



The Transatlantic Dispute over Visas

The need for EU action in the face of US non-reciprocity, moving targets and the harvesting of EU citizens' data

Marco Stefan

Summary

This Policy Insight investigates the multiple policy, legal and inter-institutional ramifications of the dispute arising from the persisting lack of visa reciprocity between the EU and the US. The ever-stringent US requirements for member states' admittance and stay in the Visa Waiver Programme discriminate against European passport holders on the basis of nationality and justify preventive policing through the harvesting of EU citizens' personal data.

It is important that all EU institutions responsible for the implementation of EU common visa policy loyally cooperate in dealing with the current state of affairs in transatlantic visa non-reciprocity. Such an approach could offer a way out of the EU's current inter-institutional dispute regarding the measures to take under a post-Lisbon regulatory framework. This would allow increasing the effectiveness and democratic accountability in EU-US cooperation on visas, and help address issues arising from US requests for personal information, which may be tantamount to the introduction of visa requirements and travel restrictions for EU citizens.



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Executive Summary

The lack of progress towards full visa reciprocity between the EU and the US has long represented an unresolved issue in transatlantic relations.

Despite its inclusion in the positive list of countries that are exempt from Schengen visas, the US still maintains visa obligations upon Bulgaria, Croatia, Cyprus, Poland and Romania. To date, the precise steps have not yet been agreed between the EU and the US that would exempt citizens of these member states to be exempt from US visa requirements.

In parallel, enhanced cooperation for the exchange of EU passport holders' information has become a prime condition for every member state's admittance and stay in the US Visa Waiver Program (VWP). In fact, the inclusion (actual or prospective) of EU member states in the VWP is used as the justification for increasingly pervasive security checks involving the gathering of data on European citizens who wish to travel to the United States.

Especially since the start of the Trump administration, the harvesting of EU citizens' data has become a priority for the US authorities. Enhanced cooperation in information sharing and gathering constitute the means by which US authorities currently impose travel checks upon EU citizens. These requests for personal information, however, may well be tantamount to the introduction of visa obligations and restrictions for certain categories of EU citizens travelling to the US.

When combined with the visa requirements still in place on Bulgarian, Croatian, Cypriot, Polish and Romanian nationals, the US authorities' requests for EU traveler information pose mobility restrictions that jeopardize the overall effectiveness of the transatlantic visa-free regime. They also subject certain categories of EU citizens to different travel regimes and preventive surveillance through the harvesting of personal data outside pre-defined EU legal channels for transatlantic data transfer.

The responsibility to address visa reciprocity in relations with the US falls under EU competence, but disagreement currently exists between the European Parliament and the Commission as to the necessary measures to adopt in the implementation of the so-called EU visa reciprocity mechanism. This legal instrument sets out the precise timeframe and actions to deal with non-reciprocal visa regimes in a post-Lisbon Treaty inter-institutional framework of cooperation.

However, the Commission is currently refusing to adopt the delegated act that would allow the co-legislators (i.e. the European Parliament and the Council) to decide whether or not to introduce a temporary Schengen visa suspension for US nationals. Such refusal to act is all the more challenging in light of the European Parliament's resolution of 2 March 2017, which urged the Commission to comply with its legal obligations and cease to treat EU-US visa reciprocity as an issue solely under its political discretion.

This Policy Insight investigates the multiple policy, legal and inter-institutional ramifications of the EU visa controversy with the US. It is argued that the lack of visa reciprocity with the US

subjects European citizens to discrimination on the basis of nationality, and preventive policing through the harvesting of personal data.

It is important for all EU institutional actors currently responsible for the implementation of the EU visa and foreign policies to loyally cooperate in the adoption of the measures that are required under EU law to address non-reciprocity. These measures are required not only to advance towards a fully reciprocal transatlantic visa-free regime, but also to ensure democratic scrutiny over the different politically sensitive and cross-sectional issues raised by the visa controversy with the US. One of the most salient issues is the ever-expanding efforts by the US to acquire EU citizens' data, which occur outside pre-defined legal channels for transatlantic data transfer, and de facto amount to travel restrictions on EU passport holders.

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1. The multifaceted controversy over EU–US visa non-reciprocity: An introduction

Between 15 and 16 June, the EU Commissioner for Migration and Home Affairs, Dimitris Avramopoulos, Justice Commissioner Vera Jourová and Security Union Commissioner Julian King met in Malta to discuss with their US counterparts from the Homeland Security and Justice Departments 'work to be done' on visa reciprocity.¹

The achievement of full visa reciprocity between the EU and the US has constituted a longstanding matter of contention in transatlantic relations. The controversy between the strategic partners directly concerns the establishment of a visa-free travel regime for all EU citizens wishing to travel to the US for non-immigration purposes, including tourism and business.

The EU common visa policy is part of the wider EU Schengen regime. One of its key goals is to ensure that third countries like the US, which benefit from a Schengen visa-free regime, do not treat member states differently for visa purposes and impose travel restrictions upon EU citizens. However, since its inclusion in the EU common list of Schengen visa-free countries,² the US has refused to lift visa requirements for Bulgarian, Croatian, Cypriot, Polish and Romanian nationals.

To date, the persistent US maintenance of visa requirements has been justified on the claim by US authorities that these five member states do not meet all the different eligibility criteria set forth in the Visa Waiver Program (VWP).³ Admittance to the latter depends inter alia on the development of US security standards for travel documents, and on the level of cooperation established with US authorities on justice and home affairs matters, including information sharing on criminal and security concerns, and the reporting of lost and stolen travel documents.

The US has repeatedly stressed that the visa requirements currently imposed upon the nationals of Bulgaria, Croatia, Cyprus, Poland and Romania will only be lifted when all these

¹ See the Joint Statement, 16 June 2017 (http://europa.eu/rapid/press-release_STATEMENT-17-1671_en.htm).

² See Annex II of Council Regulation (EC) No. 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, OJ L 81, 21.3.2001.

³ See US Department of Homeland Security, "US Visa Waiver Program" at <https://www.dhs.gov/visa-waiver-program>.

conditions have been met. That said, no precise indications or timelines have yet been given by US authorities as to how to achieve such an objective. At the June 2017 Valletta meeting, it was instead confirmed that admission to the VWP by the five member states concerned will only and ultimately be granted upon the positive consideration by the US secretary of homeland security and secretary of state as to the impact that such a decision would have on US security and law enforcement interests.

The Valletta summit also made clear – if necessary – that the dialogue between the EU and US executives on visa reciprocity is strategically and structurally linked to the enhancement of transatlantic cooperation on information sharing regarding serious crime and known or suspected terrorists. Indeed, since the perpetration of a series of terrorist attacks in a number of European cities, US representatives have expressed growing concern over the possibility of EU member state nationals entering the country for non-immigration-related reasons without first obtaining a visa from a US consulate. This sentiment is well reflected in the recent discussions over a possible ban for EU travellers from embarking on a flight to the US with a laptop.⁴

As a matter of fact, the preoccupations of the US authorities with the potential security risks posed by European passport holders have resulted in the introduction of successive legislative proposals, policy initiatives, increasingly stringent border-control practices and vetting procedures aimed at preventing member state nationals from potentially “abusing the VWP” (Bucci, 2015). Especially since the Trump administration took office, US authorities have multiplied efforts to ensure the gathering of information and intelligence on potential terrorists and other ‘bad actors’ and predict national security threats (also) through extreme vetting procedures and the use of enhanced security features in the Electronic System for Travel Authorization (ESTA).

This policy approach violates the reciprocity principle, and is currently putting the overall effectiveness of the transatlantic visa-free travel regime into jeopardy. What is more, the possibility of further entry restrictions for EU citizens if member states do not ensure a certain level of intelligence cooperation with the US⁵ reflects the complex nature and far-reaching ramifications of the transatlantic visa controversy. In particular, it shows how information exchange has become a priority for the US, as well as a tool for imposing travel checks upon EU citizens by the mean of collecting personal data outside pre-defined EU legal channels for transatlantic data transfer.

