the frequent recourse to ESPs into account. As seen above, the Visa Code introduces legal framework for the fee to be charged by ESPs. During the negotiations of the last VFAs, the parties were clearly aware of the Visa Code arrangement and clearly thought that it settled the problem in an agreeable way. Therefore, the provisions concerning the fee charged by ESPs clearly echo the Visa Code. The agreements limit the fee that can be charged by the ESPs, just like under the Visa Code. But given the fact that the applicants benefiting from the VFAs already enjoy a reduced visa fee, setting the ESP fee at half of the visa fee would mean they could charge only small amounts. To ensure these private companies can still make a profit, the VFAs set the maximum service fee at EUR 30. It must also be proportionate to the costs the ESP incurred in the performance of its task.\(^\text{429}\) Besides the fee, the same article also requires that the Member States maintain the possibility to lodge an application in person.

A second novelty concerning the visa fee can be found in the amended agreement with Ukraine. This concerns the urgency fee that can be charged if the applicant needs a decision on his application. Practice had shown that some applicants are willing to pay the extra fee even if they do not need the visa within three days, for the convenience of fast decision. The solution the Guidelines introduced in the agreement with Russia is considered to be a good solution, since the agreement with Ukraine introduces it as a proper provision in the agreement, including the acceptance of the consulate. According to the new article 6(3),

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\text{‘[t]he Member States shall charge a fee of EUR 70 for processing visas in cases where, based on the distance between the applicant’s place of residence and the place where the application has been submitted, the applicant has requested that a decision on the application be taken within three days of its submission, and the consulate has accepted to take a decision within three days.’}
\]

Especially in big countries, with limited consular presence, this provision might be an effective tool to limit the indirect costs related to a visa application, such as travel costs.\(^\text{430}\) In the future amended VFA with Russia, this might prove to be a very effective provision.

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\(^{428}\) For example VFA EU-Armenia, article 5(1).

\(^{429}\) For example VFA EU-Cape Verde, article 5(2).

\(^{430}\) Mananashvili (n 247) 18.
6. **DO VFAs TACKLE THE PROBLEMS ENCOUNTERED IN THE APPLICATION OF THE VISA CODE?**

The Commission foresaw in 2009 that some of problems that were discovered in the application of the VFAs were to be solved by the adoption of the Visa Code. Indeed, the Visa Code introduced the compulsory motivation of a visa refusal and the possibility of an appeal against such a decision and created a more or less harmonised list of supporting documents. One might argue that it is absurd to assess whether the problems one might encounter in the application of the Visa Code are tackled by the VFAs, since the majority of the VFAs is adopted before the entry into force of the Visa Code. However, since we discovered that some of the problems pertaining the Visa Code already existed before, at the time of the CCI, and given the fact that VFAs want to facilitate the issuance of visas, it is not more than logic to investigate whether the VFAs are suited to tackle these problems. As will become clear, the impact of the VFAs on the problems relating to the Visa Code is rather limited, either because of the fact that the problems find no solution in the VFAs or due to some weak points in the VFAs.

6.1. **No solution offered by VFAs**

Some problems concerning the Visa Code find no solution at all in the VFAs. A first such problem left unsolved is the consular coverage. Not a single VFA obliges the Member States to improve their consular coverage. The Commission already made clear that the VFAs are not aimed at tackling the problem of consular coverage. As a result, especially applicants in big third countries sometimes still have to travel thousands of miles. One can think for example of a Russian living in Novosibirsk intending to travel to Belgium. Just to lodge his application at the Belgian consulate, he has to travel 3400 kilometres.

A second problem not solved by the VFAs concerns the costs relating to the visa application. Although the VFAs limit the visa fee to EUR 35 or waive it in some cases and notwithstanding the fact that the second generation VFAs also limits the fee that can be charged by ESP, the visa application procedure can remain costly. For some people, even the ‘reduced’ visa fee in fact means a serious increase of the fee, or at hard a status quo. Also the indirect costs remain a problem, as an applicant still has to appear in person to lodge his application. In this regard, the VFA with Moldova should be mentioned, as it is the only one that tries to tackle this problem. In the amended version an extra article 6a is introduced, that reads:

> Member States consulates may waive the requirement to appear in person, when the applicant is known to them for his integrity and reliability, unless the applicant is required to appear in person for the collection of biometric identifiers.

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432 ibid 10.

433 Mananashvili (n 247) 3.

434 Florian Trauner and Imke Kruse (n 45) 22.
But in fact, this is nothing more than what article 10(2) VC provides, taking away the use of the provision in the agreement with Moldova, as this procedural article applies to all applicant, including the Moldovan ones.

### 6.2. Weak points of the VFAs

On some points the VFAs seem to tackle the Visa Code problems, but because of some weak points, these facilitations are not that effective. A first weak point concerns the documents required to launch a visa application. The VFAs do provide for some simplification, as they clearly set the documents that must be presented to justify the purpose of travel. But the facilitation is however limited to this one type of document, with the other types of documents asked by the Visa Code left unaltered. Even for the people benefiting from the VFAs, a lot of paperwork still needs to be done.\footnote{Weinar and others (n 281) 23.} The adoption of a Harmonised List of Supporting Documents to be submitted by applicants for a Schengen visa in the Russian Federation is an important step forward.\footnote{Harmonised list of supporting documents to be submitted by applicants for a Schengen visa in the Russian Federation <http://eeas.europa.eu/delegations/russia/documents/eu_russia/visa_harmlist_docs_en.pdf> accessed 15 August 2014.} This might ease the burden on the applicants, since it is clear for them which documents are required, taking away the possibility of the consulates to ask additional supporting documents, improving transparency and legal certainty. However, as some authors noted,\footnote{Peter Van Elsuwege and others, ‘State of Play’ (n 171) 21.} the practice in the different consulates might differ or even be contrary to the harmonised list. Moreover, also the requirements about the format might still differ between consulates, with some asking certified documents, while others accept emails or copies. All by all, the documentary simplification is rather limited, especially since article 14(6) VC also provides for a waiver of certain documentary requirements.

Similarly, concerns can be raised about the length of the visa procedure. The visa facilitation agreements contain provisions that lower the deadline to take decisions to ten days. Although this is indeed a facilitation compared to the situation under the Visa Code, the impact should not be overestimated, since the procedure is only shortened by five days. It must however be noted that the impact of this facilitation is negligible for at least three reasons. First of all, before the entry into force of the Visa Code most decisions were already taken within a timeframe of less than ten days,\footnote{Boratyński and others (n 231) 20.} and even as the time needed to process applications was steadily increasing,\footnote{Chajewski and others (n 285) 29.} most decisions were taken within this deadline.\footnote{Iryna Sushko and others, The EU Visa Policy in Ukraine: Independent Monitoring Findings 2012 (Iryna Sushko ed, Liliya Levandovska tr, Europe Without Barriers 2012) <http://novisa.org.ua/file/publics/novisa_publics1351606401.pdf> 18.} Secondly, the consulates may extend the period up to thirty days if further scrutiny is required. Thirdly, the VFAs do not regulate the modalities to lodge an application, meaning that the normal provisions of the Visa Code still applies. This means that another two weeks to obtain an appointment to lodge the application may still be added to the total length of the procedure.\footnote{Weinar and others (n 281) 21.}
A third weak point where the VFAs can only serve partly as a solution for the problems incurred in the application of the Visa Code concerns the issuance of MEVs. If the VFAs are applied correctly, the beneficiaries will receive MEVs with a validity of five years, one year or between two and five years, depending on whether the conditions are fulfilled. The minimum period of validity is longer compared to the Visa Code, where the minimum length of an MEV is set at six months. However, for some categories of travellers the possible length of an MEV is longer under the Visa Code than under the VFAs. This is the case for example for business people, who under most VFAs are in first instance only entitled to an MEV with a validity of one year, while under the Visa Code they can receive MEVs up to five years. Compared to the Visa Code, the VFAs on the other hand do not require the persons entitled to MEV with a validity of (up to) five years to prove their integrity and reliability.442

Although it becomes clear from the figures that the share of MEVs on the total number of issued visas increases,443 table 4 demonstrates that the number of MEVs with a long term validity remains low.

