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Subject : a) Draft Regulation of the European Parliament and of the Council concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas  
b) Council Decision concerning access for consultation of the Visa Information System (VIS) by designated authorities of Member States and by Europol for the purposes of the prevention, detection and investigation of terrorist offences and of other serious criminal offences

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**I INTRODUCTION**

The outstanding issues on the draft Regulation concerning the Visa Information System (VIS) as well as the draft Decision concerning access for consultation of the Visa Information System (VIS) by designated authorities of Member States and by Europol for the purposes of the prevention, detection and investigation of terrorist offences and of other serious criminal offences have been extensively discussed during the last months in the responsible bodies of the Council and with the European Parliament (EP).

The detailed discussions on the draft Decision are reflected in the so called “bridging clause” (Art. 1 B) of the VIS Regulation, as this provision opens the possibility of allowing for access to the VIS under a third pillar instrument.

The EP has also linked the issue of access to the VIS for the purposes of the prevention, detection and investigation of terrorist offences and of other serious criminal offences to the third pillar draft Framework Decision on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters: The EP is of the opinion that the Decision for access to the VIS shall only apply when the Framework Decision has entered into force. Based on a revised draft the Article 36 Committee on 23 March 2007 had an intensive exchange of views on the draft Framework Decision. After a meeting with the EP Rapporteur on this Council Framework Decision, Madame Roure, the revised draft was extensively discussed in the MDG.

Following a technical Trialogue meeting on 21 and 22 March 2007, a political Trialogue took place on 28 March 2007 involving Minister for the Interior Dr. Schauble, Vice-President Frattini and the Rapporteur on the draft Regulation and the draft Decision Baroness Ludford. Progress was made on a number of issues, including in particular the misuse of visas, keeping of VIS data in national files, use of data for reporting and statistics, comitology, penalties as well as the procedure of access to the VIS. The Trialogue has therefore significantly reduced the number of issues outstanding. The Presidency believes there is scope for reaching an understanding on other issues as well in the near future and that a first reading agreement with the EP on the VIS Regulation is now a realistic possibility. The Presidency has also been encouraged by the reactions by delegations on a number of issues at the Visa Working Party on 29 March 2007.

The Presidency invites Coreper to examine the questions outstanding set out under II below.

## II QUESTIONS SUBMITTED TO COREPER

### A. The systematic use of fingerprints at border controls (Article 16 of the Regulation).

Article 16 concerns access to data entered in the VIS for verification at the external border crossing points. The EP believes it should be possible to access the data on the basis of the number of the visa sticker in combination with verification of fingerprints or on the basis of the visa sticker alone. The Council has not established its position on the matter. Some delegations (FI/PL/SI) support the position of the EP whereas the Commission and certain delegations (including FR/ES/LU) are of the view that access should always involve a full check using the visa sticker in combination with verification of finger prints.

It should be kept in mind that Article 16 is only about **how** and for what purpose access takes place and does not in itself contain a legal obligation to access to the VIS. Moreover, previous discussions showed that the time aspect plays an important role in determining the feasibility of systematic use of fingerprint data during checks at external border crossing points. The time it takes to search the VIS using the number of the visa sticker in combination with a check on the fingerprints of the holder of the visa largely depends on technical capacities. The Presidency therefore suggests to determine the date for a systematic use of fingerprints in a comitology procedure and proposes the following text of Article 16(1):

"(1) For the sole purpose of verifying the identity of the holder of the visa and/or the authenticity of the visa and/or whether the conditions for entry to the territory of the Member States according to Article 5 of the Schengen Borders Code are fulfilled the competent authorities for carrying out checks at external border crossing points in accordance with the Schengen Borders Code shall have access to search using the number of the visa sticker, in combination with verification of the fingerprints of the holder of the visa.

At land-border and sea-border crossing points the search may be carried out using only the number of the visa sticker, until a date to be determined in accordance with the procedure referred to in Article 39(2a) and following an assessment of the appropriate procedures and/or technical solutions to enable excessive delay at such border crossing points due to the verification of fingerprints to be avoided."