Visas – and in particular the conditions for member states to be admitted to and remain in the VWP – seem increasingly to be perceived by US authorities as an essential tool to further their

⁴ See D. Millward, “Confusion over laptop flight ban as US denies EU claim that proposals have been scrapped”, *Telegraph*, 30 May 2017 (<http://www.telegraph.co.uk/news/2017/05/30/confusion-laptop-flight-ban-us-denies-eu-reports-proposals-have/>).

⁵ See N. Nielson, “US questions visa waivers for EU nationals”, *EUobserver*, 4 May 2017 (<https://euobserver.com/justice/137769>).

own internal security objectives in relations with the EU.⁶ At the same time, the use of visa cooperation as a leverage for information gathering on European citizens threatens EU data protection standards, raises potential legal conflicts and affects existing EU agreements on transatlantic data flows.

This policy insight investigates the multiple facets of the visa controversy with the US, and analyses the challenges posed by such a controversy to the legal and inter-institutional framework that, in a post-Lisbon Treaty landscape, governs the EU's decision-making process in the field of EU visa policy. The author develops an analysis of the background and current state of play in the implementation of the mechanism established under EU law to remove the obstacles towards the achievement of full visa reciprocity.

Special attention is given to the disagreement between the European Parliament and the Commission as to the necessary legal actions to take in order to 'ensure solidarity' in the common visa policy, and establish 'symmetry and equality' in the travel regime with the US.

On the one hand, the Commission maintains that 'transatlantic diplomacy' and member state compliance with US requirements for "initial and continuing participation" in the VWP are the only way towards "preserving and, if possible, expanding visa-free travel between the EU and the United States".⁷ On the other hand, the European Parliament insists on the EU's "right to expect fairness" in relations with the US,⁸ and recently urged the Commission to adopt a delegated act providing for a temporary suspension of the Schengen visa-free travel regime for the nationals of that country.

The author finds that, behind the disagreement over the actual 'EU' response and possible solutions to the longstanding lack of reciprocity on US visas lies a deeper institutional struggle between the Commission, the Parliament and the Council, regarding the distribution of competences and related responsibilities under the common visa policy. Most recently, this has emerged from the European Parliament's claim that the matter is not subject to the Commission's sole discretion.

Ensuring the involvement of all the EU institutional stakeholders responsible for the implementation of the common visa policy is essential for several reasons. First, this solution is imposed by the current framework of EU primary law, and in particular the Treaties' provisions

⁶ See US Homeland Security Committee, *Final Report of the Task Force on Combating Terrorist and Foreign Fighter Travel*, Washington, D.C., September 2015 (<https://homeland.house.gov/wp-content/uploads/2015/09/TaskForceFinalReport.pdf>).

⁷ See, Joint Statement by Commissioner Avramopoulos and Elaine C. Duke, Deputy Secretary of the U.S. Department of Homeland Security, on advancing towards full visa waiver reciprocity between the EU and U.S. Valletta, 16 June 2017 ([http://europa.eu/rapid/press-release STATEMENT-17-1671_en.htm](http://europa.eu/rapid/press-release_STATEMENT-17-1671_en.htm)).

⁸ Claude Moraes, Obligation in the field of visa reciprocity (Debate), 14 December 2016 – Strasbourg (<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20161214+ITEM-020+DOC+XML+V0//EN&language=en&query=INTERV&detail=3-961-000>)

regarding the Commission's duties to implement EU law and policies in a spirit of sincere and loyal cooperation.

Second, the Parliament and the Council's involvement in the implementation of the EU visa reciprocity mechanism is also central from the perspective of monitoring which 'effective actions' US authorities are actually willing to take towards lifting the visa requirements still imposed upon Bulgarian, Cypriot, Croatian, Polish and Romanian nationals.

And finally, one wonders how transatlantic diplomacy can be furthered if the EU actors responsible for foreign affairs – namely the European External Action Service (EEAS) and the appropriate Council configurations – are not involved in internal and external discussions on all the sensitive matters raised by the EU–US visa controversy.

The adoption of a concerted, EU inter-institutional approach is key to ensuring effectiveness and democratic accountability in the EU response vis-à-vis US foreign and security policies that, *de jure* and *de facto*, subject European citizens to different travel regimes, discriminatory treatment and preventive policing through the harvesting of personal data.

2. The visa reciprocity principle and its (non-)implementation vis-à-vis the US

Revised in 2013,⁹ the EU visa reciprocity mechanism responds to the goal of enabling a 'quicker and more efficient reaction' in cases where a third country on the Schengen visa positive list does not fulfil its visa reciprocity duties in relation to the EU and its member states. This mechanism is based on the idea that the citizens of all EU member states participating in Schengen should be treated equally. The procedure foreseen by the EU visa reciprocity mechanism is currently articulated in different phases, directed at exercising a mounting level of pressure to persuade the third country concerned to grant visa-free travel to all EU member state citizens.

In April 2014, the Commission published the non-reciprocity notifications submitted by Bulgaria, Croatia, Cyprus, Poland and Romania in the *Official Journal of the European Union*,¹⁰ and officially activated the procedure foreseen by the revised visa reciprocity mechanism. Throughout the 24 months that followed, it monitored the parties' advances towards the objective of a visa-free travel regime that is fully reciprocal, in particular by publishing biannual reports on the outcomes of 'tripartite meetings' organised by the Commission, and involving representatives from the US and the individual member state concerned.

⁹ Regulation (EU) No. 1289/2013 of the European Parliament and of the Council of 11 December 2013 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, OJ L 347, 20.12.2013.

¹⁰ See OJ C 111, 12.4.2014, p. 1.

On several occasions, the Commission recognised that the US had not moved towards the lifting of the visa requirement for Bulgarian, Croatian, Cypriot, Polish or Romanian citizens.¹¹ It also acknowledged that, while bringing important ‘security benefits’ to the US, the progressive security enhancements introduced into the VWP programme (i.e. through the Visa Waiver Program Improvement and Terrorist Travel Prevention Act of 2015) de facto translate into the introduction of travel restrictions for EU citizens.¹²

The same concerns were expressed by the ambassadors of the 28 EU member states and the EU ambassador to the US in a letter addressed to the US administration in December 2016, in which they qualified the US “blanket restriction” introduced under the revised VWP as a measure that is most likely to “disproportionately and unfairly” affect the legitimate travel of those EU citizens who have visited countries such as Syria or Iraq, or who are dual nationals of a proscribed country. The ambassadors of the member states and the EU also expressed the view that in effect, the compulsory biometric checks newly imposed by the US at the port of origin constitute a violation of the visa reciprocity principle.¹³

In substance, it was considered that by introducing ever-stringent data-sharing requirements, for instance through a revised version of the ESTA, the US had achieved the result of establishing “a visa regime in all but name”. Not only does this go against the principle of solidarity governing the EU common visa policy, but also it reveals how the gathering of European travellers’ information is a US priority to be pursued by all available means in relations with the EU and its member states, including cooperation on visa matters.

On 2 March 2017, the European Parliament adopted a Resolution¹⁴ urging the Commission to act “within two months” (i.e. 2 May 2017) and – pursuant to Art. 290 of the Treaty on the Functioning of the European Union (TFEU) – adopt the “necessary legal measures” foreseen by Regulation (EC) No. 539/2001. In particular, the Parliament stressed the need for the Commission to adopt the delegated act that, in line with the provision currently contained in Art. 1(4)(f) of Regulation 539/2001, is required to enable the temporary suspension of the Schengen visa waiver for US nationals.

¹¹ See the European Commission’s Communications, COM(2016) 481 final of 13.7.2016 and COM(2016) 816 final of 21.12.2016.

¹² See European Commission, “EU visa reciprocity mechanism – Questions and Answers”, Fact Sheet, Brussels, 13 July 2016 (http://europa.eu/rapid/press-release_MEMO-16-2506_en.htm).

¹³ See the article, “What the Visa Waiver Program means to Europe” by the EU Ambassador to the United States, David O’Sullivan in conjunction with the ambassadors of the 28 European member states, in *The Hill*, 14 December 2015 (<http://thehill.com/blogs/congress-blog/foreign-policy/262999-what-the-visa-waiver-program-means-to-europe>).