Table 4. Share of MEVs issued to Russian applicants according to length of validity

<table>
<thead>
<tr>
<th>Year</th>
<th>Single/ double entry</th>
<th>MEVs up to 1 year</th>
<th>MEVs up to 2 years</th>
<th>MEVs up to 3 years</th>
<th>MEVs up to 4 years</th>
<th>MEVs up to 5 years</th>
<th>Total MEVs</th>
<th>Total</th>
<th>Share of MEVs</th>
<th>Share of MEVs with 3-5 year validity</th>
</tr>
</thead>
<tbody>
<tr>
<td>2012</td>
<td>80712</td>
<td>21432</td>
<td>23435</td>
<td>2030</td>
<td>250</td>
<td>15</td>
<td>47072</td>
<td>127784</td>
<td>36.8%</td>
<td>1.8%</td>
</tr>
<tr>
<td>2011</td>
<td>329545</td>
<td>55220</td>
<td>8675</td>
<td>3524</td>
<td>0</td>
<td>751</td>
<td>68170</td>
<td>397662</td>
<td>17%</td>
<td>1%</td>
</tr>
<tr>
<td>2010</td>
<td>18066</td>
<td>42845</td>
<td>1442</td>
<td>83</td>
<td>10</td>
<td>20</td>
<td>44400</td>
<td>62486</td>
<td>71%</td>
<td>0.2%</td>
</tr>
</tbody>
</table>

The majority of the MEVs have a short duration, not only for Russian applicants, but also for Ukrainian applicants.445 The high number of MEVs with a short term duration cast serious doubts about the value of the MEVs. The validity, duration of stay and number of entries are three important indicators of the quality of an MEV.446 One can question the value of an MEV if it is only valid for one month, as it is not very likely that the same person will travel twice to the EU within the same month.447

Next to the traditional reluctance of Member States to issue MEVs, the Visa Code itself also explains why the Member States are not that eager to issue MEVs. MEVs are not purpose bound: although they are mostly acquired by persons because of their professional activity, nothing prevents the holder of an MEV to

442 ibid 22.
443 Supra table 5.
444 Peter Van Elsuwege and others, ‘State of Play’ (n 171) 27.
445 Iryna Sushko and others, ‘EU Visa Policy in Ukraine’ (n 440) 8.
446 ibid 27.
447 Peter Van Elsuwege and others, ‘State of Play’ (n 171) 27.
make use of it for touristic purposes. The Member States cannot really control the entry of such person once they have MEVs, the issue rate is low. This is further aggravated by the fact that the Visa Code requires applicants to have a valid reason to apply for a visa and to lodge the application at the consulate where the holder intends to travel most. If one tries to visit another Member State than the one the MEV was issued for, or for another reason the visa was issued for, this might lead to the annulment or cancellation of the visa. The VFAs do not contain provision to solve these issues, thus explaining the low share of MEVs.

7. **DO VFAs FACILITATE?: IMPACT**

Although the visa facilitation agreements are supposed to offer considerable facilitations to the persons benefiting from them, the above analysis has shown that in theory and in practise several difficulties might sincerely impact the effects of the agreements. The question rises whether the simplification of documentary requirements, the facilitated issuance of MEVs and the reduction or waiver of the visa fee have an actual impact on the number of visas issued. Since the Council and the Commission collect data on the number of visas issued, it does not seem that difficult at first sight to analyse the statistics. By simply comparing the number of applications per country and the visas effectively issued on a year by year basis, it should be able to assess whether the VFAs have a positive or rather limited impact on the number of visas issued.

But practical but not unimportant details complicate matters. The first VFAs, including the one with Russia, entered into force in January 2008, but at the end of 2007, nine Member States joined the Schengen zone. As these states issue Schengen short-stay visas from 2008 onwards, this automatically leads to an increase in the visa statistics, making it impossible to correctly assess the impact of the VFAs. Nonetheless the evolution from 2007 onwards might give some indication, especially the evolution after the enlargement of the Schengen area. Next to this, both sets of data, from the Commission and Council, are incompatible to perform an easy comparison. The statistics published on the website of the Commission are much more detailed than those of the Council: amongst others, the Commission statistics mentions the number of MEVs issued. This is important having in mind that the issuance of MEVs is one of the intended facilitations of the VFAs. In addition to this all, it is only with the entry into force of the Visa Code that the Schengen states

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448 ibid.

449 ibid 18.

start to systematically collect data for the statistics. Despite the difficulties, the statistics allow us to make some assessments.

Table 5 lists the general statistics on the issuance of Schengen C visas in Russia. It becomes clear that the visa applications from Russia for Schengen C visas amount to almost 40 % or more of the total number of visa applications. Over the years the number of applications has consistently grown, together with the visas actually issued, although the latest years both the grow in applications and visas issued is less outspoken. The number of visa refusal has always been low and continues to drop: over five years the refusal rate decreased from around 2.5 % to only 1%. Concerning the issuance of MEVs, the figures suggest that the VFA might indeed be effective, as the share of MEVs on the total number of visas issued has been increasing consistently: from 42.6% in 2010 to nearly 55% in 2013.

To have a more detailed vision on the effects of the VFA with Russia, and especially the number of MEVs issued, table 6 offers an overview of the number of C visas and MEVs issued by the consulates that receive most applications: the consulates of Finland in St. Petersburg and the consulates of Spain and Italy in Moscow.451 This makes clear that the number of applications received at the most frequented consulates has been steadily increasing, as has the share of issued MEVs. But other points are worth mentioning as well. A first thing that catches the eye is the sudden decrease in applications received in the Spanish and Italian consulates, year over year, from 2008 to 2009. No real reason can be found for this decrease, although it might be caused by the economic crisis. Another possible explanation might be that the entry into force of the VFA might have somehow frightened applicants. This is all the stranger, as the applications in the Finnish consulate have not decreased, although the increase in applications is not that big in 2009. A second element worth mentioning is the difference between the consulates in the issuance of MEVs. While the Finnish and Italian consulates have no problems in issuing MEVs, with a share of 90 percent or more, the French consulate seems to be more reluctant to do so.

Table 5. EU visa statistics with regard to Russian applicants.452

<table>
<thead>
<tr>
<th>Year</th>
<th>Total C visas issued worldwide</th>
<th>C visas applied for in Russia</th>
<th>Over year change C visa applied for in Russia</th>
<th>Total C visas issued in Russia</th>
<th>Over year change Russia C visas issued</th>
<th>Number of C visas not issued in Russia</th>
<th>Refusal Rate Russia</th>
<th>Rate C visas issued in Russia on total C visas issued worldwide</th>
<th>MEVs (C visas) issued in Russia</th>
<th>Share of MEVs on total visas issued in Russia</th>
</tr>
</thead>
<tbody>
<tr>
<td>2013</td>
<td>17,250,574</td>
<td>6,995,141</td>
<td>+15.26%</td>
<td>6,893,346</td>
<td>+16.06%</td>
<td>70,434</td>
<td>1.01%</td>
<td>39.96%</td>
<td>3,768,254</td>
<td>54.67%</td>
</tr>
<tr>
<td>2012</td>
<td>14,250,595</td>
<td>6,069,001</td>
<td>+15.30%</td>
<td>5,939,644</td>
<td>+15.28%</td>
<td>54,860</td>
<td>0.90%</td>
<td>41.68%</td>
<td>2,906,259</td>
<td>48.90%</td>
</tr>
<tr>
<td>2011</td>
<td>12,640,034</td>
<td>5,265,866</td>
<td>+24.70%</td>
<td>5,152,518</td>
<td>+25.04%</td>
<td>77,509</td>
<td>1.47%</td>
<td>40.76%</td>
<td>2,439,656</td>
<td>47.30%</td>
</tr>
<tr>
<td>2010</td>
<td>11,018,936</td>
<td>4,222,551</td>
<td>+30.20%</td>
<td>4,120,704</td>
<td>+30.20%</td>
<td>101,847</td>
<td>2.41%</td>
<td>37.40%</td>
<td>1,753,536</td>
<td>42.60%</td>
</tr>
<tr>
<td>2009</td>
<td>9,420,896</td>
<td>3,241,940</td>
<td>-</td>
<td>3,164,903</td>
<td>-</td>
<td>77,037</td>
<td>2.38%</td>
<td>34.41%</td>
<td>-</td>
<td>-</td>
</tr>
</tbody>
</table>

451 In 2013 the third most popular consulate was the one of Greece in Moscow. The consulate of Italy was forth in the ranking of consulates that received the most applications.

