



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 22 December 2006

**14196/2/06
REV 2**

LIMITE

**CATS 157
ENFOPOL 175
EUROPOL 90
VISA 267
COMIX 861**

NOTE

from : Presidency
to : delegations

No. prev. doc. : 11405/1/06 REV 1 CATS 139 ENFOPOL 144 EUROPOL 62 VISA 177 COMIX 634
10627/06 CATS 126 ENFOPOL 129 EUROPOL 53 VISA 159 COMIX 558
9641/06 CATS 105 ENFOPOL 103 EUROPOL 48 VISA 136 COMIX 481
15142/05 CATS 83 ENFOPOL 174 EUROPOL 38 VISA 300 COMIX 803

Subject : Proposal for a Council Decision concerning access for consultation of the Visa Information System (VIS) by the 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
- proposals for re-drafting

Introduction

1. The Presidency presents in annex a re-draft of the above-mentioned proposal, taking into account the results of the discussions at the PCWP of 24 November 2006. Amendments are set out in bold text and/or are indicated in footnotes. This cover note sets out the position of the EP as explained at the ministerial trilogue on 4 December 2006.

2. As the discussions concerning the Schengen-relevance of this proposal are still on-going at Coreper level, the provisions and reservations related thereto will not be dealt with by the PCWP. The issue concerning the denomination of the authorities requiring access to the VIS (see Articles 1 and 2 and footnote 17) will be submitted to the Article 36 Committee meeting of 25-26 January 2007 and will therefore also not be dealt with by the PCWP.

Discussions with the EP

3. In the ministerial trilogue of 4 December, the EP rapporteur confirmed that the essential elements of the bridging clause for the EP are the following:
 - (a) access on a case-by-case basis and
 - (b) prior entry into force of the Framework Decision on Data Protection
 - (c) central access point(s)
 - (d) prior written or electronic request
4. Concerning (a), the draft seems to satisfy the EP requirement, even if the EP would have preferred the original Commission proposal, where the explanation of what constitutes "access in a specific case" would be included in the Article and not just in the recital.
5. The link with the Framework Decision on Data Protection is a political issue that cannot be solved by the PCWP and will therefore be dealt with at a higher level.
6. As for (c) and (d), the EP rapporteur explained that it would be acceptable to have more than one access point per Member State, even though the number should still be limited. However, the EP rapporteur stated that these access points could not be the units needing the access to the VIS data. The latter units should always get an authorisation, following a prior written or electronic request, from another unit, i.e. (one of) the access point(s). The EP is of the opinion that this will not lead to a waste of time or resources and states that, as the VIS is not a criminal database, checking the VIS should be a second line measure anyway.

Proposal for a

COUNCIL DECISION¹

concerning access for consultation of the Visa Information System (VIS) by the 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 COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on European Union, and in particular Article 30 (1) (b) and Article 34 (2) (c) thereof,

Having regard to the proposal from the Commission²,

Having regard to the opinion of the European Parliament³,

Whereas:

- (1) Council Decision 2004/512/EC of 8 June 2004 establishing the Visa Information System (VIS)⁴ established the VIS as a system for the exchange of visa data between Member States. The establishment of the VIS represents one of the key initiatives within the politics of the European Union in the area of Justice, Freedom and Security. The objectives of the VIS are to contribute towards improving the administration of the common visa policy and towards internal security and to combating terrorism.
- (2) During its meeting of 7 March 2005 the Council adopted conclusions stating that ‘in order to achieve fully the aim of improving internal security and the fight against terrorism’, Member State authorities responsible for internal security should be guaranteed access to the VIS, ‘in the course of their duties in relation to the prevention, detection and investigation of criminal offences, including terrorist acts and threats’, ‘subject to strict compliance with the rules governing the protection of personal data’.⁵

¹ Parliamentary reservation DK, FR, IE, NL, SE, general scrutiny reservations DK, FR, IT, CY, HU, MT, FI, linguistic reservations FR, HU, SK.

² OJ C , , p. .

³ OJ C , , p. .

⁴ OJ L 213, 15.6.2004, p. 5.

⁵ Conclusions of the meeting Council Competitiveness 7.3.2005, doc. 6811/05.