¹⁴ European Parliament, Resolution of 2 March 2017 on Obligations of the Commission in the field of visa reciprocity in accordance with Article 1(4) of Regulation (EC) No. 539/2001 (<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2017-0060+0+DOC+XML+V0//EN&language=EN>).

The Commission's position to date remains that such a measure cannot be adopted, as it would immediately lead the US to retaliate by imposing visa requirements on all EU citizens, trigger considerable damage to the EU economy and have serious consequences for transatlantic relations.¹⁵ However, such a refusal to fulfil the duties deriving from the delegation of the power to act raises a number of crucial questions concerning both the actual compatibility of the Commission's conduct with the role that this institution is called upon to play as 'guardian of the Treaties', and the way in which EU policies in the field of visas and border control are meant to be implemented in a post-Lisbon Treaty framework.

Furthermore, EU primary law expressly confers upon the Commission the responsibility to apply EU legislation (Art. 17 of the Treaty on European Union, TEU) and to implement EU policies on visas in a way that gives effect to the principle of solidarity (Art. 80 TFEU). Ensuring "more solidarity among the member states in the implementation of the common visa policy" is precisely one of the main goals of the revised reciprocity mechanism.¹⁶

The current version of Regulation 539/2001 sets forth "precise timeframes and actions" of "increasing severity" to address situations where a third country does not ensure EU citizens the same conditions as those applying to its own nationals travelling to the EU.¹⁷ Under the existing legal framework, these actions are not limited to informal discussions with the third state concerned, nor fall under the exclusive prerogative of the Commission, but also require the adoption of normative measures and the involvement of the EU co-legislator (i.e. the European Parliament and the Council).

This means that the Commission's external cooperation efforts and duty to carefully assess and inform the co-legislator of the potential consequences of a temporary Schengen visa suspension¹⁸ does not exempt this institution from its legal obligations to act on visa reciprocity. Instead, at the present stage of implementing the EU visa reciprocity mechanism, EU law requires the Commission to adopt a delegated act temporarily amending the normative content of Annex II of Regulation 539/2001. In fact, in order for the temporary suspension to become effective, it is first of all required to amend the Schengen visa positive list through the inclusion of a footnote indicating that the exception from the visa requirement is suspended for the third country concerned.

As explained in the following section, adopting this measure in the second phase of the process for implementing the EU visa reciprocity mechanism is not only a Commission responsibility. It is also a necessary step to enable to European Parliament and the Council to subsequently

¹⁵ See the European Commission's Communication, COM(2016) 221 final, 12.4.2016.

¹⁶ See the European Commission Press release on, 'Lack of visa reciprocity with the U.S., Canada and Brunei: European Commissions assesses state of play and discusses next steps' Strasbourg, 12 April 2016 (http://europa.eu/rapid/press-release_IP-16-1345_en.htm).

¹⁷ See the European Parliament Resolution of 2 March 2017, op. cit.

¹⁸ See Commissioner Dimitris Avramopoulos' statement on the occasion of the European Parliament debate on "Obligation in the field of visa reciprocity", held on 14 December 2016 in Strasbourg.

exercise their own decision-making competence by means of discussing whether to object to the temporary introduction of a Schengen visa-waiver suspension for US nationals. Such a decision by the co-legislators is all the more important in light of the various politically and legally sensitive issues raised by the EU–US visa controversy.

3. Implementing the revised reciprocity mechanism: Whose responsibility?

The EU visa reciprocity mechanism is a result of both the continual integration of the Schengen *acquis* into the Union framework, and the increasing harmonisation that EU law has brought to the field of visas, particularly in relation to the treatment of countries included in the Schengen visa positive list.

Introduced in 2001, the mechanism has undergone a series of transformations that have affected both its implementation process and practical function vis-à-vis third countries. At the onset, it was an instrument designed to allow individual member states that were ‘victims’ of non-reciprocal visa obligations imposed by a third country to mandate the Commission to suspend the Schengen visa exception.¹⁹ However, the subsequent EU enlargement and Lisbon processes called for significant changes to be introduced to the visa reciprocity mechanism.

New rules were adopted in 2005 and then again in 2013, to prevent member states (and in particular accession ones) not only from unilaterally launching the retaliatory procedure, but also from striking bilateral deals with third countries on issues – such as short-term visa issuance and delivery – that currently fall under EU competence (Gros-Tchorbadjiyska, 2010). Interestingly, the issue was raised after US authorities presented two draft Memoranda of Understanding (MoUs), which the US intended to sign with those EU member states that were respectively admitted to the VWP or candidate countries for such a programme.²⁰

The general commitments proposed by the US under these non-legally binding MoUs included the waiver of certain VWP eligibility requirements (namely the 3% visa-application rejection rate). In exchange, the US required the implementation of security commitments on the part of the member state concerned (Gros-Tchorbadjiyska, 2010, pp. 392–93). The proposed MoUs required implementation of measures related to the ESTA, notably information exchange (including Passenger Name Records), US access to EU databases and information systems, the reporting of lost and stolen passports, repatriation, enhanced standards for travel documents and Schengen crime-related data. Because these issues were later found to fall under the EU’s exclusive competence, a set of guidelines was introduced to expressly delimit member states’

¹⁹ The power is given to the Council, which can decide, acting by qualified majority, within 30 days following the notification not to establish the provisional visa requirements. See Council Regulation (EC) No. 539/2001, *op. cit.*, Art. 1(4)(b).

²⁰ See the European Commission’s Communication, COM(2008) 486 final/2, 9.9.2008.

freedom to act on these matters in their contacts with the US.²¹ Adopted at the EU level, these guidelines were subsequently officially agreed upon by the US partner.²²

The modifications introduced by Regulation (EU) No. 1289/2013 to the new reciprocity mechanism reflect both the need to establish common EU rules on procedures to address non-reciprocity situations with countries such as the US, and the post-Lisbon Treaty requirement to involve the various institutional actors currently responsible for implementing the EU common visa policy, namely the European Parliament and the Council. Therefore, the consequences of the Commission's choice of not taking the action foreseen by Regulation 539/2001 can only be assessed in light of the distribution of roles and competences that EU primary and secondary law specifically assigns to the different EU institutions throughout the predefined and legally-mandated phases for implementing the visa reciprocity mechanism, as revised in 2013.

The original version of Art. 1(4) of Regulation 539/2001 allowed the possibility for a member state to (semi-)automatically impose visa requirements upon nationals of a third country included in the Schengen visa positive list (Peers et al., 2012, p. 234). The present legislative text, however, articulates the process for implementing the visa reciprocity mechanism in a way that, at the same time, establishes a fast-track procedure for imposing visa requirements upon countries like the US and makes it less dependent on the Commission's diplomacy through the involvement of the Parliament and the Council (Peers, 2014). Such a solution is the result of a legitimate desire by both the Council and the Parliament to exert control over the Commission in this policy area.

The first step that the mechanism established by Regulation 539/2001, as amended by Regulation 1289/2013, foresees for the removal of obstacles towards full visa reciprocity is the possibility to temporarily suspend the Schengen visa waiver for certain categories of nationals of a third country in the Schengen visa positive list. The possibility of such a suspension occurs when, after 6 months from the publication of the non-reciprocity situation in the *Official Journal* of the EU, the third country concerned continues to apply visa requirements to the citizens of at least one member state.²³

Following the general approach adopted in the implementation of the revised visa reciprocity mechanism, the Commission decided not to suspend the visa waiver for US nationals at the end of the 6-month period foreseen in Art. 1(4)(e) of Regulation 539/2001.²⁴ Nevertheless, after 24

²¹ See Council of the European Union, "US Visa Waiver Program Legislation", 7338/08, Brussels, 5 March 2008.