452 This table is the result of the author’s own elaboration, based on the information provided on the website of the Commission and draws inspiration from Peter Van Elsuwege and others, ‘State of Play’ (n 171) 26.
Table 6. Number of Schengen C visas issued in the three most ‘popular’ consulates in Russia. 453

<table>
<thead>
<tr>
<th>Year</th>
<th>C visas applied for Finnish consulate</th>
<th>C visas issued Finnish consulate</th>
<th>MEVs issued (rate on total C visas issued)</th>
<th>C visas applied for Spanish consulate</th>
<th>C visas issued Spanish consulate</th>
<th>MEVs issued (rate on total C visas issued)</th>
<th>C visas applied for Italian consulate</th>
<th>C visas issued Italian consulate</th>
<th>MEVs issued (rate on total C visas issued)</th>
</tr>
</thead>
<tbody>
<tr>
<td>2013</td>
<td>1,204,670</td>
<td>1195130</td>
<td>1171713 (98.9%)</td>
<td>1051643</td>
<td>1016986</td>
<td>196054 (19.3%)</td>
<td>725524</td>
<td>720863</td>
<td>707109 (98.1%)</td>
</tr>
<tr>
<td>2012</td>
<td>1,030,968</td>
<td>1022443</td>
<td>1000578 (97.86%)</td>
<td>949,717</td>
<td>873,812</td>
<td>107,970 (12.36%)</td>
<td>606,835</td>
<td>602,913</td>
<td>553,460 (91.80%)</td>
</tr>
<tr>
<td>2011</td>
<td>936,620</td>
<td>929,776</td>
<td>902,921 (97.1%)</td>
<td>729,066</td>
<td>668,279</td>
<td>46,054 (7.0%)</td>
<td>560,768</td>
<td>557,164</td>
<td>502,756 (90.2%)</td>
</tr>
<tr>
<td>2010</td>
<td>743,504</td>
<td>738,505</td>
<td>709,503 (96.1%)</td>
<td>487,840</td>
<td>438,182</td>
<td>51,297 (11.7%)</td>
<td>439,069</td>
<td>434,921</td>
<td>381,904 (87.8%)</td>
</tr>
<tr>
<td>2009</td>
<td>546,487</td>
<td>542,481</td>
<td>-</td>
<td>297,652</td>
<td>271,369</td>
<td>-</td>
<td>315,022</td>
<td>311,851</td>
<td>-</td>
</tr>
<tr>
<td>2008</td>
<td>524,250</td>
<td>519,032</td>
<td>-</td>
<td>366,678</td>
<td>335,820</td>
<td>-</td>
<td>399,074</td>
<td>396,741</td>
<td>-</td>
</tr>
<tr>
<td>2007</td>
<td>430,442</td>
<td>426,194</td>
<td>-</td>
<td>343,245</td>
<td>305,057</td>
<td>-</td>
<td>370,916</td>
<td>368,960</td>
<td>-</td>
</tr>
<tr>
<td>2006</td>
<td>-</td>
<td>318,858</td>
<td>-</td>
<td>288,200</td>
<td>266,878</td>
<td>-</td>
<td>277,893</td>
<td>275,424</td>
<td>-</td>
</tr>
<tr>
<td>2005</td>
<td>-</td>
<td>229,387</td>
<td>-</td>
<td>227,654</td>
<td>230,439</td>
<td>-</td>
<td>199,788</td>
<td>197,729</td>
<td>-</td>
</tr>
</tbody>
</table>

But to really assess the added value of the VFA for visa applicants from Russia, it is useful to make a comparison between the number of visas issued to Russian applicants with the number of visas issued to applicants of a country in the vicinity of the Union, that has not concluded a VFA with the EU. In search of such a country, one almost automatically ends up with Belarus, since it is the best comparable to Russia: it borders the Union and the political relations with the regime are not always that cordial. One could also think of Armenia or Azerbaijan to make the comparison, as they concluded VFAs with the EU only recently. But to my opinion, they are not a good basis for comparison, as they do not border the EU directly. Surprisingly, the available data in table 7 reveal that also the Member States consulates in Belarus witness an increase in visa applications. What is all the more striking is the fact that this increase is more or less comparable to the trends measured in the number of visas issued, which means that the extra people applying for a C visa are actually entitled to it. Apparently around 99.5% of all Belorussian applicants fulfil the conditions to be granted a Schengen visa. The refusal rate is even lower compared with the Russian applicants. When looking at the share of MEVs of these visas issued, it surprising to see that this is also almost comparable to the share of MEVs compared to the total number of visas issued to Russian applicants. Only in 2013 the share of MEVs issued to Russians was considerably higher compared with the Belorussian statistics.

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453 This table is the result of the author’s own analysis. The data for the drafting of this table comes from the visa statistics from the Council and the Commission.
Table 7. EU Visa Statistics with regard to Belorussian applicants.\textsuperscript{454}

<table>
<thead>
<tr>
<th>Year</th>
<th>C visas applied for</th>
<th>Over the year increase in applications</th>
<th>Total C visas issued</th>
<th>Over the year change c visas issued</th>
<th>Number of visas not issued</th>
<th>Refusal Rate</th>
<th>MEVs issued</th>
<th>Share of MEVs</th>
</tr>
</thead>
<tbody>
<tr>
<td>2013</td>
<td>777,813</td>
<td>+11.37%</td>
<td>768,323</td>
<td>+10.80%</td>
<td>5,910</td>
<td>0.76%</td>
<td>350,782</td>
<td>45.66%</td>
</tr>
<tr>
<td>2012</td>
<td>698,404</td>
<td>+19.60%</td>
<td>693,425</td>
<td>+19.57%</td>
<td>3,535</td>
<td>0.50%</td>
<td>326,482</td>
<td>47.10%</td>
</tr>
<tr>
<td>2011</td>
<td>583,871</td>
<td>+34.80%</td>
<td>579,924</td>
<td>+35.34%</td>
<td>3,947</td>
<td>0.68%</td>
<td>262,469</td>
<td>45.30%</td>
</tr>
<tr>
<td>2010</td>
<td>433,102</td>
<td>+17.10%</td>
<td>428,491</td>
<td>+17.35%</td>
<td>4,611</td>
<td>1.06%</td>
<td>156,037</td>
<td>36.42%</td>
</tr>
<tr>
<td>2009</td>
<td>369,842</td>
<td>-</td>
<td>365,146</td>
<td>-</td>
<td>4,696</td>
<td>1.27%</td>
<td>-</td>
<td>-</td>
</tr>
</tbody>
</table>

Statistics on the number of applicants that benefit from the visa fee waiver or the loosened documentary requirements are harder to find, but it is not impossible. Already in 2009, the Polish Batory Foundation wanted to assess the possible impact of the visa facilitation agreements.\textsuperscript{455} The Foundation requested data from several Schengen states about the possible impact of the agreements. Table 8 gives an overview of the measured impact of the VFAs. The study of the Batory Foundation also used Belarus as a neutral partner to compare. If we compare the share of MEVs issued to Russian applicants in 2008 in table 8 with the numbers of table 5, we can see a considerable increase in issued MEVs (from 31% in 2008 to 54.67% in 2013). This confirms our assertion made above that the share of MEVs increases over the years. The comparison of the same tables might however nuance the assumption that the impact of the VFAs is limited since the share of MEVs in the visas to Belorussian applicants remained stable over the years, while the number issued to Russian applicants has clearly grown.

