

## ARTICLE 29 Data Protection Working Party



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Chairman  
Strategic Committee on Immigration, Frontiers  
and Asylum (SCIFA)  
Permanent Representation of Finland  
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**Subject: Proposal for a 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.  
Letter of M. Widerman of 2 June 2006.**

Dear Mr. Visanen,

I wish to thank you for the letter of 2 June 2006 sent to me by Mr. Widerman, previous Chairman of SCIFA. In his letter, Mr. Widerman asks for the Article 29 Working Party's opinion on inclusion in the Proposal for a Regulation concerning the Visa Information System (VIS) and the exchange of data between Member States on short stay-visas of some specific items of information, aimed in particular at preventing visa misuse or failure to comply with liability to pay the cost of living during the stay (mala fide sponsoring) as well as at introducing a bridging clause to allow domestic security authorities to access the VIS.

The Working Party, of which I have the honour of being the Chairman, considered your request during its plenary meeting of June 13-14 and decided to address the main points raised in the letter. Given that the analysis of this proposal has already reached quite an advanced stage, and there is limited time available for providing the Working Party's views in a meaningful manner.

The paragraphs below therefore sum up the comments on the new articles submitted for the Working Party's attention. They include also comments on other points in the draft Regulation that also require careful analysis in the light of the unprecedented impact resulting from implementation of such a wide-ranging European database on fundamental rights of the individuals – including Community and EU citizens.

Please do not hesitate to contact me if you need additional clarification.

Yours Sincerely,

Peter Schar  
Chairman

**Remarks by the Article 29 Working Party on the Draft Amendments Made by the Council (SCIFA Committee) to the Proposal for a Regulation concerning the Visa Information System (VIS) and the exchange of data between Member States on short stay-visas tabled by the SCIFA**

**1. PRELIMINARY CONSIDERATIONS**

It should be pointed out, first and foremost, that the amendments proposed come at a very advanced stage of the reading by the Council. Neither the underlying grounds nor analytical comments are provided. Additionally, the remaining part of the text was not made available, which would have allowed better understanding of the discussion that took place in the Council. It would have also shown the lack of a specific impact assessment in respect of the drafts in question, as well as shedding some light on how to better evaluate whether the amendments are proportionate to the purposes sought.

Moreover the close relationship between the amendments proposed and other parts of the text, which have also been considerably modified following the debate held within the Council, should be taken into account.

As already pointed out, the draft VIS Regulation provides for Member States' obligation to collect certain information and personal data in respect of applicants for short-stay visas. This should be done according to common rules that are set out in other regulatory instruments, some of which have already been adopted whilst others are being developed. Member States must set up electronic files of the visa applications received and enter the data gathered as above in a Community-wide database in order to make such files immediately available to all participants in the system. In addition to the so-called alphanumeric data, the VIS composing of the central database as well as the national systems will also include biometric information. Such information includes the digitised facial image either derived from the photograph produced by the applicant or created in the office where the application is lodged, and the visa applicant's fingerprints (it is expected that about 20 million fingerprints will be collected annually).

The proposed Regulation is grounded on a first-pillar legal basis, i.e. on Community law, and it focuses basically on the regulations applying to the processing of visa applicants', accompanying persons', and sponsors' personal data – exactly because of its scope.

Regarding the protection of personal data at Community level, a harmonized legal framework and a well established set of principles already exist. The Directive 95/46/CE is the fundamental benchmark in this sector. The proposed Regulation, having regard to its scope and legal basis as currently specified, must be fully compliant with the aforementioned harmonised set of principles.

This requirement is enforced by the fact that it is equally necessary to ensure compliance with the national measures adopted by Member States to transpose the said principles into domestic legislation. The fact that the data are inserted and processed in the VIS by each Member State, who remains the controller of the processing of the said data not only in the national systems (to be created) but also in the C-VIS, implies the applicability of national provisions. However, the text of the Regulation has to be clarified, since the references are made either to the VIS or the C-VIS).