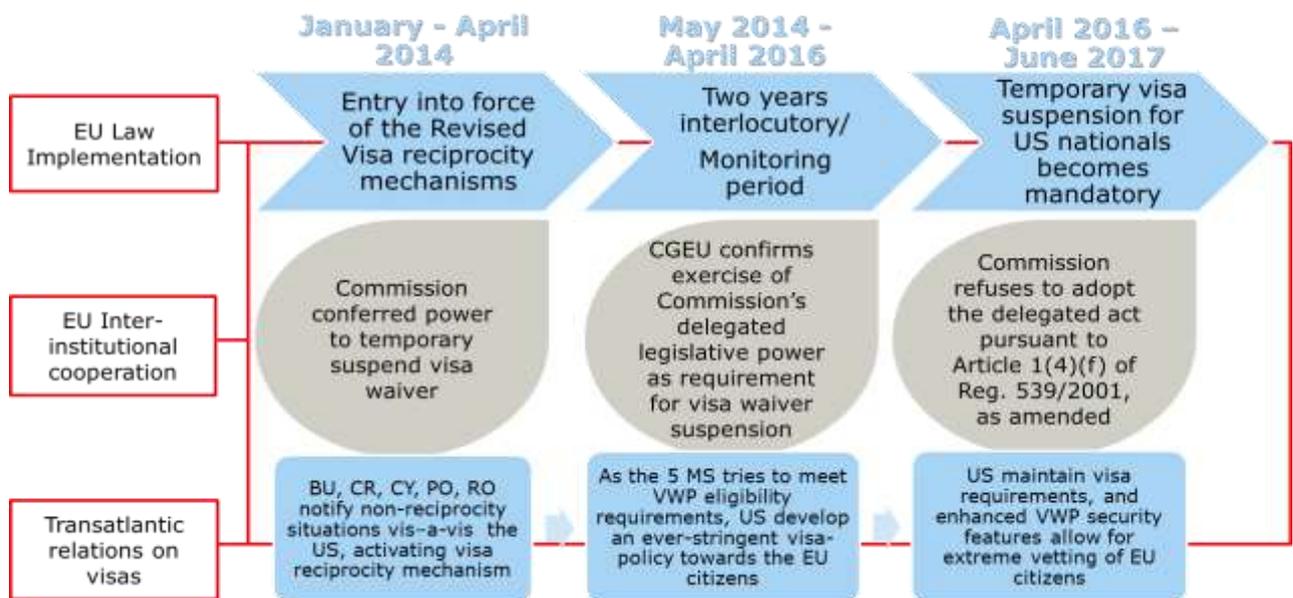
²² See the EU–US Justice and Home Affairs Ministerial Troika meeting on 12–13 March 2008, "Ministers Mate and Šturm consult with U.S. representatives on Visa Waiver Program, border security, Western Balkans and mutual legal assistance agreements" (http://www.eu2008.si/en/Meetings_Calendar/Dates/March/0312_JHA_EUTrojka_ZDA152c.html?tkSuche=ajax&globalDatum=01.03.&multiDatum=31.03.&veranstaltungsart=&globalPolitikbereich=&visiblePath=/htdocs/en).

²³ See Art. 1(4)(e) of Regulation 539/2001, as amended by Regulation 1289/2013, op. cit.

²⁴ In the two years that followed the activation of the EU visa reciprocity mechanism, the Commission produced biannual reports taking into account the parties' advances towards the objective of a fully reciprocal visa-free

months from the date of activating the procedure foreseen in Regulation 539/2001, the adoption of a delegated act providing for the temporary suspension (of up to 12 months) of the visa waiver became mandatory, as the US still failed to grant visa-free travel to all EU member state citizens (see figure 1 below).²⁵ The suspension only becomes effective if neither the European Parliament nor the Council expresses objections.

Figure 1. The unfolding of the EU–US visa controversy



Source: Author's own elaboration.

The precise legal process that governs the Commission's use of the revised Art. 1(4)(f) 'reciprocity clause' was the subject of lengthy debate during negotiations on amending Regulation 1289/2013. On that occasion, the Parliament pushed for the introduction of 'tougher rules' for encouraging third states on the EU white list to exempt citizens of all member states from a visa requirement (Peers, 2014, p. 2) and also advocated the need to adapt the procedure for implementing the EU visa reciprocity mechanism to the new allocation of decision-making competences that the Treaty of Lisbon had brought to the field of visas. Ultimately, the new visa reciprocity mechanism is designed in a way that ensures control over the Commission in this area by means of 'delegated acts' that the Parliament and the Council could possibly block the Commission from adopting.

However, the Commission was dissatisfied with the decision to introduce the 2013 clause providing for the mandatory suspension of the Schengen visa waiver through the adoption of

travel regime, and organised a series of 'tripartite meetings' involving the concerned member states and US representatives at different levels.

²⁵ See Art. 1(4)(f) of Regulation 539/2001, as amended by Regulation 1289/2013, op. cit.

a delegated act, and challenged the final version of Art. 1(4)(f) of Regulation 539/2001 before the Court of Justice of the European Union (CJEU).²⁶ In particular, the Commission contested the lawfulness of the delegation of power pursuant to Art. 290(1) TFEU, and consequently questioned the existence of an obligation to act in order to “achieve the adoption of rules coming within the regulatory framework as defined by the basic legislative act”,²⁷ in this case represented by Art. 1(4)(f) of Regulation 539/2001.

The CJEU expressly recognised that the Commission’s adoption of a delegated act providing for a temporary reintroduction of visa obligations for a third country included in the Schengen visa positive list constitutes the preliminary condition and necessary action for the actual involvement of the EU co-legislator in the procedure foreseen by the visa reciprocity mechanism, as revised by Regulation 1289/2013. According to the Court, while the temporary suspension of the visa waiver for all US nationals enters into force if neither the European Parliament nor the Council expresses objection, such a step “can only be done” after the Commission’s “exercise of a delegated power”.²⁸

The Court stressed that implementation of the principle of reciprocity through the mechanism established under EU law is based on the adoption of measures of “increasing gravity and political sensitivity to which instruments of different kinds correspond”.²⁹ The adoption of a delegated act 24 months after activation of the EU visa reciprocity mechanism represents one of these (mandatory) instruments. Yet, the decision to suspend the Schengen visa waiver does not exclusively depend on the sole discretion of the Commission, as it is also subject to the subsequent scrutiny of the Parliament and the Council, which are required to decide whether to object to its entry into force.

By refusing to adopt the delegated act pursuant to the existing reciprocity mechanism and in line with the European Parliament’s call in its Resolution of 2 March 2017, the Commission jeopardises the objective of the regulation – which is to persuade the third country concerned to comply with the reciprocity principle through the adoption of legally predefined actions to which the introduction of measures of increasing severity correspond.³⁰

4. Justifying visa non-reciprocity: Introducing and contextualising the economic loss argument

The key official argument put forward by the Commission to justify its decision not to act pursuant to Art. 1(4)(f) of Regulation 539/2001 is that the introduction of Schengen visa

²⁶ See Case C-88/14 *Commission v Parliament and Council*.

²⁷ See Case C-427/12, *Commission v Parliament and Council*, para. 38.

²⁸ See Case C-88/14, *op. cit.*, para. 46.

²⁹ *Ibid.*, para 39.

³⁰ Art. 1(4)(h) of Regulation 539/2001, as amended, *op. cit.*

requirements for US nationals would have serious repercussions on the EU economy and overall relations with the transatlantic partner.

On different occasions throughout the implementation of the first (interlocutory) phase of the visa reciprocity mechanism, the Commission noted how a suspension of Schengen visa-free travel for US citizens would “very likely” not improve the travel regime applying to the five member states concerned, yet would lead to the exclusion of all member states from the VWP.³¹ Indeed, the US has already announced that any EU steps towards the suspension of the Schengen visa waiver for their citizens would immediately lead to “retaliatory measures”.³²

In its April 2016 Communication, the Commission estimated that a reintroduction of visa requirements for the nationals of all EU member states would generate at least 8 million US visas applications per year. According to the figures provided by the Commission, this would entail extra visa application costs for EU citizens/companies of approximately €2.5 billion.³³

It is not difficult to expect or argue that the introduction of visa requirements for EU nationals wishing to travel to the US could have important consequences for the EU. At the same time, it has also been estimated that the decision to exclude those EU member states currently admitted to the VWP would generate significant losses not only for the European economy, but also for that of the transatlantic partner.

