



## Briefing Note

# ACHIEVING VISA FREE REGIME FOR UKRAINE

in parallel with

## Association Agreement 2011

Prepared by the EIPA Project

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# Achieving visa free regime for Ukraine

## Key issues

*The aim of the agreement between Ukraine and the EU is to foster their gradual integration politically, economically and legally.*

*The process of working towards eventually visa-free travel is complementary to the Association Agreement.*

## What is Association Agreement?

The European Union concludes a variety of agreements with non-EU countries; international agreements which are now covered by articles 215-219 of the Treaty on the Functioning of the European Union (TFEU).<sup>1</sup> Association is a specific and developed form of cooperation implying 'reciprocal rights and obligations, common action and special procedure' (art. 217 TFEU).

In addition, article 8 of the Treaty on European Union (TEU) lays down the need for the EU to develop 'a special relationship with neighbouring countries'.

In Europe the EU used the negotiation of Association Agreements in the early 1990s to help the countries of Central and Eastern Europe to progressively integrate with the EU prior to their accession. Very similar agreements are now being offered to the countries of Eastern Europe.

Ukraine and the EU are approaching the end of a long negotiation to conclude an Association Agreement between them, which will include a deep and comprehensive free trade area (DCFTA).

Association Agreements with eastern European countries of course will vary depending on the state with which the EU is negotiating. However the aims and structures of the agreements are liable to be quite similar.

The aim of the agreement between Ukraine and the EU is to foster their gradual integration politically, economically and legally.

On the political level there will be greater cooperation and consultation between the governments of Ukraine and the European Union institutions and member state governments and between the Ukrainian Parliament and the European Parliament. New institutions will be created by the agreement, once it is ratified, in which all issues of mutual interest or indeed disputes about the working of the agreement can be discussed. The Association Council, consisting of ministers from both sides, will be able to take legally binding decisions with respect to the matters dealt with in the agreement.

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<sup>1</sup> The Treaty on the Functioning of the EU and the Treaty on European Union form the basic law of the EU



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Economic integration will be fostered by the introduction of European Union law into the legal code of Ukraine. The economic aims of the agreement are therefore not only the creation of free trade between the two sides, but assistance to the reform of the Ukrainian economy, introducing more competition and greater transparency. The DCFTA aims however at the progressive integration of Ukraine into the internal market of the European Union. This will be a progressive process because it requires a degree of harmonisation of economic law and standardisation, but the future benefits to the Ukrainian economy and its citizens could be very considerable.

The potential gains for the Ukrainian citizen from the full implementation of the Association Agreement once ratified are considerable. With more competition in the economy and easier access to European Union markets, the economy should become more efficient and more productive with all the benefits that that suggests for income levels and employment. But beyond this, the agreement will open up wide areas of cooperation to encourage exchanges of people, ideas and skills. Although not part of the Association Agreement, the parallel process of visa facilitation and working towards eventually visa-free travel between Ukraine and the EU will produce new benefits for Ukrainian society.

The Association Agreement between Ukraine and the European Union can therefore be understood as a major support for Ukraine's own reform agenda. It is true that certain groups in society may not benefit from the implementation of the agreement but what cannot be doubted is that Ukrainian citizens as a whole will gain in terms of higher living standards, more and wider employment opportunities and better opportunities for their children.

### *Purpose of the EU visa policy*

Ukraine faces a number of challenges on its way to closer association with the European Union. Among one of them is the so-called visa free regime between the country and the European Union, which should be understood as the opportunity for Ukraine citizens to travel in the Schengen countries<sup>3</sup> without visas for 90 days in calendar six months.

As one looks at the development of EU common visa policy the foundations of it can be traced back to the Agreement on the Gradual Abolition of Checks at Common Borders, which was signed on 14 June 1985 and the Convention Implementing the Agreement signed on 19 June 1990, as well as all the acts adopted under their framework (referred further as the Schengen acquis). After

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<sup>3</sup> It shall be mentioned that the United Kingdom and Ireland are not bound by Regulation (EC) No 539/2001. They are therefore not taking part in the adoption of this Regulation and are not bound by or subject to the application thereof. They apply the national visa regulations in relation to the third country nationals.



