Why Banning Russians from Schengen Is Unlawful

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On Monday, Volodymyr Zelensky, Ukraine's president, called on Western countries to ban all Russian travelers. On the same day, the Prime Minister of Finland, Sanna Marin, asked for an EU-wide ban for Russian citizens from Schengen, targeting tourists with Russian passports more specifically. "It's not right that at the same time as Russia is waging an aggressive, brutal war of aggression in Europe, Russians can live a normal life, travel in Europe, be tourists. It's not right," Marin told Yle. In the meantime, Estonia decided to refuse issuing visas or residence permits to Russian students, limiting them to Russian workers and the Latvian embassy in Russia has simply stopped issuing visas to Russian citizens for an indefinite period of time.

The aggression against Ukraine is ongoing. Unquestionably, the horrible crimes perpetrated by the Russian state should be punished. Does citizenship equate to the state, however? And should all Russian citizens be put in the same basket, the mere possession of a particular citizenship emerging as the trigger of responsibility? Certainly not. Russians are citizens of a totalitarian state, they are not Putin. Many of them are strongly against the Putin regime and are as powerless and outraged by the war as Minister Marin. It is not only ethically wrong to punish a heterogeneous group of more than a hundred million on the basis of citizenship – a lottery ticket which they have not chosen.

Citizenship-based punishment is also unlawful. President Zelensky need not be guided by EU law: his task is to win the war and to save his country, but Ms. Marin is obliged to consider the key principles and laws binding Finland. Whether she likes it or not, there is no legal way under current EU law to adopt a blanket citizenship-based ban against Russians acquiring Schengen visas. In short, the WWI 'enemy aliens' approach, which predates the advent of human rights, has no place in the 21st century. It is outdated, illegal and should be dropped. Even more: political attention paid to it by persons in leadership positions is deeply surprising, if not irresponsible.

The Schengen visa system: a foreign policy tool, with strict legal framing

Some EU actions related to the war in Ukraine were praised – and rightly so. One of the most important breakthroughs is the record-time activation of the temporary protection directive to help Ukrainian refugees. Sanctions against the Russian regime and its puppets were equally applauded. However, the approach of sanctioning, among those close to Putin, only Russian citizens and leaving the Schröders out has been criticized, just like the focus on the oligarchs, who are as powerless, it appears, as their poorer brethren.

Adopting sanctions exclusively based on citizenship is far from proper in the world cherishing human rights, where citizenship itself, constitutes the main factor of inequalities around the globe. Citizenship-based exclusions from Schengen also raise issues of lawfulness and legality. Pressured by several Member States, the EU Commission has rightly declared that it cannot decide to limit the issuance of Schengen visas to Russian citizens. Indeed, current EU law does not provide for such a ban.

The Schengen visa is peculiar in that it is valid for the whole Schengen area, as opposed to other visas delivered by Member States under national and EU law, such as long-stay visas for students. The Schengen areas comprises all the EU Members except Romania, Bulgaria, Croatia, Ireland and Cyprus and includes several third countries (Iceland, Norway, Switzerland and Lichtenstein). Until 2021, Russian citizens constituted the main group benefiting from Schengen visas:

536 241 in 2021, the second group being Chinese citizens (27 458 in 2021).

Since the entry in force in June 2007 of the Agreement between the European Community and the Russian Federation on the facilitation of the issuance of visas to the citizens of the European Union and the Russian Federation and until recently, some groups of Russians citizens (journalists, diplomats, official delegations, business people, students, close relatives, etc.) benefited from some facilitation measures for the issuances of Schengen visas (documentary evidence, length of the procedure and visa fees). Some 'super-privileged' groups – diplomats – benefited from even more privileges (e.g. multiple-entry visas with the term of validity of up to five years). This agreement is part of a broad network of instruments used as bargaining tools with third countries. In the Russian case, it was directly tied to a readmission agreement concluded in parallel, which entered into force on the same day, allowing the EU to send more people to Putin's Russia.

