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THE EUROPEAN UNION**

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NOTE

from : Presidency
to : Police Cooperation Working Party (Mixed Committee EU/Iceland, Norway and Switzerland)

No. prev. doc. : 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

1. The Presidency presents in annex a revised version of the above-mentioned proposal, taking into account the outcome of the discussions in the Article 36 Committee of 3 July and of the Police Cooperation Working Party of 6 July 2006 on document 10627/06 CATS 126 ENFOPOL 129 EUROPOL 53 VISA 159 COMIX 558.
2. Issues that will need further in-depth discussion include data protection provisions (link with Framework Decision / detail of provisions in Article 8), keeping of records (establish parallel with VIS Regulation or SIS II) and monitoring and evaluation (see VIS Regulation and SIS II)

3. Furthermore, the Presidency invites all delegations to urgently finalise national consultations so that outstanding study reservations can be lifted or clarified.

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. One of the objectives of the VIS is 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 FR, SE, general scrutiny reservations DK, EE, EL, FR, IT, CY, LT, HU, MT, FI, CH, linguistic reservations FR, 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 define the competent Member States' authorities responsible for internal security and the (...) access points, 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 the types of crime and the offences in respect of which Europol is competent, to the extent necessary for the performance of their tasks.
- (7) For the purposes of protection of personal data, and in particular to exclude routine access, the processing of VIS data should only be in specific cases. **A specific case exists in particular when the access for consultation is connected to a specific event determined by date and place, or to a grave danger associated with serious crime, or to a specific person or specific persons in respect of whom there are serious grounds for believing that he or she will commit terrorist offences or serious criminal offences or that he or she has a relevant connection with such a person or groups of persons.**
- (7a) The authorities responsible for internal security and Europol should thus only search data contained in the VIS on the basis of reasonable grounds and clear/factual indications. **Access to the VIS shall be proportional and limited to those staff that have a need to know.**
- (7b) **Before being authorised to process data stored on the VIS, staff of the authorities with a right to access the VIS shall have appropriate knowledge about data security and data protection rules.**

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) 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 data⁸.
- (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 acquis⁹.
- (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 acquis¹⁰.
- (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.

⁸ OJ L 281, 23.11.1995, p. 31.

⁹ OJ L 131, 1.6.2000, p. 43.

¹⁰ OJ L 64, 7.3.2002, p. 20.

- (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 acquis¹¹, 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 acquis¹².
- (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 Agreement¹³.
- (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.

HAS DECIDED AS FOLLOWS:

Article 1

Subject matter and scope

This Decision lays down the conditions under which Member States' authorities responsible for internal security¹⁴ 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.

¹¹ OJ L 176, 10.7.1999, p. 36.

¹² OJ L 176, 10.7.1999, p. 31.

¹³ OJ L 368, 15.12.2004, p. 26.

¹⁴ UK suggestion: "... under which Member States' designated authorities ~~responsible for internal security~~ and the European Police Office (Europol) ...". BE, IE, IT, MT, NL support.

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 terrorism¹⁵;
 - (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;¹⁶
 - (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.

Article 3

Authorities responsible for internal security

1. Member States shall designate the authorities responsible for internal security which are authorised to¹⁷ 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*.

¹⁵ OJ L 164, 22.6.2002, p.3.

¹⁶ DE reservation.

¹⁷ **FR proposes to add "directly"; DE, EL, ES, IT, LV, PT, SI, SK, NO support; NL study reservation.**

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) the duly empowered staff of¹⁸ which shall have access to the VIS for consultation for the purpose of this Decision.
2. (deleted)
3. (deleted)

Article 5¹⁹

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)²⁰
 - (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; (...)
 - (d) if there are reasonable grounds, based on **[clear]/[factual]** indications²¹, to consider that consultation of VIS data will substantially²² contribute to the prevention, detection or investigation of any of the criminal offences in question;

¹⁸ **DE proposes to delete the words "the duly empowered staff of"; ES, NL and SE support.**

¹⁹ DE study reservation. IE and UK want this Article to be applicable to them.

²⁰ COM reservation as this does away with the prior check.

²¹ ES, FR wish to use the term "indices réelles" for "factual indications". MT wishes to delete "factual indications".

²² ES, FR reservation.

2. Consultation of the VIS shall be limited to searching with **any of** the following VIS data²³ in the application file and shall, in case of a hit, give access to all of these data:
- (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)²⁴
 - (j) fingerprints;
 - (k) type of visa and the number of the visa sticker.
- 3²⁵ 26. If the first consultation of the data listed in paragraph 2 shows that any of those data are recorded in the VIS, and if further information is necessary in the specific case, the authorities responsible for internal security shall have access to consult the following additional data contained in the application file, as well as in linked application file(s):
- (a) any other data taken from the application form;
 - (b) the data entered in respect of any visa issued, refused, annulled, revoked or extended.