- (3) It is essential in the fight against terrorism and other serious criminal offences for the relevant services to have the fullest and most up-to-date information in their respective fields. The Member States' competent national services need information if they are to perform their tasks. The information contained in the VIS may be important for the purposes of preventing and combating terrorism and serious crimes and should therefore be available for consultation by the authorities responsible for internal security.
- (4) Moreover, the European Council has stated that Europol has a key role with respect to cooperation between Member States' authorities in the field of cross-border crime investigation in supporting Union-wide crime prevention, analyses and investigation. Consequently, Europol should also have access to VIS data within the framework of its tasks and in accordance with the Convention of 26 July 1995 on the Establishment of a European Police Office⁶.
- (5) This Decision complements the 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 2005/XX/EC⁷ (hereinafter referred to as the "VIS Regulation") insofar as it provides for a legal base under Title VI of the Treaty on European Union authorizing the access to the VIS for authorities responsible for internal security and by Europol.
- (6) It is necessary to designate the competent Member States' authorities responsible for internal security and to keep a list of the units, duly authorised staff of which are to have access for consultation to the VIS data for the specific purposes of the prevention, detection and investigation of terrorist offences and other serious criminal offences as referred to in the Framework Decision on the European Arrest Warrant, to the extent necessary for the performance of their tasks. It is essential to ensure that the duly empowered staff of the units with a right to access the VIS is limited to those who 'have a need to know' and possess appropriate knowledge about data security and data protection rules.⁸
- (7) For the purposes of protection of personal data, and in particular to exclude routine access, the consulting of VIS data should be subject to certain conditions. It is thus important that such access is proportional and only allowed on a case-by-case basis, it meaning that any consultation of the data should be connected to a specific event, or to a danger associated with serious crime, or to a specific person(s) in respect of whom there are serious grounds for believing that he/she (they) will commit terrorist offences or serious criminal offences or that he/she (they) has (have) a relevant connection with such a person(s).

⁶ OJ C 316, 27.11.1995, p. 2, as last amended by the Protocol, drawn up on the basis of Article 43(1) of the Convention on the establishment of a European Police Office (Europol), amending that Convention - OJ C 2, 6.1.2004, p. 3.

⁷ OJ C, p

⁸ DE proposes to delete "as referred to in the Framework Decision on the EAW", in view of its reservation on Article 2.

- (7a) Also, the authorities responsible for internal security and Europol should thus only search data contained in the VIS when they have reasonable grounds to believe that such a search will provide information that will substantially assist them in preventing, detecting or investigating serious crime.⁹
- (7b) (deleted)
- (7c) The Commission has submitted a proposal to the Council for a Framework Decision on the protection of personal data processed in the framework of police and judicial co-operation in criminal matters¹⁰, according to which it should be approved by the end of 2006 and be applied to the processing of personal data pursuant to this Decision. However, until the rules set out in the Framework Decision are applicable, adequate provisions have to be provided for to ensure the necessary data protection.
- (8) The effective monitoring of the application of this Decision should be evaluated at regular intervals.
- (9) Since the objectives of the action to be taken, namely the creation of obligations and conditions for access for consultation of VIS data by Member States' authorities responsible for internal security and by Europol cannot be sufficiently achieved by the Member States and can, therefore, by reason of the scale and effects of the action, be better achieved at the level of the European Union, the Council may adopt measures in accordance with the principle of subsidiarity, referred to in Article 2 of the Treaty on European Union and defined in Article 5 of the Treaty establishing the European Community. In accordance with the principle of proportionality, this Decision does not go beyond what is necessary in order to achieve those objectives.
- (10) In accordance with Article 47 of the Treaty on the European Union, this Decision does not affect the competences of the European Community, in particular as exercised in the VIS Regulation and in Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data¹¹.
- (11) The United Kingdom is taking part in this Decision, in accordance with Article 5 of the Protocol integrating the Schengen acquis into the framework of the European Union annexed to the EU Treaty and to the EC Treaty, and Article 8 (2) of Council Decision 2000/365/EC of 29 May 2000, concerning the request of the United Kingdom of Great Britain and Northern Ireland to take part in some of the provisions of the Schengen acquis¹².
- (12) Ireland is taking part in this Decision in accordance with Article 5 of the Protocol integrating the Schengen acquis into the framework of the European Union annexed to the EU Treaty and to the EC Treaty, and Article 6 (2) of Council Decision 2002/192/EC of 28 February 2002 concerning Ireland's request to take part in some of the provisions of the Schengen acquis¹³.

⁹ AT reservation on the deletion of "based on factual indications" (see also comment on Art. 5)

¹⁰ COM(2005)475

¹¹ OJ L 281, 23.11.1995, p. 31.

¹² OJ L 131, 1.6.2000, p. 43.

¹³ OJ L 64, 7.3.2002, p. 20.