Looking at other aspects contained in table 8, such as the average cost of a visa, the days needed to obtain a visa and the number of cases where the visa fee was waived, the impact of VFAs seems to be rather limited. The average costs made to obtain a Schengen visa in Belarus are slightly higher than the ones made in Russia, but the difference is rather limited, at least in 2008, especially if one taken into account that the applicants in the countries with a VFA can benefit from a reduced visa fee of EUR 35. If one looks at the number of cases where the visa fee is waived, it becomes clear that the impact of the VFA with Russia is rather limited. In Belarus even more persons benefited from a visa fee waiver than in Russia. The image is slightly different for Moldova and Ukraine, which is not entirely illogical as under these VFAs more categories can benefit from the visa fee waiver (see table 3).

Regarding the number of supporting documents needed for a visa application, the impact of a VFA again seems to be rather limited. In all the countries surveyed by the Batory Foundation, more or less the same number of documents is required. In this case the number of required supporting documents in Russia was the lowest. A factor that does seemed to be influenced by the VFAs is the length of the application

\textsuperscript{454} This table is the result of the author’s own calculations, based on the statistics of the Commission and the Council. The statistics of 2010 do not take the MEVs issued by Sweden into account, since no data were available.

\textsuperscript{455} Chajewski and others (n 285).
procedure. Although in 2008 an applicant in all of the countries surveyed would receive his visa within the fifteen days the VFAs prescribe, also in Belarus, the length of the procedure is significantly longer for applicants in Belarus. An applicant in Russia in 2008 had to wait for his visa less then seven days, while a Belorussian applicant had to wait nearly twelve days. Also the average duration of a visa is longer in the countries that concluded a VFA with the EU. This is slightly remarkable, as the VFAs do not directly impact this point. It can however be explained by the fact that the MEVs issued to applicants belonging to certain categories, coming from countries with a VFA have a minimum validity of one year.

Table 8. Impacts of facilitation 2008 — Belarus versus VFA countries.456

<table>
<thead>
<tr>
<th>Facilitation</th>
<th>Belarus</th>
<th>Moldova</th>
<th>Russia</th>
<th>Ukraine</th>
<th>VFA countries’ average</th>
</tr>
</thead>
<tbody>
<tr>
<td>MEVs (%)</td>
<td>46%</td>
<td>13%</td>
<td>31%</td>
<td>47%</td>
<td>34%</td>
</tr>
<tr>
<td>Average total cost of a visa</td>
<td>62 €</td>
<td>40 €</td>
<td>52 €</td>
<td>50 €</td>
<td>49 €</td>
</tr>
<tr>
<td>Procedure’s length (days)</td>
<td>11.7</td>
<td>9.8</td>
<td>6.9</td>
<td>9.4</td>
<td>8.6</td>
</tr>
<tr>
<td>Visa duration (days)</td>
<td>58</td>
<td>90</td>
<td>74</td>
<td>112</td>
<td>92</td>
</tr>
<tr>
<td>Visa fee waived</td>
<td>14.8%</td>
<td>32.1%</td>
<td>10.7%</td>
<td>31.0%</td>
<td>23.0%</td>
</tr>
<tr>
<td>Average number of documents required</td>
<td>4.6</td>
<td>5.3</td>
<td>4.3</td>
<td>5.3</td>
<td>4.9</td>
</tr>
</tbody>
</table>
Table 9. Evolution of the number of C visas applied for in the top-10 countries where most C visas were applied for, 2009 to 2012.\textsuperscript{457}

<table>
<thead>
<tr>
<th>Country</th>
<th>Increase in applications 2009-2012</th>
</tr>
</thead>
<tbody>
<tr>
<td>Russia</td>
<td>87.2%</td>
</tr>
<tr>
<td>Ukraine</td>
<td>53.8%</td>
</tr>
<tr>
<td>China</td>
<td>108.0%</td>
</tr>
<tr>
<td>Belarus</td>
<td>88.8%</td>
</tr>
<tr>
<td>Turkey</td>
<td>38.1%</td>
</tr>
<tr>
<td>India</td>
<td>38.9%</td>
</tr>
<tr>
<td>Algeria</td>
<td>45.0%</td>
</tr>
<tr>
<td>Morocco</td>
<td>38.5%</td>
</tr>
<tr>
<td>Saudi Arabia</td>
<td>85.5%</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>10.2%</td>
</tr>
<tr>
<td>Average</td>
<td>73.0%</td>
</tr>
</tbody>
</table>

\textsuperscript{457} This table is the result of the author’s own elaboration, based on the statistics of the Commission.
CHAPTER IV:
VISA LIBERALISATION

1. INTRODUCTION

Most progress in short stay travel between Russia and the EU has been accomplished in the context of the visa facilitation agreement. Nevertheless, the assessment of the impact of the VFA EU-Russia gives a nuanced picture. One may also not forget that the Russian side regards visa facilitation as a consolation prize. President Putin had already made it clear in 2002 that the real end goal was complete visa free travel. The immediate installation of a visa-free regime was completely unacceptable for the EU side at that but both Russia and the EU decided to recognise visa-free travel as a longterm objective.458 This is also repeated in the 2005 Common Spaces, where the preamble of the Road Map for the Common Space of Freedom, Security and Justice, where visa free travel is envisaged as a long-term perspective.459 Also the VFA with Russia states in the preamble that the parties reaffirm ‘the intention to establish the visa-free travel regime between the Russian Federation and the European Union.’ This is important, as the goal of visa liberalisation is stated for the first time in a legally binding international agreement.460

The dialogue on visa-free travel eventually took off in 2007. Although Russia was the first country with whom the EU launched a visa dialogue, little progress was measured in the first years. This lead to an unexpected move by the Russian President Medvedev: in the June 2010 EU-Russia Summit, he proposed a draft agreement on mutual visa waiver.461 This move was not welcomed by the EU side, but it contributed to the adoption of the Common Steps towards visa-free short term travel of Russian and EU Citizens: a list of mutual commitments needed to initiate negotiations on visa-free travel.462 The Common Steps are not legally binding and the fulfilment of the commitments does not automatically lead to the opening of talks, but they do raise hope that both parties are willing to go further on the topic of visa liberalisation. Parallel to the visa dialogue, also negotiations took place on the amendment of the existing VFA to bring it in line with the Visa Code and to tackle the problems encountered with the first generation of VFAs. These processes are carried out in parallel, but are distinct from each other, although some links exist between the two, as will become clear below.

Below we will also discuss the implementation of the Common Steps. It will become clear that some progress has been made, although problems arise because the different pints of view of Russia and the EU. In the beginning of this year, things took a turn for the worse. With the annexation of the Crimea by Russia, the

458 EU-Russia Summit, ‘Joint Statement St.-Petersburg 31 May 2003’ 9937/03 [2003].
460 See Florian Trauner and Imke Kruse (n 45) 17. Also the other VFAs state visa liberalisation as a long term objective.
461 Peter Van Elsuwege and others, ‘State of Play’ (n 171) 10.
462 Hernández i Sagrera, ‘The Impact of Visa Liberalisation’ (n 196) 17.
first thing the EU decided, was to suspend the talks on visa liberalisation. It is therefore expected that very little progress will be made in the near future in the visa dialogue.