According to statistics from the US Department of Commerce, travellers from Western Europe represent the largest group of visitors to the US (over 10 million, see Figure 2 below). Referring to a study from 2013, the Commission recently reported to the European Parliament that the introduction of visa requirements for EU citizens was expected to result in a 23% drop of European visitors per year, resulting in \$6 billion less spent in the US.³⁴

³¹ European Commission, “Visa reciprocity with US and Canada: Commission takes stock of latest developments”, Press Release, Brussels, 13 July 2016 (http://europa.eu/rapid/press-release_IP-16-2432_en.htm).

³² European Commission, Communication COM(2017) 227 final, 2.5.2017, p. 4.

³³ For a detailed assessment, see COM(2016) 221 final, op. cit.

³⁴ See the answer given by Ms Bieńkowska on behalf of the Commission, Parliamentary questions, 6 March 2017, P-000164/2017 (<http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=P-2017-000164&language=EN#def1>).

Figure 2. Number of arrivals in the US by world region of residence, year-to-date, 2016 (total arrivals 28,483,555)

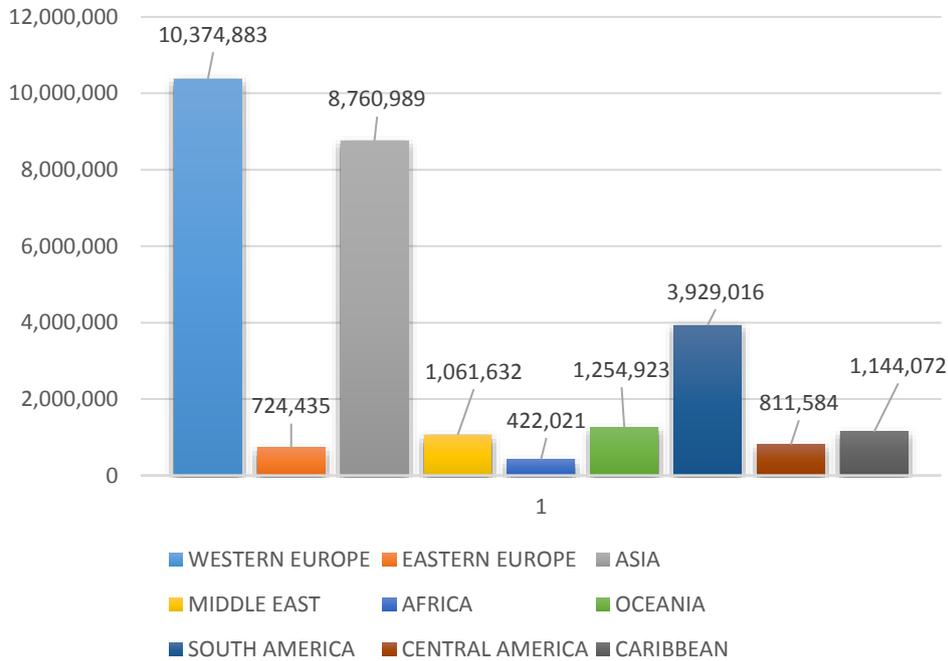
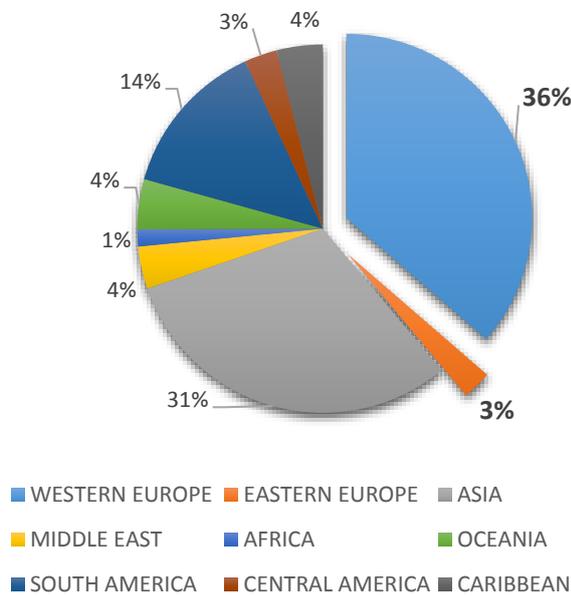


Figure 3. Share of arrivals in the US by world region of residence

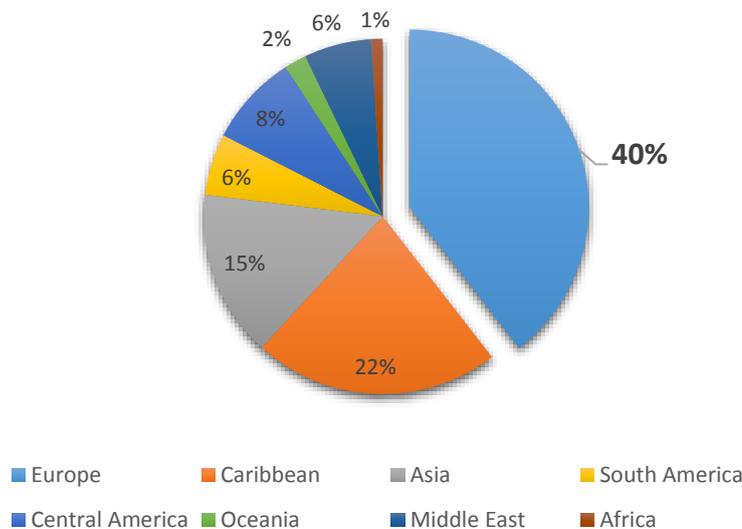


Source: US Department of Commerce, International Trade Administration (ITA), National Travel and Tourism Office, from the Summary of International Travel to the US (I-94) report (released May 2017).

Note: The monthly arrivals data in the I-94 report for September 2016 are preliminary, with these data subject to additional revisions that may be possible if improved solutions and/or sources are discovered for reporting non-resident arrivals to the US.

The number of US nationals affected by the introduction of Schengen visa requirements and border checks at a distance would be higher than that of EU travellers eventually excluded from the VWP. The US Department of Commerce calculated that the number of US citizens who travelled to Europe throughout 2016 amounts to 12,582,821, representing approximately 40% of the total number of US nationals travelling abroad (see Figure 4 below).³⁵ However, from the statistics analysed in the framework of this study, it is not possible to establish precisely where these US citizens travelled in Europe, nor the reasons or length of their stay.

Figure 4. Shares of US citizens travelling abroad, 2016



Source: US Department of Commerce, ITA, National Travel and Tourism Office (released 31 January 2017).

By reintroducing visa requirements, the EU and US would both lose the advantages of the visa-free travel regime that features in the transatlantic strategic partnership today, and consequently face serious economic and infrastructural challenges. Still, as also emerged on the occasion of interviews conducted with EU policy-makers in the framework of this policy insight, it seems difficult to precisely ascertain the actual economic impact that a transatlantic visa-waiver suspension would have on the EU and US economies.

If the Commission were to follow the same line of reasoning – i.e. purely based on the prospect of economic gain from visa liberalisation or facilitation – Schengen visa requirements should also be lifted for other largely populated strategic partners like China and India, and third countries like Russia, which currently generate the highest number of Schengen visa applications³⁶ and do not represent a major source of irregular migration to the EU (Stefan, 2017).

³⁵ See ITA National Travel and Tourism Office, “US Citizen Travel to International Regions, 2016” at <http://tinet.ita.doc.gov/view/m-2016-O-001/index.html> (last accessed on 26 June 2016).

³⁶ See “2016 Consulates Schengen Visa Stats” (https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/borders-and-visas/visa-policy/docs/2016_consulates_schengen_visa_stats_en.xlsx).