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undergoing significant changes (for example, incorporation in the EU legal framework system and a number of amendments have been made to the EC (EU) Founding Treaties since December 2009 Para. 1-2 Article 77<sup>4</sup> of the Treaty on the Functioning of the European Union (referred further as the TFEU) provides for the following:

"1) The Union shall develop a policy with a view to:

- a) ensuring the absence of any controls on persons, whatever their nationality, when crossing internal borders;
- b) carrying out checks on persons and efficient monitoring of the crossing of external borders
- c) the gradual introduction of an integrated management system for external borders.

2) For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures concerning:

- a) the common policy on visas and other short-stay residence permits..."

It should be stressed that EU common visa policy is of rather technical character<sup>5</sup>. It is directly connected with the abolition of the controls at the EU internal borders and the individuals travelling freely within the Schengen zone. It is also linked with the EU efforts to combat the illegal immigration, as the examination of the right of a person to enter the Schengen zone is shifted from the actual border of the Schengen State to the diplomatic missions and consular posts in the country of origin or permanent residence of the visa applicant<sup>6</sup>.

At the same time it almost goes without saying that visa facilitation until now has been a matter of high political priority for the European Union. It is a subject of political agreement meaning that any Council conclusions reached thus far have been done so by qualified majority voting. Despite the importance of this aspect of visa policy, the limited size of this paper does not allow listing all the documents that reflect the positions of the EU institutions or the EU Member States on the issue of visa policy – especially regarding the visa liberalisation dialogue with a number of countries, including Ukraine. Most of these documents, even in the impact they have to set the conditions for the conclusion of visa facilitation agreements, are not legally binding. Rather, they

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<sup>4</sup> Consolidated Version of the Treaty on the Functioning of the European Union, Official Journal of the European Union, C 115, 9.5.2008, p.75-76.

<sup>5</sup> Hailbronner, EU Immigration and Asylum Law: Commentary, Beck, Hart and Nomos, 2010.

<sup>6</sup> Ibid



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were adopted in the form of the conclusions of the European Council, communications of the European Commission, action plans, non-papers and other miscellaneous documents.

### ***Comparison of EU Approach on visa liberalization dialogue for other countries***

It follows from experience of previous cases of visa liberalisation that a number of specific individual considerations need to be met in order for a country to move from the EU's "black" list to the "white" one. This may be clearly seen in the experiences of the EU Associated Countries and current Applicant Countries, in particular the Western Balkan states (except for Croatia). Therefore, it should be stressed that, apart from the general criteria discussed above, each third country entering negotiations for a visa liberalisation with the EU will be informed about the specific set of such individual conditions that, in the opinion of the EU, should be fulfilled before establishment of visa free regime. At average the fulfilment of all the criteria, which were imposed by the EU on the Western Balkan countries took them from 2 to 3 years to achieve.

*There is not a definite list of conditions for the third country to accede a visa free regime with the EU. There is a set of conditions typically required from the third countries.*

What are these conditions to accede to a visa-free regime and how should they be interpreted? There is not a definite list of conditions, as they will change from agreement to agreement. However, the Council Regulation (EC) No 539/2001 of 15 March 2001 does provide one main source of the types of conditions typically required from the third countries. Additionally, it lists 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<sup>7</sup> (this Regulation has been amended a number of times).

Recital (5) of Regulation No 539/2001 provides for the following:

"The determination of those third countries whose nationals are subject to the visa requirement, and those exempt from it, is governed by a considered, case-by-case assessment of a variety of criteria relating inter alia to illegal immigration, public policy and security, and to the European Union's external relations with third countries, consideration also being given to the implications of regional coherence and reciprocity."

Upon the adoption of this Regulation, the European Commission gave a detailed, though non-legally non-binding explanation of how these criteria

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<sup>7</sup> 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., Official Journal of the European Union, L 81, 21.3.2001, p. 1–7 (with the amendments, which were made until March 14, 2011).