*Coreper is invited to consider the issue with a view to establishing a line for the purpose of further contacts with the EP.*

## **B. The transfer of data to third countries (Article 25B of the Regulation)**

The EP has expressed the view that it should not be possible to transfer data processed in the VIS to third countries and international organisations. In the context of the draft Regulation, and without prejudice to discussions on transfer to third countries and international organisations under the draft Decision, the Commission and Member States' delegations believe that such transfer should be possible to prove the identity of the person concerned i.a. for the purpose of returning illegal immigrants and can agree on the following Article 25B on communication of data to third countries or international organisations:

"Data processed in the VIS pursuant to this Regulation shall not be transferred or made available to a third country or to an international organisation, unless this is necessary in individual cases in order to prove the identity of third-country nationals in accordance with the relevant provisions of Community law and the national law of the Member State which transferred or made available the data, including the legal provisions relevant for data protection and subject to the approval of the Member State(s) which entered the data into the VIS."

The EP has strongly objected to this and in particular thought the provision was inappropriate as long as the return directive has not been adopted.

*Coreper is invited to consider its position in relation to the EP on this issue.*

## **C. Misuse**

The EP has indicated it can agree to the following declaration suggested by the Presidency:

"The European Parliament and the Council underline the necessity to tackle the phenomenon of visa misuse in a comprehensive manner and are of the opinion that the cases of misuse which have emerged or came to light after the expiry of the validity of a visa should be carefully considered in the context of the Visa Code proposal. Following an agreement on the Visa Code, they invite the Commission to propose, if necessary, suitable amendments to the VIS Regulation.

Furthermore, the European Parliament and the Council invite the Commission to report not later than three years after the start of operations of the VIS on the situation as regards misuse by persons issuing invitations, and present, if necessary, suitable proposals for amendments."

*Coreper is invited to agree to this declaration.*

## **D. The bridging clause (Article 1B of the Regulation) and the Decision**

Article 1B of the Regulation reads at present as follows (not agreed with the EP yet):

- "1. In accordance with the Council Decision concerning access for consultation of the Visa Information System (VIS) by designated authorities of Member States and by Europol for the purposes of the prevention, detection and investigation of terrorist offences and of other serious criminal offences, the designated authorities of Member States may access the data kept in the Visa Information System referred to in Articles 6 to 12 if there are reasonable grounds to consider that consultation of VIS data in a specific case will substantially contribute to the prevention, detection or investigation of any of the above-mentioned criminal offences. According to the Council Decision concerning access for consultation of the Visa Information System (VIS) by designated authorities of Member States and by Europol for the purposes of the prevention, detection and investigation of terrorist offences and of other serious criminal offences, Europol may access these VIS data. The provisions concerning the protection of personal data shall be strictly observed.
2. This Regulation is without prejudice to the communication of information on any criminal activity, detected by the authorities referred to in Article 4 in the course of their duties, to the responsible authorities for the purposes of preventing, investigating and prosecuting the related criminal offences."

The EP explained at several occasions, and most lately at the ministerial Trialogue, that it had the following concerns regarding the VIS Council Decision and therefore the bridging clause (Article 1B):

- Central access points.
- Link to the Framework Decision on Data Protection.
- Transfer to third countries.
- Other provisions similar to the VIS Regulation to be included in the Council Decision: search criteria, reply upon a hit, amendment of data, training, keeping of VIS data in national files, data security, liability, self-monitoring, penalties and right of information.

## 1. Central access points

The EP insists that a unit different from the unit requiring access to the VIS data for its operational activities checks beforehand whether the conditions of Article 5 are fulfilled. The EP thinks this requirement is necessary, as the VIS in its view mainly is a first pillar database, the main purpose of which were not the prevention, detection and investigation of terrorist offences and of other serious criminal offences. However, the EP would accept that in emergencies this check could be done after the search. Also the EP does not require that there be only one central access point per Member State but seems to suggest that every additional access point (beyond the first) should be justified.

If the Council could accept that a different unit needs to check the request for access before the search can be done, the Presidency finds that such a system should nonetheless remain practical and take account of national structures. Therefore Member States should be allowed to define independently how many access points they require. In cases of a serious and imminent threat the central access points should only have a technical function, process the requests immediately and only do the verification afterwards.