The same survey cited by the Commission³⁷ to explain that the introduction of visa requirements for North Americans (including Canadians) would be detrimental for the EU tourism industry also mentions that at least 20% more trips would be sold by travel agents if travelling to Europe were visa-free for nationals of major tourist-sending countries, namely Ukraine,³⁸ Russia, China, India, Saudi Arabia and South Africa.

Therefore, it seems that the argument regarding possible economic loss in the eventuality of a (temporary) suspension of transatlantic visa-free travel seems to be used by the Commission in a way that is instrumental to justify its decision not to act vis-à-vis the US. While this type of argumentation does not exempt the Commission from its legal obligation to act in line with EU legal requirements, it plays in favour of US authorities, which clearly have an interest in threatening the introduction of visa requirements if the EU and its member states do not take all the necessary measures required to meet US security concerns.

5. US visa policies vis-à-vis the EU: Moving targets and the harvesting of EU citizens' data

The Commission's decision not to exercise its delegated power within the procedure activated to address the US (non-)reciprocity situation is highly problematic.

First of all, this approach is at odds with the system of inter-institutional checks and balances that the Lisbon Treaty introduced with regard to the EU decision-making process in the field of Schengen visas. Also, this unilateral decision is in contrast to the principle of loyal cooperation laid down in Art. 4(3) TEU and governing EU inter-institutional relations. Furthermore, it is unlikely to serve the purpose of convincing the US to lift visa requirements currently imposed on Bulgarian, Croatian, Cypriot, Polish and Romanian nationals.

In the latest Communication on its obligations in the area of visa reciprocity and reporting on the progress achieved,³⁹ the Commission referred to the need for "increasing the efforts" towards full visa reciprocity with the US. The Commission affirmed its intention to closely coordinate with the five member states concerned and adopt "concrete steps" in this direction. The same objective was even more eloquently stressed during the last EU–US Justice and Home Affairs Ministerial Meeting, which took place in Valletta on 16 June 2017.

On that occasion, the Commission – as well as the Presidency of the Council, represented by the Maltese home affairs and justice ministers – agreed on the objective "to further step up efforts to improve security cooperation with the view to assisting Bulgaria, Croatia, Cyprus,

³⁷ See European Commission, DG Enterprise and Industry, *Study on the economic impact of short stay visa facilitation on the tourism industry and on the overall economies of EU Member States being part of the Schengen Area*, Brussels, August 2013.

³⁸ On 11 May 2017, the Council adopted a regulation on visa liberalisation for Ukrainian citizens travelling to the EU for a period of stay of 90 days in any 180-day period.

³⁹ See COM(2017) 227 final, op. cit.

Poland and Romania in advancing more rapidly towards the fulfilment of the requirements for designation in the US Visa Waiver Program". Reportedly, this 'improved security cooperation' should encompass a framework for the enhanced "sharing" and "screening" of EU travellers' information (including biometric data), in a way consistent "with US law".⁴⁰

At the same time, both sides persistently failed to indicate precisely the available measures that, at this stage, could be adopted in order to meet the requirements or somehow convince the transatlantic partners to grant visa-free travel to the EU citizens who are still subjected to visa obligations. The lack of a mutually agreed, publicly available and clear, evidence-based roadmap defining exactly what efforts are required for the five member states concerned to meet all the different VWP requirements makes it extremely difficult for the EU to plan, monitor and assess the advances mutually made by the parties in this respect.

A similar lack of transparency emerged with regard to the type of security measures presently imposed upon member state nationals wishing to travel to the US. During the EU–US Justice and Home Affairs Senior Officials Meeting that took place in Valletta in March 2017, the EU delegation had to expressly request reassurance from their US partners regarding Executive Order 13767 (Border Security and Immigration Enforcement Improvements), Section 3, concerning "restrictions on the Visa Waiver Programme as regards EU citizens".⁴¹

In fact, several of the US VWP requirements seem to amount to a moving target. Their actual achievement by each of the member states concerned appears to ultimately depend upon the US authorities' own interpretation and discretion. For instance, despite the fact that Cyprus recently managed to comply with the required 3% visa refusal rate, the US now claims that it needs to look at the "totality of all relevant circumstances" and that "the division of the island remains a challenge toward the concession of the visa waiver".⁴²

Another significant example in this respect is provided by the VWP eligibility requirement regarding the level of international commitment and cooperation of the five member states concerned with the US under the bilateral agreements on "Preventing and Combatting Serious Crime" (PCSC).⁴³ These bilateral agreements are unilaterally designed by the US, and their scope is mainly the establishment of a framework for ensuring the availability, to the US, of the personal data (including biometrics and DNA profiles) of EU citizens suspected of crimes that

⁴⁰ See Council of the European Union, Joint EU–US press statement following the EU–US Justice and Home Affairs Ministerial Meeting, Valletta, 16 June 2017 (http://www.consilium.europa.eu/press-releases-pdf/2017/6/47244661332_en.pdf).

⁴¹ See Council of the European Union, Outcome of the EU–US Justice and Home Affairs Senior Officials Meeting, Valletta, 1–2 March 2017, Brussels, 21 March 2017 (<http://www.statewatch.org/news/2017/apr/eu-usa-meet-1-2-march-7163--17.pdf>).

⁴² See COM(2017) 227 final, op. cit.

⁴³ See the PCSC Agreement on enhancing law enforcement cooperation in order to prevent and combat serious crime.

would render them “inadmissible to or removable from the United States under U.S. federal law”.⁴⁴

It is significant that while the signature of these agreements initially seemed to constitute the benchmarks to be achieved for admission into the VWP, the US now claims that each member state must also ensure ‘full implementation’ of such instruments. The aim, of course, is to allow US law enforcement authorities access to a wide range of EU citizens’ personal data, including information “revealing racial or ethnic origin, political opinions or religious or other beliefs, trade union membership or concerning health and sexual life” if they are particularly relevant to the purposes of such agreements.⁴⁵ The last requirement is all the more problematic, as it is not fully clear the extent to which cooperation under these bilateral agreements actually ensures respect of the EU legal and fundamental rights standards on transatlantic access and exchange of personal data (Carrera et al., 2015).

6. Access to EU citizens’ data: An ever-pressing US foreign affairs priority

The analysis of developments in the EU–US dialogue on visas suggests that behind the US request for EU cooperation towards the achievement of full visa reciprocity lies the objective of facilitating US law enforcement authorities’ access to EU citizens’ data outside pre-established channels for transatlantic information exchange.⁴⁶

In August 2015, the US Department of Homeland Security decided to take the following measures: require the use of e-passports for all VWP travellers coming to the US; use Interpol’s lost and stolen passport database in order to screen travellers crossing a Visa Waiver country’s borders; and expand the deployment of US federal air marshals on international flights from Visa Waiver countries to the US (Siskin, 2015).

On 8 December 2015, the US House of Representatives passed two similar bills (i.e. H.R. 158 and S. 2362), which required all VWP countries to also have machine-readable passports at all ports of entry, and to implement appropriate screening protocols and information sharing with US authorities. The reforms were expressly designed to strengthen the VWP’s security components and take significant steps towards “preventing those who seek to cause harm” from entering the US.⁴⁷

⁴⁴ See, for example, the US–Croatia “Agreement on enhancing cooperation in preventing and combating serious crime”, signed at Washington, 16 February 2011 and entering into force on 19 August 2011.

⁴⁵ Ibid., Art. 13, para 1.

⁴⁶ See the US Homeland Security Committee’s *Final Report of the Task Force on Combating Terrorist and Foreign Fighter Travel*, op. cit., in particular key findings 22, 29 and 31.

⁴⁷ See the US Senate Committee on Homeland Security & Governmental Affairs, “Johnson Comments on Inclusion of Key Security Bills in Omnibus”, Washington, D.C., 16 December 2015 (<https://www.hsgac.senate.gov/media/majority-media/johnson-comments-on-inclusion-of-key-security-bills-in-omnibus->).