Third-country nationals who receive a Schengen visa can enter from any border crossing point in the Schengen area. This is precisely what the prime minister of Finland was complaining about: since the opening of the Imatra border crossing point between Finland and Russia in early July (both Finland and Russia have lifted the COVID restrictions at the border), Russians in possession of a Schengen visa tend to cross via this specific point. Unsurprisingly so, given the EU's closure of the airspace with Russia in February: flying via Armenia, Serbia, Turkey or the UAE is quite expensive. Finland, Estonia, Latvia, Lithuania and Poland (leaving the northern crossing with Norway out) are thus for many the easiest crossing point to reach other destinations in the EU.

Kaja Kallas, Estonia's Prime Minister, sees it as a problem: "while Schengen countries issue visas, neighbours to Russia carry the burden", she wrote on Twitter. Does this justify the adoption of an automatic ban championed by Latvia and Estonia? Absolutely not, as there is no provision in the current Schengen *acquis* which would allow for the adoption of a blanket ban on visas for the citizens of one country in particular. Exceptions to the Schengen visa rules regarding restrictions and bans are exhaustively set out in the legal texts:

1. They can relate to the suspension of the Facilitation Agreement (and not the Schengen visa issuance itself), resulting in the suspension of (part of) the facilitations conditions. Two ways to suspend agreement privileges are available. Firstly, Article 15(6) of the Facilitation Agreement EU-Russia stipulates that each Party may suspend the Agreement in whole or in part for reasons of public order, protection of national security or protection of public health. This clause was activated by the Council just after the break-out of the war on February 25 and suspended the privileges enjoyed by diplomats, related groups and business people. As a result, all these categories are now under the non-privileged rules of the Schengen Visa Code. One wonders why the EU hadn't already suspended these privileges in reaction to the annexation of Crimea. Secondly, Article 25a of the Visa Code empowers the Council to suspend (part of) these privileges or impose higher visa fees when the country is not cooperating sufficiently in the field of readmission, exacerbating potential "selectivity effects of the visa policy by discriminating between individual cases owing to the political performance of the country of nationality". In any case, these mechanisms do not foresee bans solely based on nationality.
2. The second option concerns *individual* travel bans, in particular via common foreign and security policy This mechanism has been used by the Council toward several people close to Putin. Annulment requests are currently pending before the General Court.

No blanket ban possible under the current Schengen Acquis

It is beyond any doubt that any blanket ban which implies an automatic refusal of a Schengen visa to *any* Russian citizen is unlawful. Not only is it in violation

of the 2007 Facilitation Agreement, which has been only partly suspended by the Council (Russian journalists, students and some other categories still benefit from it), but more fundamentally it is in breach of the foundational principles of the entire Schengen visa regime. As opposed to Schengen borders which can be easily closed under some exceptional circumstances – exceptions which have been largely used (and abused according to the ECJ) by the Member States since 2015 – there is no possibility in the Schengen *acquis* to introduce a blanket ban towards the nationals of one country, however exceptional the circumstances.

The Visa Code is crystal clear: Member States should examine each application for a Schengen visa *individually* and, in case of refusal, the reasons – which are exhaustively listed in Article 32(1) of the Visa Code – should be clearly stated. In response, applicants have a right to appeal (Article 32(3)). As a consequence, it is prohibited to adopt a blanket ban, or automatically refuse *any* citizen of any country. The same rules apply for long-stay visas which fall under EU immigration law Directives. The ECJ has been abundantly clear that visa decisions should be *individual*, i.e. they should take into account the personal circumstances of the applicant. Moreover, Member States are under an unconditional obligation to provide for a meaningful appeal procedure against decisions refusing a visa. Even when a Member State wants to refuse a Schengen or a long-stay visa under an EU immigration Directive for reasons linked to a threat to public policy, internal security or public health, they should do so on an individual basis. While this could be a ground to refuse Schengen visas to Putin's officials, to announce 'we do not issue visas to Russians' is a violation of EU law.