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should be assessed and applied<sup>8</sup>. This explanation and the relevant criteria can be summarized, largely in the words of the European Commission, as follows:

- 1) Illegal immigration – reference may be made:
  - a) to a number of relevant sources of statistical information and indicators to assess the risk of illegal migratory flows (such as information and/or statistics on illegal residence, cases of refusal of admission to the territory, expulsion measures, and clandestine immigration and labour networks),
  - b) to assess the reliability of travel documents issued by the relevant third country (in past negotiations with third countries, the EC has introduced a condition requiring the introduction of biometric passports in the third countries concluding the visa facilitation agreements)
  - c) to consider the impact of readmission agreements with those countries.
- 2) Public policy:
  - a) conclusions reached in the police cooperation context among others may highlight specific salient features of certain types of crime.
  - b) depending on the seriousness, regularity and territorial extent of the relevant forms of crime, imposing the visa requirement could be a possible response worth considering.
  - c) threats to public order may in some cases be so serious as even to jeopardise domestic security in one or more Member States. If the visa requirement was imposed in a show of solidarity by the other Member States, this could again be an appropriate response.
- 3) International relations:
  - a) the option for or against imposing the visa requirement in respect of a given third country can be a means of underlining the type of relations which the EU is intending to establish or maintain with it,
  - b) but the EU relations with a single country in isolation are rarely at stake. Most commonly it is the relationship with a group of countries, and the option in favour of a given visa regime also has implications in terms of regional coherence,
  - c) the choice of visa regime can also reflect the specific position of a EU Member State in relation to a third country, to which the other EU Member States adhere in a spirit of solidarity,
  - d) the reciprocity criterion, applied by States individually and separately in the traditional form of relations under public international law, now has to be used by reason of the constraints of the EU external relations with third countries.

In addition the European Commission stressed that, “Given the extreme diversity of situations in third countries and their relations with the EU and the Member States, the criteria set out here cannot be applied automatically, by means of coefficients fixed in advance. They must be seen as decision-making

*the criteria set out for visa free regime cannot be applied automatically.....it will be used flexibly and pragmatically.*

*In November 2010 the roadmap for visa liberalisation was issued to Ukraine.*

<sup>8</sup> The description is based on the list of criteria, which should be used for determining whether a third country should be in Annex I or Annex II (explanatory memorandum for the Proposal for Regulation /COM/2000/0027 final - CNS 2000/0030/, Official Journal of the European Union C 177E, 27.6.2000, p. 66–69.



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instruments to be used flexibly and pragmatically, being weighted variably on a case-by-case basis.”

Finally, Recital 1 of Regulation (EC) No 1932/2006 of 21 December 2006 amending Regulation (EC) No 539/2001 provided for the following: “The composition of the lists of third countries in Annexes I and II to Regulation (EC) No 539/2001 of 15 March 2001 should be, and should remain, consistent with the criteria laid down in recital (5) thereto. Some third countries should be transferred from one Annex to the other, particularly with regard to illegal immigration and public policy.”<sup>9</sup>

*The third country must harmonise its own legal framework with all major instruments of EU law in the area of Freedom, Security and Justice as well as to join the relevant international treaties and to provide for their implementation in practice.*

For the Western Balkan countries (with exception of Croatia), special roadmaps for visa liberalisation have been issued by the EU and made public<sup>10</sup>. In November 2010 such roadmap was issued to Ukraine and, the last one at the moment- in January 2011 to Moldova

These roadmaps are very similar in their contents. Based on their requirements, it can be assumed that the third country must harmonise its own legal framework with all major instruments of EU law in the area of Freedom, Security and Justice as well as to join the relevant international treaties and to provide for their implementation in practice. In the roadmaps, no particular lists of EU law were attached, only the relevant fields of EU law were indicated.

The requirements included in the roadmaps are structured in the following way:

- 1) Requirements related to the correct implementation of the Community Visa Facilitation and Readmission Agreements,
- 2) Requirements on the third country's document security, illegal migration, public order and security and external relations:
  - a) Passports/travel documents, ID cards and breeder documents,
  - b) Illegal migration, including readmission (border management, carriers' responsibility, asylum policy, migration management),
  - c) Public order and security (Preventing and fighting organised crime, terrorism and corruption, judicial co-operation in criminal matters, law

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<sup>9</sup> Council Regulation (EC) No 1932/2006 of 21 December 2006 amending 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, Official Journal of the European Union, L 405, 30.12.2006., p.23.

<sup>10</sup> For example, in the case of Bosnia and Herzegovina, the roadmap can be found on the website of the Delegation of the European Commission available at <http://www.delbih.ec.europa.eu/docs/map.pdf>, checked on 01.03.2011; others can be found on the websites of various different NGOs, e.g. at <http://www.esiweb.org/index.php?lang=en&id=352>.