Signed into law by US President Barack Obama in December 2015, the Visa Waiver Program Improvement and Terrorist Travel Prevention Act introduced new travel restrictions (in the form of visa requirements) for certain categories of EU travellers, and in particular for all member state nationals who have been present in Iraq, Syria, Iran, Sudan, Libya, Somalia or Yemen at any time on or after March 2011.⁴⁸ The law also imposes additional information-sharing and reporting requirements among VWP participating countries. Failure to meet these may lead the programme country to being suspended from the VWP or having its participation terminated.

US officials have traditionally contended that such enhanced security measures would enable 'better vetting' of VWP visitors while preserving legitimate trade and travel.⁴⁹ However, the changes progressively brought to the VWP were reportedly intended to capture information and impose travel restrictions on any EU citizen considered a potential security threat to the US (Archick, 2016).

Thus, the increasingly information-based approach in the implementation of US visa policy has been instrumental to justify ever-expanding requests for personal data (sharing and gathering) related to EU travellers. Already under the Obama administration, the application for the ESTA included additional questions to address the new eligibility requirements under the December 2015 Act. Through the revised standard questionnaire used for the VWP, the US agency for Customs and Border Protection started to seek social media identifiers.⁵⁰ These modifications were especially designed to assist US law enforcement and immigration authorities in the identification of those who may represent a security threat and be ineligible to travel to the US under the VWP.⁵¹

Despite the fact that they were voluntary, and did not include personal data such as account passwords, these requests for additional information raise serious issues with regard to the respect of data protection standards for transatlantic data transfer, notably as provided by the new 'Umbrella Agreement' between the US and the EU on the protection of personal information relating to the prevention, investigation, detection and prosecution of criminal offences.⁵² It is worth remembering that a key principle set forth in this agreement is that the

⁴⁸ These restrictions do not apply to VWP travellers whose presence in these countries was to perform military service in the armed forces, or carry out official duties as a full-time employee of the government of a member state.

⁴⁹ See US Department of Homeland Security, "Statement by Secretary Jeh C. Johnson on Intention to Implement Security Enhancements to the Visa Waiver Program", Press Release, Washington, D.C., 6 August 2015.

⁵⁰ See US Customs and Border Protection, "Agency Information Collection Activities: Arrival and Departure Record (Forms I-94 and I-94W) and Electronic System for Travel Authorization", Washington, D.C., 23 June 2016.

⁵¹ See US Department of Homeland Security, "Emergency Approval Request for Revision of the Electronic System for Travel Authorization Application under the Paperwork Reduction Act", Washington, D.C., 16 June 2016.

⁵² See the Agreement between the United States of America and the European Union on the protection of personal information relating to the prevention, investigation, detection, and prosecution of criminal offences, OJ L 336 (http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2016.336.01.0003.01.ENG&toc=OJ:L:2016:336:TOC).

transborder data flow should not compromise the data protection standards to which EU citizens are eligible under EU law.⁵³

With the establishment of the new US executive in 2016, the above-mentioned security-inspired approach towards an ever-wider range of EU citizens wishing to travel to the US has escalated. In fact, two consecutive executive orders adopted by US President Donald Trump have not only (and not mainly) resulted in the introduction of travel bans for citizens of third countries (including Iran, Libya, Somalia, Sudan, Syria and Yemen).⁵⁴ They have also had the chief result of allowing US authorities to harvest the additional personal data of third-country nationals – including EU citizens and residents – with the scope of determining whether their presence in the country increases the likelihood of a credible threat to the national security of the US (Guild et al., 2017).

The material scope of application changed between the two subsequent versions of the ‘Trump travel ban’, and the US authorities have confirmed that the second one cannot be applied to EU dual nationals. On 12 June 2017, the US Court of Appeals for the 9th Circuit ruled that the President, in issuing the revised version of the executive order “exceeded the scope of the authority delegated to him by Congress, and suspended the measure”.⁵⁵ However, subsequent to the US Supreme Court’s decision of 26 June 2017 to review the case,⁵⁶ portions of President Trump’s travel ban remain in effect.⁵⁷

In the meantime, EU citizens admitted under the VWP, as well as member state nationals holding a US tourist visa, currently run the risk of being denied entry if they refuse to provide their social media account passwords to the Department of Homeland Security,⁵⁸ or based on

⁵³ See the Speech at the Center for Strategic and International Studies by Věra Jourová, Commissioner for Justice, Consumers and Gender Equality, “EU–U.S. data flows and data protection: Opportunities and challenges in the digital era” in Washington, D.C., 31 March 2017 (http://europa.eu/rapid/press-release_SPEECH-17-826_en.htm).

⁵⁴ See respectively, the White House, Office of the Press Secretary, Executive Order Protecting the Nation from Foreign Terrorist Entry into the United States of 27 January 2017 (<https://www.whitehouse.gov/the-press-office/2017/01/27/executive-order-protecting-nation-foreign-terrorist-entry-united-states>) and of 6 March 2017 (<https://www.whitehouse.gov/the-press-office/2017/03/06/executive-order-protecting-nation-foreign-terrorist-entry-united-states>).

⁵⁵ See *Hawai’i v Trump*, No. 17-15589, U.S. App (9th Cir. June 12, 2017) (<http://cdn.ca9.uscourts.gov/datastore/opinions/2017/06/12/17-15589.pdf>).

⁵⁶ See the Supreme Court of the United States, Nos. 16-1436 (16A1190) and 16-1540 (16A1191), *Trump v International Refugee Assistance Project*, 582 U.S. (2017) (https://www.supremecourt.gov/opinions/16pdf/16-1436_l6hc.pdf).

⁵⁷ See A. Parlapiano and A. Singhvi, “The Supreme Court Partially Allowed Trump’s Travel Ban. Who Is Still Barred?”, *New York Times*, updated 29 June 2017 (https://www.nytimes.com/interactive/2017/06/29/us/politics/supreme-court-trump-travel-an.html?ref=collection%2Ftimestopic%2FU.S.%20Supreme%20Court&action=click&contentCollection=timestopics®ion=stream&module=stream_unit&version=latest&contentPlacement=2&pgtype=collection).

⁵⁸ See E. Bhandari, “Social Media Passwords Shouldn’t Be a Condition of Entry to the U.S.”, ACLU blog, 28 February 2017 (<https://www.aclu.org/blog/free-future/social-media-passwords-shouldnt-be-condition-entry-us>).

the replies they provide regarding their beliefs and personal opinions.⁵⁹ This is yet another clear example of how an expanded request for personal information may be tantamount to the introduction of visa requirements and travel restrictions for EU citizens travelling to the US.

A piece of legislation that was introduced in April 2017 for US congressional consideration⁶⁰ holds the prospect of a further expansion of the type of personal information that US border authorities can require of non-US persons who are at the US border and wish to enter US territory. According to the proposed bill, US authorities may request and obtain access to the digital content of electronic equipment belonging to all non-US persons who are at the border, as well as request and obtain access to the digital contents of their online accounts and online account information.⁶¹

While the actual adoption of this bill is not guaranteed, news reports indicate that a sharp increase in electronic device searches at the US borders (24,000 in 2016, compared with the nearly 5,000 devices searched in 2015) has already taken place, and the number of searches continues to escalate, with 5,000 device searches having been conducted by the Department of Homeland Security in February 2017 alone.⁶²

According to US Customs and Border Protection authorities, a traveller may be chosen for inspection for many different reasons. The decision to inspect an EU citizen's electronic devices might happen randomly, or because his or her name matches a "person of interest" in the government's databases, or because his or her travel documents are incomplete.⁶³ US federal courts have largely agreed that such searches do not even require reasonable suspicion – consistent with the general rule (Shappert, 2014).⁶⁴ These practices also leave EU citizens – among all other non-US persons – and their personal data in an extremely vulnerable situation.

⁵⁹ See H. Handeyside, "'Extreme Vetting' of Visitors Poses an Extreme Threat to Our Principles and Our Security", ACLU blog, 10 April 2017 (<https://www.aclu.org/blog/speak-freely/extreme-vetting-visitors-poses-extreme-threat-our-principles-and-our-security>).

⁶⁰ See US Congress, S. 823: Protecting Data at the Border Act, *GovTrack* (<https://www.govtrack.us/congress/bills/115/s823>).