There is obviously a risk that instead of a blanket ban, some Member States could abuse their wide discretion and systematically refuse Schengen visas for Russian citizens on phony public policy or internal security grounds among others, as a way of irrational collective retribution, unknown to EU law. Such systematic practice would be much more difficult to challenge in practice, while any state that does not even pretend to act on the individual basis, like Estonia unlawfully discriminating against Russian students, is committing a violation of EU law, which is possible to capture and challenge due to its blunt nature.

The EU cannot overlook fundamental principles and rights

The question that follows is whether it would be possible to amend the Schengen *acquis* to provide for blanket citizenship-based exclusions. The answer is less straightforward. The EU is competent to adopt measures concerning the common policy on visas and short-stay residence permits, in accordance with the ordinary legislative procedure (Article 77(2)(a) TFEU). The Schengen *acquis* is fully part of EU law and can be modified on that basis. In fact, the Convention implementing the Schengen Agreement has been modified several times already and additional regulations developing the Schengen *acquis* have been adopted and regularly amended, among them the Visa Code.

Automaticity is the anti-thesis of the whole Schengen visa system. Political 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. It would imply a complete change of the rationale underpinning the issuance of Schengen visas, which is based on individual assessment of whether the applicants fulfil the conditions and constitute a risk of illegal immigration or a risk to the security of the Member States (Article 21(1) of the Visa Code). The Schengen Convention, the Common Visa Code, the Handbook for the processing of visa applications and the modification of issued visas, as well as the Handbook for the administrative management of visa processing provide for a strictly individual basis of assessment. Even a previous visa refusal cannot lead to an automatic refusal of a new application (Article 21(9) Visa Code). It also transpires from a settled case-law of the ECJ that the decision should be individual and that an effective remedy should be provided to the applicant (ECJ, *R.N.N.S. and K.A.*, C-225/19 and C-226/19, para. 43 and the case-law cited). Although the principle of good administration (Article 41 of the EU Charter of fundamental rights,

CFR) applies only to EU institutions and bodies, it also sets the tone as to the importance of having someone's case handled individually.

The organization of the Schengen system aside, the question of respect of fundamental rights is crucial in this case. In her tweet, Kaja Kallas wrote "Stop issuing tourist visas to Russians," "Visiting Europe is a privilege, not a human right". If she is right that there is no fundamental right to receive a Schengen visa, it does not mean that fundamental rights do not apply to more than a hundred million people she happens to be tweeting against, when examining and assessing a visa application. An automatic refusal toward any Russian citizens would obviously be in contradiction with the fundamental principle of equality before the law (Article 20 CFR). It would also raise important questions of discrimination. Although EU law does not protect third country nationals against discrimination on grounds of nationality, even under the Charter (e.g. see ECJ, C-22/08 and C-23/08, *Vatsouras and Koupatantze* and ECJ, *X. v. Belgian State*, C-930/19), the European Court on Human Rights, on the contrary, considers that a difference of treatment on grounds of nationality only constitutes a suspect criterion which calls for stricter scrutiny based on very weighty reasons.

What's more, Article 21(1) CFR prohibits discrimination on the ground of ethnic origin. Although the Court adopts a restrictive understanding of discrimination on grounds of ethnicity, it is not difficult to identify persons of a given ethnic origin who are at a disadvantage: Russian citizens are mainly ethnic Russians.

More fundamentally, among Russian citizens who ask for a Schengen visa, there are not only tourists who were vehemently criticized by the Finnish and Estonian Prime Ministers, but also people who leave Russia for other reasons: humanitarian grounds, family, work, medical appointments, studies, and so on. Not examining these applications on an individual basis would be an attack on an array of fundamental rights, including the right to private and family life and the prohibition of torture and inhuman treatment. It would also sideline Russian citizens who live in a third country and apply for Schengen visas (between 150.000 and 300.000 have left Russia since the start of the war and millions more did so earlier).

In any case, the reason for applying for a visa and the place where Russian citizens live notwithstanding, 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, given that Russia, like the majority of countries in the world, is not a democracy and that citizenship cannot be chosen or easily renounced. Vile retributive logic is an unsuitable ground for a complete overhaul of the Schengen visa regime, established to diminish, rather than to boost violations of fundamental rights.

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The original version of this article contained several minor errors that have been corrected.

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