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- enforcement co-operation, data protection),
- d) External Relations and fundamental rights (Freedom of movement of the third country's nationals, Conditions and procedures for the issue of identity documents, Citizens' rights including protection of minorities).
- 3) Rate of visa refusals - based on the achievements of the third country in the implementation of the requirements set up in the roadmap, the European Commission will assess the situation, taking into account the visa refusal rate for this country's applicants and the refusal rate of entry into the common Schengen area for them. The decreasing trend of the refusal rate, which should progress towards 3% for visas and 1000 persons per year refused for entry into the common Schengen area, shall be used as an indicative reference.

It should be noted that in case of Western Balkan countries almost all the above-mentioned requirements were also covered by the Stabilisation and Association Agreements. With some countries these agreements have been concluded prior to starting the visa liberalisation dialogue (for example FYROM), but majority of them were in the process of finalising negotiations on these agreements. Stabilisation and Association Agreements (further referred to as the SAA) have quite a standard format and in the case of Western Balkan Countries all these agreements contained the title "Justice, Freedom and Security" with the articles covering obligations of the parties on preventing and combating organised crime and other illegal activities, combating terrorism, money laundering and financing of terrorism, prevention and control of illegal immigration, readmission, visa, border management, asylum and migration, reinforcement of institutions and rule of law, protection of personal data and cooperation on illicit drugs.

### ***Where does Ukraine currently stand?***<sup>11</sup>

*The Action Plan on Visa Liberalisation for Ukraine is political, not a legally binding document. It sets the benchmarks for the assessment of the overall progress of Ukraine towards visa liberalisation.*

EU-Ukraine visa liberalization dialogue was launched on 29 October 29, 2008 in compliance with the agreements of the Ukraine-EU Paris Summit of September 9, 2008.

On 19-20 March 2009 the European Council emphasized that "The EU, in line with the Global Approach to Migration, should also take gradual steps towards full visa liberalisation as a long term goal for individual partner countries and on a case by case basis provided that conditions for well-managed and secure mobility are in place."

On November 22, 2010 the European Council and Ukraine announced "an

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<sup>11</sup> Due to the limitations to the size of this paper the author skipped the description of EU-Ukraine relations as well as the detailed chronology of the development of visa liberalisation dialogue.





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action plan for Ukraine toward the establishment of a visa-free regime for short-stay travel".

Based on the above-mentioned description of EU approach to visa liberalisation until this moment it could be said that the basic contents of the groundwork that Ukraine must implement in a visa free regime is well known and it is formally stipulated in the Action Plan on Visa Liberalisation for Ukraine.

The Action Plan on Visa Liberalisation for Ukraine is political, not a legally binding document. However it sets the benchmarks, the achievement of which will be evaluated in order to assess the overall progress of Ukraine towards visa liberalisation. Unlike roadmaps for Western Balkan countries the Action Plan includes division into two phases (levels): legislative and strategic planning mechanisms (including legal harmonisation) and the practical implementation of these national laws and other governmental policy planning and strategy documents<sup>12</sup>. One additional point should be noted here: although the transition from a visa facilitation regime to a visa-free one is an aspiration that is articulated in many of the agreements, there is no legal linkage between the existence of a visa facilitation regime and the possibility of establishing the visa-free one with the EU.

*The Action Plan includes two phases (levels):*

*legislative and strategic planning mechanisms*

*the practical implementation of these national laws and other governmental policy planning and strategy documents.*

### **EU-Ukraine Association Agreement/Deep and Comprehensive Free Trade Agreement.**

The draft text of EU-Ukraine Association Agreement/Deep and Comprehensive Free Trade Agreement is not publicly available at the moment so it is not possible to evaluate, whether there are differences in the content of the chapter "Justice, Freedom and Security" from the requirements of the SAAs for Western Balkan countries. However, so far the experience shows that the Association Agreements follow the same pattern, although they may vary in some specific details (for example transitional periods for the implementation of their

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<sup>12</sup> The lack of a legal linkage, however, has not prevented such a transition from occurring on multiple occasions. Indeed, some countries have transitioned directly from visa facilitation to visa-free regimes. On 12 February 2009, the European Commission approved draft Council Decisions on the signature and conclusion of short-stay visa waiver agreements between the EC and six countries: Antigua, Barbuda, the Bahamas, Saint Kitts and Nevis, Mauritius, Barbados and Seychelles. These agreements were concluded in the very short period of time in 2009. A similar process toward a visa-free regime also took place in relation to Taiwan, in which case the major discussion was focused on a number of familiar issues: the introduction of biometric passports, broadening visa exemptions for some EU Member States, and non-existence of illegal migratory flows from Taiwan into the EU.