⁶¹ Ibid.

⁶² See C. McFadden, E.D. Cauchi, W.M. Arkin and K. Monahan, "American Citizens: U.S. Border Agents Can Search Your Cellphone", *NBC News*, 13 March 2017 (<http://www.nbcnews.com/news/us-news/traveling-while-brown-u-s-border-agents-can-search-your-n732746>).

⁶³ See G. Shappert, "The Border Search Doctrine: Warrantless Searches of Electronic Devices after *Riley v. California*", *Border Issues*, Vol. 62, No. 6, November 2014. (<https://www.justice.gov/sites/default/files/usao/legacy/2014/11/14/usab6206.pdf>).

⁶⁴ One exception is the US Court of Appeals for the Ninth Circuit (covering Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon and Washington), which held in 2013 that reasonable suspicion must underlie the "forensic examination" of a computer hard drive taken at the border. See https://informationsecurity.princeton.edu/sites/informationsecurity/files/searches_of_electronic_devices_at_the_border_-_faqs_-_march_2017_0.pdf.

7. Conclusions and recommendations

The US imposition of direct or indirect visa requirements upon European passport holders affect the Union as a whole, as it subjects certain EU citizens to disparate travel regimes and exposes them to differing treatments that, *de jure* and *de facto*, lead to discrimination on the ground of nationality, which is prohibited under EU law.

To address this concerning issue, the Commission should in the first place comply with its legal obligations under the common visa policy – as currently set forth by Art. 1(4)(f) and laid bare by the CJEU case law – and adopt the delegated act providing for the temporary suspension of the visa waiver for US nationals. This would finally allow the European Parliament and the Council to decide whether to object, or not, to a Schengen visa-waiver suspension vis-à-vis the US.

This step would not only send a clear message and increase the EU's credibility towards the strategic partner. It would also and foremost allow for a higher degree of democratic scrutiny on the way in which EU visa policies are implemented vis-à-vis the US. It would also contribute to solving once and for all the EU inter-institutional dispute regarding the distribution of competences and responsibilities that, in a post-Lisbon Treaty regulatory framework, govern the implementation of the EU visa reciprocity mechanism.

Ensuring loyal and sincere inter-institutional cooperation is key in a sensitive policy field such as EU visa policies, which are now subject to the co-decision powers of the EU legislators. If the Commission's position is to exercise sole diplomatic powers and political discretion over the EU-US visa controversy, then without further ado the European Parliament should take the matter to the Luxembourg courts, pursuant to Art. 265 of the TFEU.

Also, if diplomatic efforts are to be enhanced by working jointly with the US in “a constructive and positive spirit”,⁶⁵ these should encompass – in particular – more active participation by the European Parliament. The latter has an important role to play as an interlocutor with the US Congress, and it could help to increase mutual understanding and trust in transatlantic relations (Bigo et al., 2015).

The European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE) should pursue its efforts in holding a structured dialogue with relevant counterparts in the US Congress, and request clarification from its US counterparts as to the exact steps that Bulgaria, Croatia, Cyprus, Poland and Romania need to take in order to gain admission to the VWP.

Greater cooperation between the US Congress and the European Parliament could be especially useful from the perspective of amending the US Immigration and Nationality Act to allow participation in the VWP by the five member states that are currently excluded from it. This could also help increase the overall transparency of EU and US cooperation on visas and

⁶⁵ See, COM(2017) 227 final, op. cit.

information sharing, and enable the strategic partners to work more closely on interrelated inquiries in the expanding policy field of justice and home affairs.

The analysis conducted in the framework of this policy paper clearly shows that enhanced cooperation on information sharing and gathering, and not visas, is the way in which US authorities are presently imposing travel restrictions upon EU citizens. The Commission needs to carefully assess whether the new security enhancements initiated by the recent US administrations under the VWP – and in particular concerning additional requests for travellers' information through the ESTA – are measures equivalent to a visa requirement.

These US requests also put EU data protection standards at risk, raise potential legal conflicts and affect the existing legal framework for transatlantic data flows, especially as provided under the EU–US Privacy Shield and the Umbrella Agreement on the protection of personal information relating to the prevention, investigation, detection and prosecution of criminal offences. The Commission should therefore also evaluate whether member states' bilateral cooperation on the exchange of personal data, under the agreements with the US on preventing and combating serious crime, is compatible with the standards set forth under the existing framework of EU law on transatlantic information exchange.

The various ramifications of the EU–US visa controversy clearly show that this issue cannot be tackled solely from a 'home affairs diplomacy' perspective. With EU citizens' information becoming a key tool in EU–US relations, the EEAS should also be involved in the discussions, not least to ensure coordination in EU external action towards the strategic partner. Closer involvement of the Council of the EU's foreign affairs configurations, notably the Working Party on Transatlantic Relations (COTRA), should also be envisaged in EU discussions concerning visa cooperation with the transatlantic partner.

References

- Archick, K. (2016), *U.S.–EU Cooperation Against Terrorism*, Congressional Research Service Report prepared for the Members and Committees of the Congress, Washington, D.C., 2 March.
- Bigo, D., S. Carrera and E. Guild (2015), “A quest for accountability? EU and Member State inquiries into the CIA Rendition and Secret Detention Programme”, Study for the European Parliament’s Civil Liberties, Justice and Home Affairs, Brussels (<https://www.ceps.eu/system/files/Quest%20for%20Accountability.pdf>).
- Bucci, S. (2015), “Visa Waiver Program Improves Security” (Testimony before the Subcommittee on Border and Maritime Security in the Committee on Homeland Security, United States House of Representatives on March 17, 2015), The Heritage Foundation, Washington, D.C. (<http://www.heritage.org/testimony/visa-waiver-program-improves-security>).
- Carrera, S., G. González Fuster, E. Guild and V. Mitsilegas (2015), *Access to Electronic Data by Third-Country Law Enforcement Authorities: Challenges to EU Rule of Law and Fundamental Rights*, CEPS Paperback, CEPS, Brussels (https://www.ceps.eu/system/files/Access%20to%20Electronic%20Data%20%2B%20covers_0.pdf).
- Gros-Tchorbadjiyska, A. (2010), “Europeanization of Visa Policy”, PhD Thesis, Katholieke Universiteit Leuven, pp. 352–56 (<https://lirias.kuleuven.be/bitstream/123456789/268889/1/The+Europeanization+of+Visa+Policy+July2010.pdf>).
- Guild, E., D. Bigo and S. Carrera (2017), “Trump’s Travel Bans: Harvesting personal data and requiem for the EU–US Privacy Shield”, CEPS Policy Insight No. 2017/13, CEPS, Brussels, April (<https://www.ceps.eu/publications/trump%E2%80%99s-travel-bans-harvesting-personal-data-and-requiem-eu-us-privacy-shield>).
- Peers, S. (2014), “Amending the EU’s visa list legislation”, Statewatch Analysis, Statewatch, London, February version (<http://www.statewatch.org/analyses/no-236-visa-list.pdf>).
- Peers, S., E. Guild and J. Tomkin (eds), (2012), *EU Immigration and Asylum Law (Text and Commentary): Second Revised Edition – Volume 1: Visas and Border Controls*, Leiden: Martinus Nijhoff Publishers, p. 234.
- Siskin, A. (2015), *Visa Waiver Program*, Congressional Research Service Report prepared for the Members and Committees of the Congress, Washington, D.C., 11 December.
- Shappert, G. (2014), “The Border Search Doctrine: Warrantless Searches of Electronic Devices after *Riley v. California*”, *Border Issues*, Volume 62, No. 6, November (<https://www.justice.gov/sites/default/files/usao/legacy/2014/11/14/usab6206.pdf>).
- Stefan, M. (2017), “Migration versus Mobility in EU External Action towards Asia: A closer look at EU relations with China, India, the Philippines and Thailand”, CEPS Commentary, CEPS, Brussels, February (<https://www.ceps.eu/publications/migration-versus-mobility-eu-external-action-towards-asia-closer-look-eu-relations>).



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