- (13) As the United Kingdom and Ireland do not participate in the common visa policy and consequently are not Member States to which the VIS Regulation applies, authorities responsible for internal security of these Member States do not have direct access to the VIS for the purposes of this Decision. However, it is appropriate that visa information is exchanged also with the authorities responsible for internal security in the United Kingdom and Ireland. By this Decision, Member States to which the VIS Regulation applies agree that VIS data can be made available by any of them to the authorities responsible for internal security in the United Kingdom and Ireland.
- (14) As regards Iceland and Norway, this Decision constitutes, with the exception of Article 7, a development of provisions of the Schengen acquis within the meaning of the Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the association of those two States with the implementation, application and development of the Schengen acquis¹⁴, which fall within the area referred to in Article 1, point B of Council Decision 1999/437/EC of 17 May 1999 on certain arrangements for the application of the Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the association of those two States with the implementation, application and development of the Schengen acquis¹⁵.
- (15) As regards Switzerland, this Decision constitutes, with the exception of Article 7, a development of the provisions of the Schengen acquis within the meaning of the Agreement signed by the European Union, the European Community and the Swiss Confederation concerning the association of the Swiss Confederation with the implementation, application and development of the Schengen acquis which fall within the area referred to in Article 1, point B of Council Decision 1999/437/EC of 17 May 1999 read in conjunction with Article 4 (1) of the Council Decision 2004/849/EC on the signing, on behalf of the European Union, and on the provisional application of certain provisions of that Agreement¹⁶.
- (15a) This Decision constitutes an act building on the Schengen acquis or otherwise related to it within the meaning of Article 3(2) of the Act of Accession.
- (16) This Decision respects the fundamental rights and observes the principles reflected in particular in the Charter of Fundamental Rights of the European Union.

¹⁴ OJ L 176, 10.7.1999, p. 36.

¹⁵ OJ L 176, 10.7.1999, p. 31.

¹⁶ OJ L 368, 15.12.2004, p. 26.

HAS DECIDED AS FOLLOWS:

Article 1

Subject matter and scope

This Decision lays down the conditions under which Member States' authorities responsible for internal security¹⁷ and the European Police Office (Europol) may obtain access for consultation of the Visa Information System for the purposes of the prevention, detection and investigation of terrorist offences and of other serious criminal offences.

Article 2

Definitions

1. For the purposes of this Decision, the following definitions shall apply:
 - (a) 'Visa Information System (VIS)' means the Visa Information System as established by Council Decision 2004/512/EC;
 - (b) 'Europol' means the European Police Office as established by the Convention of 26 July 1995 on the Establishment of a European Police Office ("the Europol Convention");
 - (c) 'terrorist offences' means the offences under national law which correspond or are equivalent to the offences in Articles 1 to 4 of Council Framework Decision 2002/475/JHA on combating terrorism¹⁸;
 - (d) 'serious criminal offences' means the forms of crime which correspond or are equivalent to those referred to in Article 2(2) of the Framework Decision of 13 June 2002 on the European Arrest Warrant;¹⁹
 - (e) 'authorities responsible for internal security' means authorities which are responsible for the prevention, detection or investigation of terrorist offences or of other serious criminal offences and designated by the Member States in accordance with Article 3 of this Decision.
2. The definitions in the VIS Regulation shall also apply.

¹⁷ UK suggestion: "... under which Member States' *designated* authorities and the European Police Office (Europol) ...". BE, IE, IT, MT, NL, AT support.

¹⁸ OJ L 164, 22.6.2002, p.3.

¹⁹ DE study reservation.

Article 3

Authorities responsible for internal security

1. Member States shall designate the authorities responsible for internal security which are authorised to directly access VIS data pursuant to this Decision.
- 1a. Within [three] months after this Decision enters into force, each Member State shall notify in a declaration to the General Secretariat of the Council and the Commission the list of authorities designated pursuant to paragraph 1.
- 1b. (deleted)
2. A Member State may at any time amend or replace its declaration by another declaration.

The Commission shall publish the declarations in the *Official Journal of the European Union*.