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obligations)

It should be underlined that neither the previous roadmaps for Western Balkan countries, nor the Action Plan on Visa liberalisation for Ukraine had introduced new specific requirements for the countries, which are separate and different from the general legal harmonisation and capacity building obligations and activities of the country in issue. They just specify in more detailed manner the requirements of EU law in the area of justice, freedom and security, which shall be implemented by any country willing to submit an application for EU accession.

### **Legal and illegal employment opportunities in the European Union.**

*Visa free regime with the EU is seen by the part of Ukrainian population as an opportunity for employment and settling down in the EU...*

It is worth mentioning that visa free regime with the EU is perceived by the part of the Ukrainian population as a possibility of getting a job and settle down in the EU Member States. However, legal migration issues are covered by the specific EU legislation, which should be implemented in EU Member States and short term stay without visas is not supposed to target or to stimulate the employment of the third country nationals in the EU.

*...short- term stay without visas is not intended to allow employment in the EU.*

In fact Article 4 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, provides for that “A Member State may provide for exceptions from the visa requirement ...”, but at the same time it also stresses that “A Member State may provide for exceptions from the exemption from the visa requirement ...as regards persons carrying out a paid activity during their stay”. That means an EU Member State may request such persons to receive the authorisation to stay in the country in order to work. Moreover the specific rules on the employment and self-employed activities of Ukrainian nationals in EU will be also included in the EU-Ukraine Association Agreement.

*Impact analysis of the visa free regime on the migration flows from the Ukraine to the EU Member States and the possible “brain drain” is needed .*

**The visa free regime is not a permanent construction.** On the basis of the proposal from the European Commission the Council may decide to move any country from the “positive” to “negative list” of Regulation 539/2001/EC. To name a few examples:

- in 2003 Ecuador was moved to the “negative list” due to the illegal migration concerns,
- in 2006 Bolivia was moved to the “negative list” due to the issues of illegal migration and crime.

In November 2010 it was also announced that for Serbia, Macedonia and Montenegro, which citizens had just obtained the right to enter EU without visas, the EU has to adopt a monitoring mechanism due to the inflow of the



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asylum-seekers from that countries (according to the UNHCR statistics few thousands people of primarily Roma origin asked for asylum in EU Member States). The issue of establishment of such mechanism is still pending.

**Possible brain drain and illegal employment.** At this moment the majority of Ukrainian highly skilled labour force in principle is not precluded from undertaking the employment in EU Member States subject to the requirements of the EU law and national legislation of the Member States in issue. The statistics shows a rather large amount of Ukrainian citizens staying and working legally in EU. What may change after the visa liberalisation is the numbers of persons representing low skilled labour force, which may increase their efforts in order to try to enter the EU Member States other than e.g. neighbouring Poland, in search for the jobs and which may potentially end up in the illegal employment, thus increasing the statistics on illegal immigration to the EU. However it should be added that the separate serious analysis of the impact of the visa free regime on the migration flows from the Ukraine to the EU Member States and the possible “brain drain” effect should be conducted in order to model the consequences for the supply and demand of the labour force in Ukraine.

*On February 17, 2011  
the Cabinet of  
Ministers approved the  
Draft National Plan for  
the Implementation of  
the EU-Ukraine Visa  
liberalisation action  
plan.*

It should be indicated, however, that as indicated by the European Commission, the recognition rate of readmission requests for illegal migrants in case of Ukraine is 80-90 %. Almost one third of the readmitted persons to Ukraine were the third country nationals, not Ukrainian citizens<sup>13</sup>.

