Why Banning Russian Tourists from Schengen Might not Be Unlawful

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This article belongs to the debate » European Visa for Russian Tourists?

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Recently, politicians in different EU countries have suggested barring Russian tourists from visiting the EU (see reporting here and here). Such a ban would be in retaliation for the war waged by Russia against Ukraine. From a legal perspective, these suggestions raise the interesting question whether such a blanket ban would be lawful. A recent post for *Verfassungsblog* makes the claim that a ban would simply be unlawful.

However, while the piece rightly makes a distinction between two issues, namely whether a ban would be unlawful under the current legal framework and whether such a ban is simply precluded by EU primary law, its analysis only shows how a ban would be difficult to square with the current legal framework. In doing so, the piece also seems to overstate the importance of an individualized assessment in the application of the Visa Code and Schengen Borders Code (adopted pursuant to Article 77 TFEU), conflating their 'ratio legis' with that of the Directives establishing immigration regimes (adopted pursuant to Articles 78 and 79 TFEU).

What is more, as the piece moves from the first to the second issue, one gets the impression that the analysis morphs from a legal to a moral argument. On the second issue, the piece notes that "[*p*]*olitical will and the possibility to amend aside, the adoption of a blanket citizenship-based ban would contradict the very ratio legis of the Schengen visa system: the individualisation of the treatment of a visa application*." However, from a legal perspective, the question precisely is whether there is a possibility to amend the existing acquis, in order to ban Russians from obtaining short term visas for the purpose of visiting Europe as tourists (hereafter 'tourist visas'). In this regard, it seems hardly tenable to argue that the EU (secondary) legislature is somehow bound by the *ratio legis* of the current Schengen visa system.

The EU legislature's broad discretion to adapt its legislation to changing circumstances

Instead, the Court of Justice has already recognized that the EU legislature's famously broad discretion under the legal basis of Article 114 TFEU also applies in the Area of Freedom Security and Justice (*Slovakia & Hungary v. Council*, para. 124). It is also part of well-established case law that the Union legislature cannot be denied the possibility of

adapting its acts to any change in circumstances or development of knowledge, having regard to its task of safeguarding the general interests recognised by the Treaties (see *Vodafone*, para. 34).

This brings us to the question whether the EU legislature would be barred from, for example, amending Article 32 of the Visa Code (which deals with the refusal of visas). This, for instance, by inserting a provision that gives the Council (or the Commission) the exceptional power to declare the existence of a threat to the international relations of the EU and/or its Member States, or to the stability of the EU neighbourhood. When such a declaration is made (and for which it would have to be prescribed that it must be periodically reassessed), Member States would be obliged to refuse visa applications made by citizens of a given country, if the intended purpose of the stay is tourism.

Similar mechanisms (in the sense of containing an element of the collective retribution, repudiated in the original post as being 'unknown to EU law') already exist in the current Schengen acquis, as also noted by Nicoli. For instance, Regulation 2018/1806 makes a distinction between countries whose nationals are required to possess a visa when entering the Schengen zone (Annex I) and those nationals that are exempt from such an obligation (Annex II). However, also for the latter category, there is a possibility to temporary suspend the exemption under Article 8, for instance when there is "an increased risk or imminent threat to the public policy or internal security of Member States", or when the country concerned shows a "decrease in cooperation on readmission". The question before us now is whether an analogous mechanism aimed at refusing the issuance of (tourist) visas to all nationals of a given country (rather than being aimed at requiring all nationals of a previously exempt country to apply (again) for visas) would be per se unlawful.

The necessity of a limitation test

The original blogpost rightly draws our attention to a number of provisions of the Charter of Fundamental Rights (notably Articles 20 and 21 on non-discrimination and equal treatment) but it seems to treat these rights as absolute in nature, since it does not mention that there will only be a breach of these rights when the conditions under Article 52 of the Charter on scope and interpretation are not met. To conclude that a ban would be unlawful, one would thus have to show that the conditions of Article 52 of the Charter could never be met. While the original blogpost rightly points out that not all Russians that apply for visas are tourists, the public calls for a ban have been mainly aimed at Russian tourists. As a result, if the legislature would create a mechanism that only allows the issuance of tourist visas to be suspended, this issue would not pose itself and the 'targeted' nature of the measure would be a key factor in the assessment of its proportionality.

Instead of pursuing the analysis under Article 52 of the Charter, the blogpost turns to hyperbole: "the war between Russian and Ukraine is not a compelling justification to treat Russian citizens as pariahs unworthy of human rights for no rational reason." This is a strawman argument since no one is seriously claiming that Russians are 'unworthy of

human rights'. Instead, the more sober legal question before us is whether EU primary law (including the Charter) prevents the EU legislature from updating the Schengen acquis to the effect that countries could be put on a banned list, precluding their nationals from acquiring visas (at least for certain purposes), when these countries threaten international stability, wage war against a country associated with the EU, or possibly even invade an EU Member State.

A way forward

This possibility cannot simply be dismissed as unlawful and it appears unhelpful for the quality of the debate to dismiss the suggested ban as "a way of irrational collective retribution, unknown to EU law." At the same time, it is also evidently clear that there would be important legal limits on the discretion of the EU legislature, were it to devise such a mechanism. These limits need to be charted with care to identify the scope under EU primary law for banning nationals of some third countries that flagrantly disregard international law and endanger peace and stability in the EU's neighbourhood.

What could be a concrete way forward then? As noted by the original blogpost, "the EU Commission has rightly declared that it cannot decide to limit the issuance of Schengen visas to Russian citizens." But this is only so because the issuance of visas is a Member State responsibility under the current acquis. Member States might now individually seek out the limits of their discretion under the current acquis to impose a de facto ban, but that would be legally questionable (as noted in the original blog post) and there would only be a patchwork of national bans. For a uniform EU-imposed ban to be legally sound, the Visa Code would have to be amended, inserting a mechanism allowing for targeted bans as described above.

For this, a proposal from the Commission is needed and a decision by the Parliament and Council under the ordinary legislative procedure. Member States might not feel comfortable enough (to entrust the Commission with the power to declare a 'threat to the international relations of the EU and/or its Member States' but in these situations, Article 291(2) TFEU allows the EU legislature to exceptionally confer powers on the Council. In short, if there is a political will between the co-legislators, a mechanism allowing for the imposition of temporary and targeted bans could be introduced and depending on the modalities of the mechanism, the resulting bans could be entirely lawful.

I would like to thank Lilian Tsourdi and Joyce De Coninck for comments on an earlier draft. All errors or omissions remain mine.

This post in the originally published version incorrectly noted that a quarter of the Member States could table an amendment to the Visa Code. This has been corrected.

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