2. OPTIONS VISA-FREE REGIME

The installation of a visa-free regime between the EU and a third country is not a simple thing, as it demands the abolishment of visa requirements. The fact whether nationals of a certain third country are required to apply for a visa to enter the EU, depends on the relevant Annexes of Regulation 539/2001. The most logic way to proceed is through an amendment of that regulation. This is also recognised by the Commission, stating that ‘[t]he most effective visa facilitation, of course, is the waiving of the visa requirement for citizens of a third country by transferring third countries from the negative list into the positive list attached to Reg. 539/2001’.463 The criteria to assess whether a country is ready to be transferred from the blacklist to the whitelist have already been mentioned above.464 The criteria are however not exhaustive, leaving a wide margin of discretion to the EU and its Member States to do the actual shift between the lists. The Commission is however of the opinion that also the economic impact should be taken into account for future visa liberalisation, stressing the possible economic impact for tourism.465 Until today, this cannot be found in the preamble of Regulation 539/2001.

Despite the effectiveness of introducing visa-free travel through the amendment of Regulation 539/2001, this is probably not the way how the visa-free travel between the EU and Russia will be accomplished. The Common Steps state that abolishment of the visa obligation will be the result of a visa waiver agreement.466 This allows to limit the visa waiver to holder of biometric passports only. Such an agreement between the EU and Russia would not be the first agreement the EU concludes on the visa waiver: it has already concluded such agreements with Antigua and Barbuda467, the Bahamas468, Barbados469, Brazil470, Mauritius471, Saint Kitts an Nevis472 and the Seychelles.473 Also Russia has experience with such

464 Text to n 198 in ch II. For a more detailed overview, see Gromovs and others (n 191) 231-234.
466 Council 18217/11, 1.
agreements. The agreements concluded by the EU with third countries that citizens of both parties can enter each other’s territory and stay ‘for a maximum period of three months during a six-months period.’ In these agreements, persons travelling for economic purposes, i.e. carrying out paid activities, are excluded from the visa-free travel. This does not include business people, who can benefit from the waiver. Depending on the wording of such agreements, they might cover up to 95% of all short-stay travels. This is the case in the agreement with Brazil, which clearly also covers visits for tourism and business purposes, two concepts that have a broad definition.

### 3. COMMON STEPS FOR VISA-FREE TRAVEL BETWEEN THE EU AND RUSSIA

#### 3.1. Four Blocks of steps

In November 2011, the last difficulties in the drafting of the Common Steps were tackled and in December of that year both parties agreed on the final version. The ten-page-long document lists the jointly agreed common steps and operational measures, grouped around four blocks or areas, which the parties committed to implement. One might get the feeling it is a checkbox list. The parties agreed that they are acting on an equal footing and that the Common Steps commit both parties on the basis of reciprocity. The four blocks are documents security, including biometric; illegal migration, including readmission; public order and security; and external relations.

Block 1 concerns document security. As main measures in this field, the parties have agreed to introduce ICAO-compliant biometric passports; to report on lost and stolen passports; to maintain regular exchange information on false documents and cooperation on document security; and to conduct training programs on the methods of the document protection on the basis of ICAO standards.

Block 2 concerns illegal migration and is divided into three sub-areas. The first sub-area concerns Migration issues, with regard to which the parties agreed to conclude implementing protocols with regard to the EU-Russia Readmission agreement; to effectively implement the VFA; to amend the VFA in order to further simplify visa requirements for the short-term travels and to ensure facilitation; and regularly exchange information on respective visa policies. The second sub-area concerns asylum issues. The parties have agreed amongst others to establish clear and transparent asylum procedures effectively accessible for persons seeking asylum and to closely cooperate on the asylum related issues. The third sub-area deals with border management issues, with regard to which the parties have agreed to take necessary steps in order to develop cooperation between Rosgranitsa and FRONTEX; to deploy appropriate staff, resources, technical

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474 Peter Van Elsuwege and others, ‘State of Play’ (n 171) 32.
475 ibid 32.
476 VLA EU-Brazil, article 3.
equipment and infrastructure at the relevant parts of the state border, as well as effectively implement border control procedures and best practices at their common state border crossing points.

Also Block 3, concerning public order, security and judicial cooperation is divided into sub-areas. The first sub-area concerns the fight against international organised crime, terrorism and corruption. The second sub-area tackles issues concerning law enforcement cooperation. With regard this sub-area, the parties have agreed to undertake necessary steps for conclusion and effective implementation of a strategic and operational cooperation agreement between Europol and the Russian Federation. Concerning the third sub-area of judicial cooperation the parties have agreed to undertake necessary steps for conclusion and effective implementation of a cooperation agreement between Eurojust and the Russian Federation; and to accede to certain international agreements concerning child protection jurisdiction. The forth sub-area concerns personal data and foresees in the accession to the 1981 Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data.

Block 4 is the last block and concerns external relations. Both parties have committed to ensure that all Russian and EU citizens and legally residing persons (regardless of the length of their authorised stay) can travel on equal basis with the Parties’ own citizens within their respective territories, subject to their internal rules and regulations concerning national security; to ensure full-fledged and effective issuance of travel and identity documents, including with regard to their price and deadlines of procedures, to all categories of persons for example to all citizens, internally displaced persons, refugees, non-citizens and stateless persons including to persons belonging to minorities: and to conduct training programs for law enforcement officials, prosecutors, judges and other practitioners in the areas covered by Block 4, and address possible deficiencies. It is remarkable that the operational measures with regard to this block are prudently worded: the parties only agree to discuss and cooperate on the relevant fields. According to some authors this is due to the fact that the forth block clearly mentions human rights and Russia’s reluctance to commit with regard to that field.477

Lastly, and following the four blocks, the Common Steps also contains Final provisions. Although they are not part of the four blocks, they also contain some issues that will be taken into account. These issues are: the rate of visa applications refusals; the rate of readmission applications accepted and effective returns under the Russia-EU readmission agreement; the number of return decisions with regard to citizens of the Parties, illegally staying or residing on the territory of the other Party; the number of refused entries at the border; the number of apprehended citizens of the Parties, illegally staying or residing on the territory of the other Party; and the border crossing time between EU Member States and Russia.

477 Peter Van Elsuwege and others, ‘State of Play’ (n 171) 35.
3.2. Comparative analysis

Russia was the first country with whom the EU started a visa dialogue with the long term perspective of visa-free travel, but is not the only one. Most other VFAs also contain a reference to visa liberalisation, except the agreement with Cape Verde. For most of the Western Balkan countries, a visa-free regime is already in place and also with Ukraine, Moldova and Georgia concrete steps have been taken. The road toward the end-goal takes the same route for all these countries: all of the negotiations are centred around the same four blocks as we can find in the Common Steps. The start of the negotiations with the countries from the Western Balkan was made dependent on the fulfilment of technical reforms proposed by the Union, which took the form of a Roadmap. These lists of technical benchmarks were more or less the same for all the Western Balkan countries.

With regard to the countries of the Eastern Partnership, the technical reforms were also grouped in a document and similarly divided into four blocks. But since the EU was reluctant to use the term of “Roadmaps” for these documents, because of the fact that the Western Balkans have a clear perspective of EU membership, another term was used. The lists of benchmarks receive the label of “Visa Liberalisation Action Plan” or VLAP. From the content of these Action Plans, it becomes clear the EU applies a different approach towards the East, compared to the Balkans. The EU opts for the reference to and the implementation of international norms, rather than EU norms. Since the countries of the Eastern Partnership are geographically part of Europe and members of the Council of Europe, the VLAPs refer to norms agreed upon within that context.