Finally irrespectively of the results of the above analysis, during the adoption of the visa free regime and afterwards there is a need for the proper, simple and clear explanation to the Ukrainian population of the rights and obligations of Ukrainian citizens under the visa free regime. Without diminishing the significance of achieving the visa liberalisation, the limitations of such regime need to be carefully explained to the society by the leadership of Ukraine.

**Current progress of Ukraine in planning the implementation of the benchmarks of the Action Plan.** The leadership of Ukraine currently set the ambitious goal in relation to the establishment of visa free regime with the EU by 2012.

The Draft Programme of the economic reforms of Ukraine for 2010-2014 stipulates, that visa free regime between EU and Ukraine should be established

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<sup>13</sup>Communication from the Commission, Evaluation of EU Readmission Agreements, Brussels, 23.2.2011, COM(2011) 76 final



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by the end of 2012.

On February 7, 2011 the Coordinating Centre for implementation of the EU – Ukraine Action Plan on visa liberalisation was established by the Resolution of the Cabinet of Ministers of Ukraine nr. 77. The Coordinating Centre is a permanently functioning body under the Government of Ukraine, the main task of which is to consolidate efforts and coordinate activities of the central executive authorities within the framework of implementation of the EU – Ukraine Action Plan on visa liberalisation.

*Since the reception of the Action Plan on visa liberalisation Ukraine has swiftly moved to elaboration and/or adoption of a number of the legislative initiatives and strategic and policy planning documents.*

On February 17, 2011 the Cabinet of Ministers approved the Draft National Plan for the Implementation of the EU-Ukraine Visa liberalisation action plan. The National Plan is still to be approved by the President of Ukraine. It presupposes that the Action Plan should be implemented by 2012. The measures of the plan are scheduled on the quarterly basis. The plan has not yet been made public.

**Progress in adoption of the legislative and programming/strategic documents.** Since the reception of the Action Plan on visa liberalisation Ukraine has swiftly moved to elaboration and/or adoption of a number of the legislative initiatives and strategic and policy planning documents, which formed a significant part of this document (this list is not exhaustive):

- elaborated the draft Law of Ukraine on Introduction of Amendments to Certain Legislative Acts of Ukraine for Migration, nr.2232 of 13 January 2011 (among these acts are the Law on Legal Status of Foreigners and Stateless Persons and the Code of Ukraine for Administrative Offences)
- elaborated the draft Law of Ukraine on Refugees and Persons who Need Complementary or Temporary Protection in Ukraine
- adopted Law on Access to Information Law,
- the Law On Protection of Personal Data (adopted on June 1, 2010, but entered into force on January 2011). In 2010 European Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data and the Additional Protocol to the Convention was also ratified.
- ratified the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism of the Council of Europe,
- elaborated the Draft Law On Combating Trafficking in Human Beings. In November 2010 Ukraine ratified the Council of Europe Convention on Action against Trafficking in Human Beings,
- elaborated the draft Action Plan for implementing of the National Integrated Border Management Strategy,
- elaborated the draft concept of migration policy of Ukraine,
- elaborated the Draft new Anti-corruption law (currently examined by the Verkhovna Rada),
- adopted National strategy on anti-drag policy and fighting against illegal



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*Some challenges  
facing Ukraine in the  
implementation of the  
Action Plan on visa  
liberalisation:*

*- issuance of biometric  
passports,*

*-institutional  
development and  
capacity building which  
will have a large  
budgetary impact*

*-achieving compliance  
with the European  
standards and best  
practices in relation to  
the relevant structures  
in the public sector*

- circulation of drugs and psychotropic substances for 2011-2015,
- Operational agreement between Ukraine and Europol was elaborated in October 2010. Its signing is subject to the implementation of the data protection legislation in Ukraine,
- local border traffic agreements are being negotiated with Poland, Romania, Slovakia and Hungary,
- 17 individual readmission agreements with EU and non-EU Member States were concluded, the negotiations are ongoing with Czech Republic and Austria.

A significant part of the Draft National Plan for the Implementation of the EU-Ukraine Visa liberalisation action plan is devoted to the introduction of biometric passports as the citizens' passports for travelling abroad. The new law "On documents, which confirm the identity of a person and the citizenship of Ukraine" and the related by-laws should be elaborated and adopted for this purpose, as well as the technical solution for the new biometric passports should be approved.

