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Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Council Regulation (EC) No 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, as regards the withdrawal of the United Kingdom from the Union.

Submitted by Home Office on **30 NOV 2018**

SUBJECT MATTER

1. This Explanatory Memorandum (EM) relates to a proposal by the European Commission to consider the UK as a non-visa required country, once the UK formally withdraws from the European Union (EU).
2. Currently, the UK is a Member State of the EU and, as such, UK nationals enjoy free movement under Article 21 of the Treaty on the Functioning of the European Union (TFEU) and Directive 2004/38/EC. This affords the right to enter, move within and reside freely in any other Member State without the need to obtain permission via a visa or similar formality.
3. Upon departure from the EU the UK becomes, in EU terms, a third country: the current freedom of movement will cease to apply to UK nationals. A decision by the EU is required as to whether UK nationals will require a visa when crossing the external borders of the Schengen Area. Regulation (EC) No 539/2001 splits all third countries into two groups: those which require a visa (Annex I); and those which do not (Annex II).
4. The Regulation is part of the EU's common visa policy for short stays of 90 days in any 180-day period, which covers travel to all Member States - except Ireland which does not participate in the Schengen *acquis* - and to the Schengen Associated Countries (Iceland, Norway, Lichtenstein and Switzerland).
5. Under the European Commission's proposal, the UK would be placed on Annex II of Regulation (EC) No 539/2001. As such UK nationals would be exempt from the visa requirement. Under the proposal the Regulation would be amended to grant nationals of the UK who are British citizens visa free travel to the EU after the UK's withdrawal from the EU. In a deal outcome this would take effect at the end of the Implementation Period; in a no deal outcome it would take effect as of 30 March 2019.

SCRUTINY HISTORY

6. None for this document.

MINISTERIAL RESPONSIBILITY

7. The Home Secretary has responsibility for policy on immigration issues.

INTEREST OF THE DEVOLVED ADMINISTRATIONS

8. The Home Secretary retains overall responsibility for immigration control in the United Kingdom, which is a reserved matter under the UK's devolution settlement. The Devolved Administrations have previously expressed a keen interest in issues of labour mobility. This proposal, which relates solely to 90-day visa free access does not touch on issues of labour mobility.

LEGAL AND PROCEDURAL ISSUES

- i. **Legal basis**
This proposal seeks to amend Regulation (EC) No 539/2001, which is based on Article 77(2)(a) of the Treaty on the Functioning of the European Union, which provides for measures concerning the common policy on visas.
- ii. **European Parliament Procedure**
Ordinary legislative procedure.
- iii. **Voting procedure**
Qualified Majority Voting (co-decision)
- iv. **Impact on United Kingdom Law**
The UK does not participate in the Border and Immigration aspects of the Schengen Acquis, furthermore this proposal would take effect upon the UK's withdrawal from the EU. As such, there is no impact on UK law and we will not be expected to make any changes to our law as a result.
- v. **Application to Gibraltar**
Citizens of Gibraltar currently enjoy the right to free movement, including visa-free access, as the Lisbon Treaty reference to UK nationals extends to British Overseas Territories citizens who acquire their citizenship from a connection with Gibraltar. Upon the UK's departure from the EU, British Overseas Territories citizens in Gibraltar will no longer be considered UK nationals as understood by the Lisbon Treaty, instead being referred to as British Overseas Territories citizens. As British Overseas Territories citizens are already listed in Annex II (Part 3) of Regulation (EC) No 539/2001, British Overseas Territories citizens of Gibraltar will be exempt from a visa requirement in line with British citizens and British subjects with the right of abode in the UK. The exemption in Annex II (Part 3) of Regulation (EC) No 539/2001 applies equally to British Overseas Territory citizens from all of the

British Overseas Territories. Those citizens of Gibraltar who are British citizens will have visa-free access by virtue of the changes proposed by Article 1(2).

- vi. Fundamental rights analysis
None applicable.

APPLICATION TO THE EUROPEAN ECONOMIC AREA

- 9. This Report is of interest to all Member States that are party to the Schengen *acquis*, including the four associated Member States (Norway, Lichtenstein, Iceland and Switzerland).

SUBSIDIARITY

- 10. This Report complies with the principle of subsidiarity in that Schengen visa decisions cannot be achieved by Member States acting alone.

POLICY IMPLICATIONS (including Exit implications where appropriate)

- 11. As set out in the Political Declaration on the future relationship, endorsed by leaders at a special meeting of the European Council on 25 November 2018, the UK and the EU aim to provide through their domestic laws for visa-free travel. This builds on the ambition as set out in the White Paper on the Future Relationship Between the United Kingdom and the European Union, published 12 July 2018, in which HM Government set out its ambition for a reciprocal arrangement between the EU and the UK, that would enable UK and EU citizens to travel freely, without a visa, for tourism and temporary business activity.
- 12. The proposal upholds this stated ambition and demonstrates the EU's continued support for allowing visa-free travel. In its proposal, the Commission is satisfied that the UK does not pose a significant risk that would warrant the imposition of a visa requirement. This risk assessment is based on a number of factors, including the UK's: high-income economy; membership to OECD; trade capacity with the EU; close proximity to the EU; and the historical interlinkages between the EU and UK economies. Furthermore, the Commission is satisfied that existing checks on third country nationals crossing external borders are sufficient to mitigate and manage any potential risks posed by British citizens.
- 13. Regulation (EC) No 539/2001 includes mechanisms by which the EU could seek to suspend visa-free travel. Should the UK seek to introduce a visa requirement on any EU Member State now or in the future, the EU could seek to suspend the UK's visa exemption as per the EU's visa reciprocity mechanism, set out in Article 1(4). Should the security or migratory risk from British nationals require urgent action to suspend visa-free travel, this can be achieved through the visa suspension mechanism set out in Article 1a.
- 14. The effect of the Regulation is that all categories of British citizen, including those who are not nationals of the UK, enjoy visa-free access to the EU. Article 1(2) of the proposal for the Regulation makes provision for nationals of the United Kingdom, capturing British citizens from the United Kingdom and the islands. The proposed amendments to the title of Part 3 of Annex II, as set out at Article 1(3) of the proposed Regulation ensures that visa-free access is also enjoyed by people who are British subjects by virtue of Part IV of the British Nationality Act 1983 and have the right of abode

in the UK (and are thus exempt from UK immigration control), and; British Overseas Territories citizens who acquire their citizenship from a connection with Gibraltar.

15. To note, since 09 June 2014, all British Overseas Territories citizens (BOTCs), British Overseas citizens (BOCs), British Protected Persons (BPPs), and British Subjects (BS) have been allowed to travel visa free to the EU Schengen Area. They are currently listed under Part 3 of Annex II to Regulation (EC) No 539/2001. Their status will not change as the UK withdraws from the EU.
16. The reciprocal status of Irish citizens in the UK, and British citizens in Ireland, as associated with the Common Travel Area (CTA) arrangements is unaffected.

CONSULTATION

17. HM Government maintains close contact with non-governmental and voluntary organisations concerned with immigration and asylum and holds regular discussions with them.

IMPACT ASSESSMENT

18. Not appropriate.

FINANCIAL IMPLICATIONS

19. None.

TIMETABLE

20. The proposal will need to be adopted by the European Parliament and the Council. It is anticipated that the EU will seek to move this through the co-decision process quickly so that it is in place in advance of the UK's withdrawal from the EU.

OTHER OBSERVATIONS

21. None.

MINISTERIAL NAME AND SIGNATURE



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Minister of State for Immigration