Next to the four blocks, the VLAPs are also centred around a dual structure or a two phased approach: a first phase of legislative reforms and a second phase of more specific benchmarks. Also the content of the Blocks differs from the Roadmaps. Regarding Block 1, the VLAPs only refer to international norms and not to EU norms. Next to that, the benchmarks are more specific and far-reaching compared to the Roadmaps. Concerning the second block of illegal migration, the VLAPs make clear that any progress is conditional upon the implementation of the readmission agreement concluded with the third countries. Next to that, some extra measures must be taken, compared with the Roadmaps. Block 3 lists a number of standard adopted by certain international organisations. The forth block concerns external relations and is more far-reaching than the Roadmaps, as it lists combatting hate crimes and the freedom of religion, next to the protection of minorities. The focus is clearly on human rights.

478 Hernández i Sagrera, ‘The Impact of Visa Liberalisation’ (n 196) 16.
480 Hernández i Sagrera, ‘The Impact of Visa Liberalisation’ (n 196) 16.
481 This is the opposite of what Hernández i Sagrera writes. According to him, the progress with regard to the implementation of the readmission agreement depends on the progress in the visa dialogue. See Hernández i Sagrera, ‘The Impact of Visa Liberalisation’ (n 196) 16. If one looks at the VLAP for Moldova, the opposite is stated. See Council 18078/10, 2.
The Common Steps can best be compared with the VLAPs, although considerable differences can be noted. These differences are the result of the reciprocal character of the Common Steps. Where the Roadmaps were documents unilaterally adopted by the Union and the VLAPs can be described as ‘unilateral’\textsuperscript{482}, the Common Steps are the result of negotiations between the parties: they both commit to solve the problems listed in the Common Steps. It is not the EU who imposed these conditions on Russia, since conditionality does not work in relation to Russia. Some authors even find conditionality not only ineffective, but also counterproductive.\textsuperscript{483} Conditionality works for the Western Balkans and ultimately for the Eastern Partners, as the former have a clear view to membership of the EU and the latter at least aspire it. Russia on the other hand has made it clear it is not interested in EU membership, making the golden carrot of EU membership ineffective. The result, and in the same time the problem, with this is that the benchmarks defined in the Common Steps are vaguer compared with the VLAPs.\textsuperscript{484} This offers a certain flexibility, but in the same time the more general nature also makes the process in the visa dialogue much more political. Some authors are not satisfied with this and fear that ‘[a]llegations of double standards loom around the corner’, compared with the process of visa liberalisation in the Eastern Partnership.\textsuperscript{485}

The EU was apparently aware of the possible discontent the more general Common Steps might cause with the partner countries who had to implement VLAPs and refused to disclose the Common Steps despite requests by MEP Hosna.\textsuperscript{486} It is not entirely clear whether this refusal was caused by the EU’s own reluctance or by Russian unwillingness, but the fact is that the document was only made public in March 2013. Fact is that, if the Common Steps became public knowledge too soon, they might have set a precedent for future visa dialogues, seriously weakening the Union’s negotiating position.\textsuperscript{487}

4. EVALUATION OF THE IMPLEMENTATION: WHERE ARE WE TODAY?

Once the Common Steps have been implemented, the parties will decide on the opening of the negotiations on a visa waiver agreement. It could not be stressed enough that the parties ‘will decide on it’, meaning that such negotiations are not the automatic result of the implementation of the Common Steps. It is nonetheless useful to look at the state of play of the implementation, since the Steps must be implemented to even start thinking about the opening of negotiations.

\textsuperscript{482} This term is used by professor Erwoan Lannon to describe the fact that Action Plans in the ENP are bilateral in name, but unilateral in essence since it is in fact the Union that imposed conditions.

\textsuperscript{483} Hernández i Sagrera and Potemkina (n 165) 4.

\textsuperscript{484} Peter Van Elsuwege and others, ‘State of Play’ (n 171) 35.

\textsuperscript{485} Peter Van Elsuwege, ‘The legal framework of EU-Russia relations: Quo vadis?’ (n 9) 455

\textsuperscript{486} Council, ‘Public access to documents’ 12338/12 [2012]; Council, ‘Public access to documents’ 12340/12 [2012].

\textsuperscript{487} Peter Van Elsuwege and others, ‘State of Play’ (n 171) 36.
4.1. Evaluation Common Steps

Given the reciprocity inherent to the Common steps, the evaluation of the implementation is different compared to the implementation of the VLAPs. With regard to the VLAPs, the Commission produces progress reports on the implementation by the third country.\textsuperscript{488} Russia and the EU are equal partners and decided to monitor the implementation together. The parties agreed that a monthly monitoring of the progress was needed, where the parties were to discuss the implementation of the Common Steps.\textsuperscript{489} Next to that, parties were required to write reports on the implementation of the Common Steps. Russia transmitted its report in April 2012, while the EU did so in May 2012.\textsuperscript{490} On the basis of these reports, both parties had the possibility to organise experts’ field missions, which both parties did. It is important to stress that also Russia had the opportunity to send missions to the Union, as that possibility does not exist for other partners with whom the EU conducts visa dialogues under the respective VLAPs.\textsuperscript{491} The reports of the missions and parties are internal documents and not publicly accessible.

This reciprocity did not take away the possibility for the Commission to make progress reports and in December 2013, the first progress report on the implementation of the Common steps by Russia was published.\textsuperscript{492} In its general assessment the Commission is of the opinion that Russia made progress in the implementation and contends that quite a number of steps can be considered as fulfilled. Nonetheless, the Commission also is of the opinion that further implementation is required.\textsuperscript{493} Generally speaking the Commission is happy with the progress made by Russia with regard to Block 1.\textsuperscript{494} Russia introduced biometric passports in 2006 and complies with the updated ICAO norms. Also the way the passports are secured pleases the Commission, as does the reporting of stolen passports to Interpol and the training programmes for Russian officials.

With regard to Block 2, the Commission contends that ‘Russia’s migration policy has undergone significant changes’.\textsuperscript{495} This block concerns the implementation of measures regarding migration, asylum and border-management. Especially the implementation of the readmission agreement is of importance for this block as it is a precondition for further progress. The implementation of the readmission agreement was discussed above in more detail,\textsuperscript{496} and we decided that the implementation of the agreement was satisfactory. Next to that, also the implementation of the VFA and the progress of the renegotiation of the VFA are

\textsuperscript{488} With regard to the Eastern partners, Moldova is the best pupil. Last year, the Commission proposed the amendment of the black list. See European Commission, ‘Fifth Report on the implementation by the Republic of Moldova of the Action Plan on Visa Liberalisation (Report)’ COM (2013) 807 final.

\textsuperscript{489} Hernández i Sagrera and Potemkina (n 165) 4.

\textsuperscript{490} COM (2013) 923 final, 2.

\textsuperscript{491} Peter Van Elsuwege and others, ‘State of Play’ (n 171) 37-38.

\textsuperscript{492} COM (2013) 923 final

\textsuperscript{493} ibid 52.

\textsuperscript{494} ibid 3.

\textsuperscript{495} ibid 6.

\textsuperscript{496} Text to n 158 in ch I.
considered. The implementation of the VFA is considered to be satisfactory, while the issue of service passports is the only element preventing the update of the existing agreement.\footnote{COM (2013) 923 final, 8-9} With regard to the update of the VFA, a first point of disagreement between the EU and Russia becomes clear: while the EU believes that an update is a precondition for a visa waiver, the Russian side considers the VFA-track and the visa-free track to be separate and wants to reach visa facilitation as soon as possible.\footnote{Peter Van Elsuwege and others, 'State of Play' (n 171) 42.} Nevertheless, the refusal on the EU side to include service passports shows that the attainment of the visa-free travel might prove to be more difficult than assumed by some.