**Timeframe for implementation for the visa liberalisation plan.** The timeframe of the Draft National Plan for the Implementation of the EU-Ukraine Visa liberalisation action plan is very ambitious – activities to be implemented by 2012. The text of the draft National Plan is not yet publicly available. Its excerpts/descriptions, which were quoted in mass media, suggest that some of the Action Plan requirements will not be completed earlier than in 2015. The Government does not suggest the shortening of the period of implementation of such activities as the implementation, for example, of the law enforcement programme on State Border Development and Reconstruction.

### **Declining rate of visa refusals to Ukrainian citizens**

The positive trend of declining rate of visa refusals to Ukrainian citizens is observed in the last few years: 2009- the visa refusal rate was approximately 5 per cent of all visa applications, in 2010 – approximately 3-4 per cent according to the Ministry of Foreign Affairs of Ukraine<sup>14</sup>. Therefore Ukraine is very close to the achievement of the most clearly defined benchmarks: 3 per cent visa refusal rate for its citizens.

### **Major challenges for Ukraine**

The areas covered by the Action Plan are so diverse and important that it is impossible to single out „higher” or „less important” priorities. For example, issuance of biometric passports can be considered as a very high priority simply due to the fact that only holders of biometric passports will be able to enjoy visa free travel.

<sup>14</sup> According to the interview of the officials of the Ministry of Foreign Affairs of Ukraine <http://ru.radioera.com.ua/eranews/?idArticle=27121> (checked last time on 01.03.2011).



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It needs to be stressed that the biggest challenge for Ukraine represent implementation of the benchmarks of the 2nd phase: these priorities include a lot of issues of institutional development and capacity building and which will inevitably have a large budgetary impact.

The Ministry of Interior and the Ministry of Justice as well as the representatives of other central administration institutions started to develop the concept of reform of the system of criminal justice of Ukraine. The goal of the reform is to achieve the compliance with the European standards and best practices in relation to the structure of the Ministry of Interior, organisation of the work of the militia (police) in the area of fighting organised crime, protection of public order and fundamental rights of the Ukraine's citizens and residents.

One of the challenges will be also the establishment of fully operational State Service of Ukraine on the Protection of Personal Data.

According to the previous history of development one of the most problematic areas seems to be anti-corruption issue as presented in the Action Plan: adoption of legislation on preventing and fighting corruption (the previous legislation was not fully implemented and was later repealed), establishment of a single and independent anti-corruption agency and strengthening coordination and information exchange between authorities responsible for the fight against corruption (In this regard recent negative public comment made in January 2011 by GRECO on the anti-corruption situation in Ukraine should be mentioned).

As for other issues it may be said that strengthening of border control (including necessary data bases on the persons crossing Ukrainian borders), proper migration policy and well-functioning asylum system (with effectively operating State Migration Service, which was established in December 2010), guarantees for personal data protection and fighting organised crime, efficiency of the judicial and prosecutorial authorities- all these priorities should be deemed as equally significant.

*No EU legislation on employment matters will be simplified in relation to the Ukrainian citizens.*

### **Conclusions and recommendations**

#### **What visa free regime with EU really means?**

Such regime, albeit convenient for the travellers, does not mean any changes related to the aspects of EU immigration policy other than entry, transit and exit of the Schengen zone. No EU legislation on employment matters will be simplified in relation to the Ukrainian citizens, as the issues of employment of third country nationals or their long term stay in some of EU Member States for



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different reasons, are not subjects to the EU visa liberalisation dialogue.

### **Conditions to be fulfilled for visa liberalisation with the EU**

The Action Plan on Visa liberalisation for Ukraine does not introduce new specific requirements for Ukraine, which would be separate and different from the general legal harmonisation and capacity building obligations and activities directed on the closer integration of any [usually associated country] country into the European Union.

At present, the basic EU imposed conditions for the achievement of the visa free regime are very broad and are almost the same for every third country, including Ukraine:

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*Ukraine has chosen an efficient approach to the Action plan for Visa Liberalisation.*

- approximation of laws in the area of migration, border control, asylum, fighting the organised crime and corruption, data protection with EU law and the obligations of the international law,
- democracy and rule of law,
- strengthening of the institutional and technical capacities in all above mentioned areas, including implementation and enforcement of this legislation in line with EU requirements
- existence of the adopted ENP Action Plan or similar planning document,
- proper implementation and enforcement of the readmission agreement and visa facilitation agreement, which were concluded with the European Union.