Article 4

Access points to the VIS

1. At national level, each Member State shall keep a list of the units within the authorities designated pursuant to Article 3(1) of this Decision which shall have access to the VIS for consultation for the purpose of this Decision. Such access shall be exercised by the duly empowered staff of these units, as referred to in Article 10 of this Decision.
2. (deleted)
3. (deleted)

Article 5²⁰

Conditions for access to VIS data by authorities responsible for internal security of Member States to which the VIS Regulation applies

1. Access to the VIS for consultation by authorities responsible for internal security shall take place within the scope of their powers and if the following conditions are met:
 - (a) (deleted)²¹
 - (b) access for consultation must be necessary for the purpose of the prevention, detection or investigation of terrorist offences or other serious criminal offences and
 - (c) access for consultation must be linked to a specific case and;
 - (d) if there are reasonable grounds²², to consider that consultation of VIS data will substantially contribute to the prevention, detection or investigation of any of the criminal offences in question;

2. Consultation of the VIS shall be limited to searching with any of the following VIS data in the application file:
 - (a) surname, surname at birth (earlier surname(s)); first names; sex; date, place and country of birth;
 - (b) current nationality of the applicant; nationality at birth;
 - (c) type and number of the travel document, the authority which issued it and the date of issue and of expiry;
 - (d) main destination and duration of the intended stay;
 - (e) purpose of travel;
 - (f) date of arrival and departure;
 - (g) border of first entry or transit route;
 - (h) residence;
 - (i) (deleted)
 - (j) fingerprints;
 - (k) type of visa and the number of the visa sticker
 - (l) details of the person issuing an invitation and/or liable to pay costs of living during the stay

²⁰ IE and UK want this Article to be applicable to them.

²¹ COM reservation as this does away with the prior check.

²² AT wishes to maintain "based on factual indications".

and shall, in case of a hit, give access to all of the above data as well as to

- (a) any other data taken from the application form;
- (b) the data entered in respect of any visa issued, refused, annulled, revoked or extended.

Article 6²³

Conditions for access to VIS data by authorities responsible for internal security of a Member State to which the VIS Regulation does not apply

1. Access to the VIS for consultation by authorities responsible for internal security of a Member State to which the VIS Regulation does not apply shall take place within the scope of their powers and
 - (a) subject to the same conditions as referred to in Article 5 (1) (b) to (d); and
 - (b) by a duly motivated written or electronic request to an authority responsible for internal security of a Member State to which the VIS Regulation applies; that authority shall then request its national central access point to consult the VIS.
2. A Member State to which the VIS Regulation does not apply shall make its visa information available to Member States to which the VIS Regulation applies, on the basis of a duly reasoned written or electronic request, subject to compliance with the conditions laid down in Article 5 (1) (b) to (d).

Article 7

Conditions for access to VIS data by Europol²⁴

1. Access to the VIS for consultation by Europol shall take place within the limits of its mandate and
 - (a) when necessary for the performance of its tasks pursuant to Article 3(1), point 2 of the Europol Convention and for the purposes of a specific analysis as referred to in Article 10 of the Europol Convention ; or
 - (b) when necessary for the performance of its tasks pursuant to Article 3(1), point 2 of the Europol Convention and for an analysis of a general nature and of a strategic type, as referred to in Article 10 of the Europol Convention, provided that VIS data is rendered anonymous by Europol prior to such processing and retained in a form in which identification of the data subjects is no longer possible.
2. Article 5 (2) and (3) of this Decision apply accordingly.

²³ IE, UK find this provision unworkable as it does not provide a quick and efficient access and unnecessarily burdens other MS. FR study reservation.

²⁴ IE, UK reservation on Europol access as this is not consistent with the approach taken in Article 6.

3. Europol shall designate a specialised unit for the purpose of this Decision with duly empowered Europol officials to act as the central access point to access the VIS for consultation.
4. Processing of information obtained by Europol from access to the VIS shall be subject to the consent of the Member State which has entered that data in the VIS. Such consent shall be obtained via the Europol national unit of that Member State.

Article 8

Protection of personal data

1. The processing of personal data consulted under this Decision shall be subject to the following rules and to the national law of the consulting Member State. With regard to the processing of personal data consulted under this Decision, each Member State shall ensure an adequate data protection level in its national law which at least corresponds to that resulting from the Council of Europe Convention of 28 January 1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data and, for those Member States which have ratified it, the Additional Protocol of 8 November 2001 to that Convention, and shall take into account Recommendation No. R (87) 15 of 17 September 1987 of the Committee of Ministers of the Council of Europe Regulating the Use of Personal Data in the Police Sector.
2. The processing of personal data by Europol pursuant to this Decision shall be in accordance with the Europol Convention and the rules adopted in implementation thereof and supervised by the independent joint supervisory body established by Article 24 of the Convention.
- 2a. Personal data obtained pursuant to this Decision from the VIS shall only be processed for the purposes of the prevention, detection, investigation, prosecution and adjudication of terrorist offences or other serious criminal offences.
3. (deleted)
4. (deleted)
5. Notwithstanding paragraphs 1 and 2, personal data obtained pursuant to this Decision from the VIS shall not be transferred or made available to a third country or to an international organisation. **By way of exception, such data may be transferred or made available to a third country or an international organisation, exclusively for the purposes and under the conditions set out in Article 5(1) of this Decision, subject to the consent of the Member State having entered the data into the VIS and on the basis of an agreement between the respective Member State and the third country or international organisation in question. Such an agreement shall foresee that the data shall only be transferred to other law enforcement authorities of countries that ensure an adequate level of protection of personal data.**²⁵

²⁵ The other option for this paragraph is to delete the last sentence.

