

Opinion of the Joint Supervisory Body of Europol

(Opinion 06/22)

with respect to the proposal for a Council decision concerning access for consultation of the Visa Information System (VIS) by authorities of Member States responsible for internal security and by Europol for the purposes of the prevention, detection and investigation of terrorist offences and of other serious criminal offences.

THE JOINT SUPERVISORY BODY OF EUROPOL,

A. Introductory remarks

On 24 November 2005 the Commission presented its proposal on granting access to the VIS to authorities of Member States and Europol for the purposes of prevention, detection and investigation of terrorists offences and of other serious criminal offences¹.

Since this proposal may have important implications for the processing of personal data by Europol, the Joint Supervisory Body of Europol (JSB) considers it as its task to present this opinion.

B. General remarks

Referring to the Council conclusions of 7 March 2005 and 13 July 2005, the explanatory memorandum to the proposal indicates that in order to achieve the aim of improving internal security and the fight against terrorism, authorities responsible for internal security should be granted access to VIS. Europol is one of those authorities.

The VIS is established by a Council Decision based on Title IV of the Treaty of the European Community². The purpose, functionalities and responsibilities are defined in the proposal for a

¹ COM (2005)600

² OJ L 213, 15.6.2004, p5

Regulation of the European Parliament and of the Council³. This proposal indicates that the VIS is established to facilitate the exchange of data between Member States on applications for short stay visas and on the decisions taken thereto. It is not established as an information system for law enforcement authorities.

The present proposal for a Council Decision allows law enforcement authorities and Europol access and use of the VIS data for other purposes than for which these data were collected and processed, thus implying an exception to the purpose limitation principle.

Such an exception could be justified under certain conditions: no routine access, access limited to specific cases or in the case of Europol to a specific task, and furthermore sufficiently safeguarding control of the use of this access. The exception of the purpose limitation principle should furthermore be proportionate and substantially contributing to the purpose of the exception. Only then, an exception to the principle of purpose limitation may be justified. The JSB notes with satisfaction that Recital 7 mentions that routine access should not be allowed. Access is only allowed in specific cases. Chapter 2 of the Explanatory Memorandum also refers to a case-by-case access.

C. Specific Remarks

The proposed Council Decision contains specific conditions that have to be fulfilled (Article 5 (1) points a-d) before access to a limited set of data (Article 5(2)) is allowed. Access is limited to when necessary in a specific case and when there are reasonable grounds, based on factual indications, to consider that consultation of VIS data will contribute to the prevention, detection or investigation of any of the criminal offences in question. Control on access is foreseen by introducing the administration of the reasons for request and the recording of all data processing operations (Article 10).

However, these conditions only apply to Member States authorities responsible for internal security. The access for Europol is not subjected to these conditions. Europol may access the VIS within the limits of its mandate and when necessary for the performance of its task pursuant Article 3(1), point 2, of the Europol Convention and for the purposes of a specific analysis file.

As already stated, the proposed Council Decision introduces an exception to the purpose limitation principle of the VIS and should therefore have a limited character. Since the task of Article 3(1), point 2, of the Europol Convention refers in general terms to obtaining, collating and analysing of

³ COM (2004) 835

information and intelligence by Europol, and in view of Europol's general objective, the JSB wonders how the limitation of the VIS access to a specific case as referred to in Recital 7 can be safeguarded.

It should be noted that although Member States authorities responsible for internal security including the fight against crime and Europol have the same general task: the fight against terrorism and serious forms of international crime with an organized criminal structure, their objectives are different. Where the work of Member States authorities will be focussed on specific cases, Europol's objective is more general and focuses on the improvement of the effectiveness and cooperation of competent authorities in Member States.

The proposed Council Decision apparently introduces a new policy concerning a specific element of Europol's task: the obtaining of information. Although this might be related to specific cases (for example in a specific analysis project), the simple reference to Europol's general tasks also includes obtaining information for the general objective of Europol to improve effectiveness of Member States authorities. This last aspect is not necessarily limited to Europol's task in a specific case but may also refer to enhancing the general information position of Europol or improving the quality of Europol's data. Without specific conditions applicable to Europol's access, this access will in practice not be limited in such a way that it justifies the exception of the purpose limitation.

What is also striking is the difference between the present proposal and the proposed Council Decision establishing the second generation Schengen Information System⁴. The latter proposal introduces access for Europol to some of the SIS data, but limits that access to a view access. The present proposal does not limit the access to viewing alone.

The JSB furthermore notes that the Council is initiating a discussion on the new legal basis of Europol and how to increase the effectiveness of Europol. The operational role of Europol and the data collection will no doubt be subject of that discussion.

The JSB acknowledges that Europol may have a need to access the VIS data, but this should be well defined, limited to specific cases or circumstances and embedded in a transparent policy on Europol's operational role, including the use of other sources of personal data outside Europol. The introduction of Europol's access to the VIS data by just referring to the general task of Europol and

⁴ COM(2005) 230

without any specific explanation and limitation, is in itself insufficient to justify the exception to the purpose limitation. The existing legal framework of the Europol Convention and in particular Article 10(4) should be respected.

In defining the reasons and conditions for granting access to Europol, the following should be taken into account.

In view of the various tasks of Europol, a general limitation of the access to the VIS data to a specific case may be too strict; especially in some analysing processes the notion "case" may not always be realistic. Furthermore, a distinction in access conditions should be made when it concerns access on behalf of an analysis process and access for other purposes. These other purposes should be in line with a specific aspect of Europol's objective, which aspect should be clearly defined. For example, should access to the VIS data only be possible to check whether personal data already processed by Europol are correct, or is access also allowed to add or supplement personal data in Europol's information systems. The discussions and decisions on the future role of Europol will be important for defining these access conditions.

Furthermore, and in order to justify the exception to the purpose principle limitation, such a use of VIS data needs to substantially contribute to Europol's task⁵.

These conditions should also provide for similar safeguards as referred to in Article 5(1) of the proposed Council Decision.

The JSB urges the Council to amend the proposed Council Decision in the light of the suggestions and remarks set out in this opinion. The JSB also reaffirms that it is ready to contribute to the ensuing discussion in a constructive manner.

Done at Brussels

26 June 2006

Emilio Aced Fález

Chairman

⁵ See also the opinion of the EDPS, dated 20 January 2006, Chapter 2.2