However it shall be also stressed that:

- no exhaustive list of conditions for visa liberalisation that have to be met exists, although detailed list of benchmarks exists in the form of the Action Plan on Visa Liberalisation.
- some of the conditions may and do vary country-per-country and each country is assessed individually by the European Union,
- At the end the decision to establish visa free regime with Ukraine is still political and has to be adopted by the qualified majority voting of the EU Member States.

Ukraine has chosen an efficient approach to the Action plan for Visa Liberalisation by establishing a high level monitoring authority - the Coordinating Centre for implementation of the EU – Ukraine Action Plan on visa liberalisation and by adopting a special planning document - the National Plan for the Implementation of the EU-Ukraine Visa liberalisation action plan.

In this regard it is recommended:



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*The decision on the moving of Ukraine from “negative” to “positive” visa list will be taken by the Council and European Parliament*

- that the results of the implementation of this plan and activities of the Coordinating Centre should be examined by the Council of Ministers on a monthly or at least a quarterly basis.
- The Verkhovna Rada should be regularly and fully informed on the results of the implementation of the National Plan for the Implementation of the EU-Ukraine Visa liberalisation action plan, especially in relation to the legislative programme and any problems/delays arising in regards to the legislation to be adopted in accordance with this document.

*... advocacy is needed in relation to the EU Member States, which are sceptical to the visa liberalisation for Ukraine.*

Swift positive developments can be observed in the area of fulfilment of the benchmarks of the 1<sup>st</sup> phase (elaboration of the legislation and strategic/planning documents). This also includes a significantly declining rate of refusals of visas to Ukrainians, which currently constitutes approximately 4 per cent of all visa applications

However proper attention should be paid to practical implementation of the legislation and strategic/planning documents and other benchmarks of the 2<sup>nd</sup> phase. In general, the European Commission considers that the strategic document is implemented<sup>15</sup> if the following criteria are met:

- Action plan for the implementation of the strategy has been adopted,
- All the necessary legislation, including by-laws and/or administrative acts have been adopted and entered into force,
- Necessary human and financial resources have been allocated,
- Implementation of the measures, which form strategic priorities, is ongoing.

It also concerns the ways of their reflection in the progress reports to the European Commission and the Member States (e.g. collection of the statistics on cases of corruption, money laundering and others, which were examined by the police, prosecutor's office and the courts, number of the judgments etc.). In the majority of cases as in the areas of both legal and illegal migration and asylum the collection of the statistics should be an issue as it presumably should be collected in the course of the usual work of the responsible institutions.

It is also recommended that proper attention should be paid to the reflection of human resource capacity of the existing and newly established institutions (number of staff, their professional qualifications, numbers of the trainings

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<sup>15</sup> European Stability Initiative, “Isolation Confirmed. How the EU is undermining its interests in Kosovo”, 22 November 2010.





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undergone by the staff, turnover of staff, gender balance and other relevant subjects).

In case of the Western Balkan countries the visa liberalisation may look as a fast process but it was followed by the years of advocacy by both the diplomats and NGOs even long before these countries concluded visa facilitation and readmission agreements.

The decision on the moving of Ukraine from “negative” to “positive” visa list will be taken by the Council and European Parliament by means of the ordinary legislative procedure. Ordinary legislative procedure means that the Council will vote by the qualified majority voting. Therefore serious efforts and advocacy is needed in relation to the EU Member States, which are sceptical to the visa liberalisation for Ukraine.

It is recommended that Ukraine should actively use both the diplomatic channels and the NGOs for the promotion of the country’s efforts to achieve the visa free regime and of the right image of the Ukraine in this respect in the European Union.

Although there is already large number of Ukrainian citizens living in EU Member States for the different reasons (e.g. work, education and other reasons) it is recommended to conduct the impact analysis of the consequences of introduction of visa free regime on the migration flows from the Ukraine to the EU Member States and its possible “brain drain” effect on labour market in Ukraine.

Further information on the Association Agreement can be found at: [www.nrdevelopment.com/eipa.html](http://www.nrdevelopment.com/eipa.html)