²³ CH suggests to add the possibility of searching on the "sponsor". DE, ES and FR supports.

²⁴ Photographs should be included if they are included in the VIS Regulation.

²⁵ DE study reservation.

²⁶ DE wishes to add the provision of Article 37(4) of the draft Regulation on VIS as paragraph 4 of this Article: "*No Member State shall consult the data transmitted by other Member States to the VIS before it [or another Member State representing this Member State] starts entering data in accordance with Article 37(2) and (3) of the VIS Regulation.*" This provision is not to apply to Europol. NL, ES do not see the need for this reciprocity when dealing with access for the purposes of internal security.

Article 6²⁷

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 Europol^{28 29}

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.

²⁷ IE, UK find this provision unworkable as it does not provide a quick and efficient access and unnecessarily burdens other MS. FR study reservation.

²⁸ IE, UK reservation on Europol access as this is not consistent with the approach taken in Article 6.

²⁹ **DE study reservation.** PL (linguistic) reservation.

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 Council Framework Decision on the protection of personal data processed in the framework of police and judicial co-operation in criminal matters (2005/XX/JHA) shall apply to the processing of personal data pursuant to this Decision. The processing of personal data shall be supervised by the independent national Data Protection Supervisory authority or authorities as provided for in Article 30 of that Council Framework Decision.³⁰
2. The processing of personal data by Europol pursuant to this Decision shall be in accordance with the Europol Convention and supervised by the independent joint supervisory body established by Article 24 of the Convention.
3. **(deleted)**
4. **(deleted)**³¹

³⁰ DE study reservation. **BE, DK, ES, FR, NL, CH** suggest to include a transitional provision on data protection, similar to the data protection provision of the draft Framework Decision on simplifying the exchange of information and intelligence (doc. 13986/5/05). Until the Council Framework Decision on the protection of personal data processed in the framework of police and judicial co-operation in criminal matters (2005/XX/JHA) would enter into force, the following rules would therefore apply: the national data protection provisions; the Council of Europe Convention of 28 January 1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data; for those Member States which have ratified it, the Additional Protocol of 8 November 2001 to that Convention, regarding Supervisory Authorities and Transborder Data Flows and the principles of Recommendation No. R(87) 15 of the Council of Europe Regulating the Use of Personal Data in the Police Sector should also be taken into account.

³¹ ES reservation: this Article should reflect the content of Articles 31 and 32 of the proposal for a Council Framework Decision on the protection of personal data processed in the framework of police and judicial co-operation in criminal matters (2005/XX/JI).

5. The transfer of personal data obtained from accessing the VIS by authorities responsible for internal security and by Europol shall be prohibited, except where the data is transmitted to competent authorities responsible for internal security of Member States, under the conditions and for the purposes of Articles 5 and 6 and in full accordance with the applicable rules on the protection of personal data as referred to in this Article.
6. The competent Data Protection Supervisory authority or authorities shall investigate the lawfulness of the processing of personal data pursuant to this Decision at least once a year³². The resulting reports shall be made public.
7. Member States, the Commission and Europol shall provide to the competent Data Protection Supervisory authority or authorities the necessary information to enable them to carry out their tasks in accordance with this article.

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 10³³

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 exact purpose³⁴ 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 and time of access, the data used for consultation and the type of data consulted, and the name of the authority accessing and consulting the data³⁵. In addition, each Member State and Europol shall keep records of the persons **duly empowered to consult the data. Those records shall provide, in accordance with national law, the identification and code assigned to each user.**

³² SE reservation: this should be left to MS and also depends on Framework Decision on data protection. ES finds it should be specified which authorities are meant.

³³ DE study reservation. BE, ES, FR, SE reservation on grounds that there should only be an ex-post traceability.

³⁴ NL study reservation.

³⁵ DK suggests to add "the identification of the user".

2. [Such records containing personal data may 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.
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 12³⁶

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.

³⁶ DE, ES, FR, SE, UK study reservation.

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 following conditions are met:
 - (a) the Commission has informed the Council that the VIS Regulation has entered into force and is applicable;
 - (b) the Council Framework Decision on the protection of personal data processed in the framework of police and judicial co-operation in criminal matters (2005/XX/JI) has entered into force.³⁷

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

³⁷ **BE, DE, FR** reservation. See also suggestion for transitional provision on data protection (cf. Article 8).