## 2. Transfer to third countries

The EP is not in favour of allowing the transfer of VIS data to third countries [but might be able to accept it for exceptional cases of urgency]. The transmission of national VIS data to third countries is unaffected by the VIS Regulation and the Council Decision.

The current version of the draft Council Decision foresees that VIS data can be transferred to third countries or international organisations subject to the agreement of the Member State owning the data. As the question was asked whether such a condition would in practice be very different from asking the Member State owning the data to transfer his national data to the concerned third country, it could be accepted, that the transfer to third parties by another Member State than the data owner, is limited to urgent cases only.

### 3. Framework Decision on Data Protection

The EP insists on the link between the VIS Council Decision and the Council Framework Decision on Data Protection as it was set out in the Commission proposal (VIS Decision will only apply when the Framework Decision has entered into force).

The Presidency has informed the EP of its intention to make substantial progress in this matter, which would mean that the Framework Decision could be adopted before the VIS is operational. However, the Presidency has also explained that a successful outcome of the negotiations within such a timeframe can never be guaranteed. As there are already sufficient provisions on the issue of data protection in the draft VIS Council decision the Presidency is of the opinion, that there is no need for a link to the Framework Council Decision.

### 4. Other provisions

The EP suggested at the technical triologue that a number of provisions of the Regulation (see document 7695/07 VISA 102 CODEC 267 COMIX 299) be made applicable on the access to VIS data pursuant to the VIS Council Decision. It concerns the provisions on the ex officio amendment of data (amendment of data (Article 21(2)), training (Article 24(4a)), keeping of VIS data in national files (Art. 25A), data security (Article 26), liability (Article 27), self-monitoring (Article 28), penalties (Article 29) and right of information (Article 30)).

As these provisions seem proportional, the Presidency suggests to integrate them into the VIS Council Decision.

In addition, a draft revision of the text of the VIS Council Decision that was sent by the rapporteur after the last political triologue, more issues appear related to the search criteria and the reply upon a hit.

The EP draft wording implies that, next to the ex ante control before the search can be done, the search be based on at least two data fields (except where this would be impossible) and the reply upon a hit be done in two steps (see original proposal of the Commission - Article 5(2) and (3)).

In order to set out a practical way of accessing the VIS the Presidency suggests not to accept this additional provisions. The presidency has therefore already presented a number of examples to the EP that show clearly that it has to be possible to access all VIS data with only one search criteria (and especially the inviting party) already by the first hit.

### III CONCLUSION

Coreper is invited to examine the above issues with a view to reaching a first reading agreement with the European Parliament on the draft Regulation and reaching agreement on the draft Council Decision for the purpose of the adoption of the two instruments in the near future and to decide to which extent the outstanding issues should be submitted to the forthcoming JHA Council.

a) Concerning the VIS Regulation Coreper is invited:

- to consider the issue of Art. 16 with a view to establishing a line for the purpose of further contacts with the EP,
- to consider its position on Art. 25 B in relation to the EP, and
- to agree to the proposed declaration concerning the misuse (former Art. 11 A).

b) Concerning the bridging clause (Article 1B of the VIS Regulation) and therewith the Decision concerning the access to the VIS, Coreper is invited to examine if a compromise can be reached with the EP on the following basis:

- The requests for accessing the VIS will be checked before the search by central access points.
- The number of central access points is up to national law and depends on the organisational and the administrative structure of each Member State.
- In cases of a serious and imminent threat the central access points only have a technical function. They will process the requests immediately and only do the verification afterwards.
- The transmission of national VIS data to third parties is unaffected by the VIS Regulation and the Council Decision.
- The transfer of data to third parties by another Member State than the data owner, is possible in urgent cases subject to the consent of the data owner.



- The Council will integrate additional provisions on data protection that are already set out in the VIS Regulation (data security, liability, training, etc.).
  - Further additional provisions related e.g. to the search criteria and the reply on a hit are not accepted by the Council.
  - The EP will lift the link to the Framework Decision on Data Protection.
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