With regard to Block 3 and 4, the evaluation of the Commission is less optimistic. For a long time, EU Officials did not want to make any declarations on the progress in this field, but with the Progress Report the Commission makes its view known. The adoption of international standards in the implementation of Block 3 is well under way and also at national level several legislative initiatives have been taken.\footnote{COM (2013) 923 final, 23-39} Some issues however remain. For example, with regard to the trafficking of firearms the Commission has some negative impression. With regard to the judiciary, the Commission openly doubts whether the judiciary is independent. The Commission also questions whether the institutional setup of the Russian administration is effective given the overlap in competences in certain areas. Block 4 poses most difficulties. The adoption of the Common Steps was only possible by limiting the Block on external relations to discussions on human rights. While the Russian side contends that the discussions are a mere formality, the EU takes the human rights more seriously. The Commission recognises that the Russian side takes steps with regard to the 4th Block, but also notices quite a number of difficulties. The Commission openly questions whether enough is done to fight discrimination and determines that certain forms of discrimination are not even considered as problematic in Russia. This is the case for discrimination of women and certain ethnic groups, as some of them face mass-detention. According to the Commission, Russia should also do more to prevent ill-treatment by government bodies, prevent and combat extremist activities and xenophobia. With regard to the measures that have been taken, the Commission has serious doubts with regard to the implementation. Lastly, the implementation of judgements of the ECtHr should also be improved. Russia mostly pays the rewards granted to the parties, but there are problems with the subsequent changes of law needed to comply with the judgement.

Russia initially wanted the visa-free regime to be in force by February 2014, in time for the Sochi Olympic Winter Games.\footnote{Council 14618/12, 2.} But it became clear that progress was to slow to meet that target date. Russia did some efforts, \textit{inter alia} by presenting a Road Map for quicker progress in 2012.\footnote{Hernández i Sagrera and Potemkina (n 165) 5.} The EU side did not agree with this, the quicker progress never came and the deadline preferred by the Russians was missed, much to their discontent. The reluctance of the EU to fix a date to start negotiations is understandable, since the
Common Steps first have to be properly implemented. But the EU must also be aware that this might discourage the Russian side\textsuperscript{502} and even might lead to ‘an increase of anti-European sentients in Russia, thus feeding nationalistic rhetoric’.\textsuperscript{503} The Russian point of view can also be understood, given the fact that the Common Steps are not legally binding, which means that parties can start the negotiations even before all Common Steps have been implemented.

From this state of play, it becomes clear that both parties envisage a different approach. The Russian side mainly focusses on the technical side of the obstacles to the visa-waiver agreement, which explains why most progress has been made with regard to Block 1. Russia is willing to implement all technical requirements under the Common Steps.\textsuperscript{504} They also stress that, when dealing with concrete technical problems of the Common Steps a compromise was always found.\textsuperscript{505} This caused Moscow to believe that the real difficulties do not lie with the technical aspects, but within the political sphere. The EU, on the other hand, recognises in official documents like the Progress Report the progress made by the Russian side and stresses the technical nature of the dialogue. However, at an informal level, EU officials acknowledge that some problems remain at political level, some of which might be insurmountable, such as human rights. The European Parliament insists on human rights and democracy as preconditions for visa liberalisation talks and repeatedly criticised Russia in this regard.\textsuperscript{506} Russia rejects this and only wants to include human rights issues in the implementation of the Common Steps if they deal with visa liberalisation directly, such as discrimination rules.\textsuperscript{507}

Until recently it seemed that the major obstacles to progress in the visa dialogue lied with the EU and its Member States. Some Member States in Central Europe and the Baltic states are clearly opposed to visa liberalisation\textsuperscript{508} and even the Member States who are in favour were reluctant to fix a date for the start of the negotiations.\textsuperscript{509} Russian authors have come up with several reasons explaining the cautious EU approach.\textsuperscript{510} First of all, the EU is said to fear a major influx of Russian criminals. But one can question a visa requirement is an effective way to counter criminality. Secondly, and this is also the major concern of the Union, the EU fears massive illegal immigration caused by the gap in living standards, although this should be nuanced as the disparity in income differs from region to region. It is however a questionable presumption that the waiver of the visa requirement for short stays will automatically lead to soaring illegal migration

\textsuperscript{502} Hernández i Sagrera, ‘The Impact of Visa Liberalisation’ (n 196) 18.
\textsuperscript{503} Hernández i Sagrera and Potemkina (n 165) 6.
\textsuperscript{504} Hernández i Sagrera, ‘The Impact of Visa Liberalisation’ (n 196) 18.
\textsuperscript{505} Peter Van Elsuwege and others, ‘State of Play’ (n 171) 43.
\textsuperscript{507} Hernández i Sagrera and Potemkina (n 4) 5.
\textsuperscript{508} ibid 5.
\textsuperscript{509} Golunov (n 4) 91.
\textsuperscript{510} ibid 93-98.
numbers. And even if it does, since 2008, there is a readmission agreement in place to tackle this. Lastly, the Russian side also thought of other reasons that might cause the EU slow down the process. It is believed that that EU cannot explicitly state certain reasons due to diplomatic considerations or political correctness, such as the reluctance of European politicians to risk political capital by making concessions to Russia on the delicate visa issue, the perception of Russia as a corrupt state and even ethinical preferences of EU officials. Probably there is some ground of truth in these allegations. But even if all of them were true, it is acknowledged that the current Russian procedures to obtain a visa are more complicated than the one Russians have to go through obtain a Schengen visa.

4.2. Problems in the Crimea

Due to recent events, the past reluctance on the EU-side has almost been completely forgotten. The crisis in the Crimea has changed the discussions on the topic completely. To give a short reminder of the facts: in November 2013 unrest broke out in Ukraine after a police assault, which soon led to pro-European protests. The government at that time tried to deal with the protests by criminalising them. Ultimately, the protesters toppled the regime of president Yanukovych and a new government was installed. This triggered a reaction from the Russian side: Russia send in troops to occupy the Crimea peninsula, a part of Ukraine with a majority of Russian-speaking population, although they did not openly admit so. Ultimately, the Russian side recognised the rupture of the Crimea from the Russian mainland and after a referendum with a clear majority of Crimeans voting in favour of joining the the Russian Federation, Russian president Vladimir Putin signed an accession treaty, whereby the Crimea officially became part of the Russian Federation.

Evidently, the EU was ‘not amused’ by the Russian move, as both Russia and Ukraine are important partners for the EU. With Russia, the EU is negotiating a new agreement to replace the old PCA, and is negotiating on an number of other elements such as the updated VFA and the Common Steps. Ukraine is one of the ENP partners of the Union. Also here the EU tries to replace the old PCA with a new agreement. This was supposed to take the form of an association agreement. But because of Russian pressure, president

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511 For the possible impact of visa liberalisation see text to n 521.
Yanukovych decided not to conclude the new agreement in December 2013.\textsuperscript{517} Combined with the invasion of the Crimea, this was the final drop for the EU side.

On 3 March 2014 the Foreign Affairs Council decided that action should be taken. Russia had not taken the de-escalating steps the EU had demanded and the Council agreed that this would have consequences for the bilateral relations between the EU and Russia. Among the possible action to be taken, the suspension of the bilateral talks on visa matters was mentioned.\textsuperscript{518} The actual decision to suspend the visa dialogue was taken by the European Council on 6 March 2014. The Heads of State or Government of the EU issued a statement after an Extraordinary meeting. They noted the lack of action by the Russian side and ‘decided to take actions, including those envisaged by the Council on 3 March, notably to suspend bilateral talks with the Russian Federation on visa matters.’\textsuperscript{519} The suspension of the visa talks was the first sanction adopted,\textsuperscript{520} but given the events of July 2014, with the problems concerning the Malaysian airlines flight and the new trade sanctions, a revival of the talks seems not very likely in the near future.