6. The competent body or bodies, which in accordance with national law are charged with the supervision of the processing of personal data by the authorities designated under this Decision shall monitor the lawfulness of the processing of personal data pursuant to this Decision.²⁶
- 6a. The bodies referred to in paragraph 6 shall ensure that at least every four years an audit of the processing of personal data pursuant to this Decision is carried out, where applicable according to international auditing standards.
7. Member States²⁷ and Europol shall allow the competent body or bodies referred to in paragraphs 2 and 6 to obtain the necessary information to enable them to carry out their tasks in accordance with this article.
- 7a. Each Member State shall be liable in accordance with its national law for any injury caused to a person as a result of processing of data in violation of the provisions of this Decision.

Article 9

Costs

Each Member State and Europol shall set up and maintain at their expense, the technical infrastructure necessary to implement this Decision, and be responsible for bearing the costs resulting from access to the VIS for the purposes of this Decision.

Article 10

Keeping of records

1. Each Member State and Europol shall ensure that all data processing operations resulting from access to the VIS for consultation pursuant to this Decision are recorded for the purposes of checking whether the search is admissible or not, for the purpose of monitoring the lawfulness of data processing, for self-monitoring, ensuring the proper functioning data integrity and security. Those records shall show the purpose of the access for consultation referred to in Article 5(1)(b) and in Article 7(1)(a) or (b) of this Decision, the date and²⁸ time of access, the data used for consultation and the type of data consulted, and the name of the authority accessing and consulting the data. In addition, each Member State and Europol shall, according to national rules or the rules of the Europol Convention, keep records of the persons consulting data²⁹ with the help of relevant codes³⁰.

²⁶ **Study reservation DK.**

²⁷ COM reservation on the deletion of "the Commission" in this sentence.

²⁸ **AT proposes to add "exact".**

²⁹ **BE technical study reservation.**

³⁰ **AT proposes to replace the last part of this sentence by "also record the identifying mark of the official who carried out the search and of the official who ordered the search or supply." DK, NL study reservation on this proposal.**

2. Such records containing personal data shall be used only for the data protection monitoring of the legality of data processing as well as to ensure data security. Only such records containing data of a non-personal nature may be used for the monitoring and evaluation referred to in Article 12 of this Decision.
3. These records shall be protected by appropriate measures against unauthorised access and abuse and deleted after a period of one year after the five year retention period referred to in Article 20 (1) of the VIS Regulation has expired, unless they are required for monitoring procedures referred to in paragraph 2 of this Article which have already begun.

Article 11

Advisory Committee

(deleted)

*Article 12*³¹

Monitoring and evaluation

1. The Commission shall ensure that systems are in place to monitor the functioning of the VIS pursuant to this Decision against objectives, in terms of outputs, cost-effectiveness and quality of service.
2. Two years after the VIS starts operations and every two years hereafter, the Commission shall submit a report to the European Parliament and to the Council on the technical functioning of the VIS pursuant to this Decision. That report shall include information on the performance of the VIS against quantitative indicators predefined by the Commission.
3. Four years after the VIS starts operating and every four years thereafter, the Commission shall produce an overall evaluation of the VIS pursuant to this Decision. This evaluation shall include an examination of the results achieved against objectives and an assessment of the continuing validity of the underlying rationale behind this Decision and any implications for future operations. The Commission shall submit the evaluation reports to the European Parliament and the Council.
4. The Member States and Europol shall provide to the Commission the necessary information to enable them to carry out its tasks in accordance with this article. This information may never **jeopardise working methods or** include information that reveals sources, staff members or investigations of the authorities responsible for internal security.

³¹ FR and SE propose to replace "Commission" by "Council" in paragraphs 2 and 3.

Article 13

Entry into force and date of application

1. This Decision shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.
2. This Decision shall apply from the date to be determined by the Council once the Commission has informed the Council that the VIS Regulation has entered into force and is applicable.

The General Secretariat of the Council shall publish that date in the *Official Journal of the European Union*.

Done at Brussels,

For the Council

The President