\section*{5. POTENTIAL IMPACT}

With this suspension of the talks, progress in the visa dialogue should not immediately be expected. However, it is useful to assess the potential impact of a visa waiver agreement. As described above, a visa-free regime could really boost tourism and the related income.\textsuperscript{521} Next to that, free travel can also lead to a pro-european sentiment in the Russian society and the adoption of certain values, such as democracy.\textsuperscript{522}

But despite the clear advantages, the focus from the EU side is mostly on the possible negative impact of the visa-free travel. As stated above, there is a fear for the influx of criminals and illegal migrants.\textsuperscript{523} The fear also exists that the number of asylum seekers might increase, as happened when the countries of the Western Balkans were granted visa free travel.\textsuperscript{524} These fears are not recent as the Commission already mentioned them when the issue of visa-free travel was put on the table.\textsuperscript{525} But certain studies indicate that fears should be nuanced. The contribution of Russians to the national crime rates is negligible and even decreasing.\textsuperscript{526} The increase in asylum applications from the Western Balkans mostly concerned the Roma, a


\textsuperscript{519} European Council, ‘Statement of the Heads of State or Government on Ukraine Brussels 6 March 2014’ [2014].


\textsuperscript{521} Text to n 234 in ch II.

\textsuperscript{522} Golunov (n 4) 93.

\textsuperscript{523} Text to n 510.

\textsuperscript{524} Hernández i Sagrera, ‘The Impact of Visa Liberalisation’ (n 196) 25.

\textsuperscript{525} COM (2002) 510 final, 6.

\textsuperscript{526} Golunov (n 4) 93.
group of people with a very limited presence in Russia. Also with regard to illegal migration, doubts can be placed to the fears. It is true that quite a number of Russians are living in Europe, but they are mostly ethnic Germans repatriated after the collapse of the Soviet Union. Other studies with regard to countries in a comparable process of visa liberalisation, show that the liberalisation will not lead to an increase of migration. Migrants from countries such as Moldova and Ukraine argue that those who wanted to leave for Europe have already left. It is even argued that a visa-free regime might even have a positive impact on the outflow of illegal migrants, as they would than get the chance of leaving the EU in a safe way, without running the risk of apprehension.

The figures regarding the VFA with Russia also demonstrate that the application rate is very high and even increasing, while the refusal rate remains low. This suggest that visa liberalisation can bring benefits for the EU and the Member States, as the administrative burden in the issuance visa could be decreased. Also the Russian side would be able to profit, as Russians who previously did not apply for a visa, either because of the fear of a refusal, or because of the administrative burden, would be tempted to come to EU. This would again be beneficial for the Union as it can create extra jobs and generate income in the tourism sector.

527 On this subject, see Dirk Tieleman (n 1) 138-143.
528 Weinar and others (n 281) 13.
529 ibid 24.
530 Supra table 5.
CONCLUSION

With the adoption of the Common Spaces and the Road Maps for the implementation thereof, the relations between the EU and the Russian Federation got a new impetus, despite the limited legal framework provided for by the PCA. With regard to the Common Space of Freedom, Security and Justice the interests of the parties were not the same. Whereas the Union was interested in the conclusion of a readmission agreement to combat illegal migration, a visa facilitation agreement was the *minimumimumimorum* for Russia, to be able to offer its citizens better mobility to the Union. The latter party even wanted to go further, advocating nothing less than visa-free travel. By coupling the negotiations on the two agreements the parties were able to proceed, however hesitant that progress was. This even set an example that has been followed ever since: the EU does not ask for the conclusion of a readmission agreement if it cannot offer a visa facilitation agreement, since a visa facilitation agreement has become the standard counter-demand by third countries. As a result, the EU only answers to requests to conclude a visa facilitation agreement if a readmission agreement is in place or when the third country is willing to conclude one.

The readmission agreement entered into force in 2007 and is fully operational since 2010. The agreement has been described as the best working one the EU has ever concluded. It is true that Russia has done a considerable effort in implementing the agreement, be it with the technical and financial assistance of the Union. Russia adapted its legislation, created the necessary bodies to tackle the readmission requests administratively, set up the necessary centres to deal with the readmittees logistically and concluded the necessary international readmission agreements with its neighbours in an astonishing pace, compared with the slow progress the EU makes in negotiating readmission agreements. But one must always remember that Russia does not only implement the readmission agreement ‘out of the goodness of its hart’. The Russians are fully aware that the good implementation of the readmission agreement is a basic condition for the negotiations on a visa-free regime.

If one compares the agreement with other readmission agreements, it is clear that the negotiating leverage of Russia resulted in some special provisions. First of all, it is the only readmission agreement in which the link with the corresponding visa facilitation is explicitly mentioned. Next to that, the clause on the readmission of TCNs and stateless persons only became effective three years after the rest of the agreement entered into force. Nonetheless, the implementation of the agreement by Russia is considered to be satisfactory.

Because of the linking between the two types of agreements, the visa facilitation agreement with Russia is the first one of its kind ever concluded by the EU. The agreement aims to facilitate the issuance of short-stay visas to Russian nationals and EU citizens. On the EU side the VFA tries to loosen the provisions contained in the Visa Code, which replaces the CCI. If one has to apply for a short-stay Schengen visa, he might
encounter several difficulties such as a limited consular presence, strict documentary requirements, and lengthy and burdensome procedures. These problems were already known at the time of the CCI and continue to cause problems under the Visa Code. If the Union concludes VFAs, one might expect the agreements to mainly focus on these elements.

Visa facilitation agreements indeed contain a number of facilitations. They ease the documentary burden, encourage the issuance of MEVs, and waive or reduce the visa fee for certain categories of visa applicant. The first generation of VFAs suffered some teething troubles, as it contained some inconsistencies. Moreover, most of the VFAs of the first generation had been adopted before the adoption of the Visa Code, necessitating changes in drafting the second generation of agreements and amendments of the first generation of agreements. The second generation solved the specific problems that were encountered with the first generation of agreements. But not all negotiations were successful: in the negotiations on the amendment of the agreement with Russia insurmountable differences in opinions on service passports emerged, thus preventing a compromise.

Notwithstanding the facilitations offered, the VFAs do not solve all the problems experienced in the application of the Visa Code. The issue of consular presence is not solved, the documentary facilitation only has a limited impact and problems remain in the issuing of MEVs. Nevertheless, the visa statistics demonstrate that the number of visas issued to Russian citizens continues to grow every year, while the refusal rate remains low. It is however questionable whether this is the result of the visa facilitation agreement, since the visa applications by citizens of countries that have not concluded a VFA with the EU show the same evolution. But in general the agreement with Russia is considered to have a positive impact of the number of visas issued, although it is not the most liberal one.

The end-goal for Russia in the relations with the EU was however the complete abolition of the visa-requirements. After years of insisting, the EU accepted visa-free travel as a long term objective. The two agreed on Common Steps that needed to be fulfilled before the two parties would even consider negotiating on the matter. The readmission and visa facilitation agreements are listed among these conditions, together with the update of the visa facilitation agreement. As far as the technical arrangements are concerned, the EU is quite happy with the implementation of the Common Steps by Russia. With regard to the steps to be taken with regard to human rights, the EU and Russia have opposite opinions. Russia considers that the most important element concerning human right contained in the Common Steps is a dialogue, while the EU wants to see real changes on the ground. This dispute caused the talks to slow down. With the recent annexation of the Crimea by Russia and the ongoing troubles in the east of Ukraine, little progress is to be expected, as the first measure the EU took in the sanctions-was was the suspension of the visa-free talks. People travelling from Russia to the EU and vice versa will have to apply for visas a little longer.
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