Hence, any action taken by the Community in respect of the proposed VIS Regulation must be fully in compliance with the harmonised set of rules currently in force regarding the processing of personal data. According to that, restrictions to the scope of the data controller's obligation- related to data quality, information and consent by the data subject and access to the data- are only possible where the conditions laid down in Article 13 of the Directive are fulfilled.

Therefore, the Regulation should only introduce where necessary, provisions that develop and particularise, in a harmonised manner, those discretionary powers left by the Directive to national lawmakers

Accordingly, it is fundamental to consider the text of the Articles submitted to our consideration and the full text of the Draft Regulation (in such a manner as to ensure that only common principles related to the use of the derogations allowed for pursuant to Article 13 of the Directive should be introduced). In addition such derogations should be actually necessary as well as compliant with the proportionality principle, taking account of the purposes of the processing.

From this viewpoint, it should be noted that the current wording raises several problems for the fundamental data protection principles. Reference is made here to the text resulting from the discussion held within the Council rather than simply to the initial draft submitted by the Commission (Doc. 8325/06 of 12 April 2006, latest available version) – and to the opinion rendered by the Working Party on 23 June 2005 (WP 110), which is referred to in the letter.

## **2. SPECIFIC REMARKS**

First, the Working Party remains concerned by the unsatisfactory specification of the purpose sought by the VIS. Indeed, the amendments made by the Council would appear to be aimed at enhancing its features as a tool designed to support the prevention and suppression of criminal offences rather than the application of the common visa policy.

Special concern is also given to the amendment made to the definition of “visa authorities”, which in the current version are “the authorities of each Member State which take part in taking decisions on the application...” – rather than the “authorities responsible for examining applications and for decisions...” as per the wording of the initial draft.

This circumstance increases the interpretive difficulties encountered in relation to the provisions at issue.

### **Article 1A**

The new Article 1A provides that the data collected for the purposes for which the VIS was set up, i.e. first-pillar purposes, should be made available to the third-pillar authorities that are competent, under domestic laws, for preventing and suppressing criminal offences -which is what is arguably meant by the reference to authorities responsible for national security – is worded too broadly in the current version. The types of offence in respect of which access might be allowed and the authorities entitled thereto should be precisely and directly (clearly) set out in the Regulation, by ensuring transparency as to the purposes and bringing about the involvement of the European Parliament to enhance transparency and safeguards in the law-making process as well.

## **Article 6**

Accordingly, due to the expanded scope of the definition of “visa authorities”, Article 6 in the draft Regulation should be worded more restrictively. In particular, in paragraph 4) it should be specified that the personal data to be entered in the application file as taken from the application form should be “*not more than...*”. It must then be clarified that the application forms currently used must be reviewed in the light of assessing the necessity and proportionality of the information required.

This is particularly relevant as Article 5, paragraph 1 links the creation of the application file to the insertion of the data in VIS (C-VIS?); for that reason, a clarification and a more cautious wording is needed in order to ensure that personal data are included in the C-VIS both more selectively and in full accordance with the purposes of VIS.

A different issue is the one concerning sponsors, which the Working Party had already addressed in its opinion of 23 June 2005. The Working Party is of the opinion that data related to sponsors should be considered as additional data in case of consultation between central authorities (Article 7). Moreover, data concerning sex, date and place of birth of the sponsors exceed the purpose of the Regulation. Specific considerations will be made on this point in the comments relating to Article 11A.

## **Article 11A)**

As for Article 11A, the concerns already made by the Working Party are enforced further. Indeed, it is difficult to understand why information such as that referred to in the first paragraph should be included in the C-VIS rather than in national systems. This possibility should be laid down and regulated appropriately and, if necessary, the possibility to enter an alert in the SIS concerning overstayers should be provided for - where this is not already the case – on the basis of an administrative decision made by the competent authorities.

This line of reasoning holds true to an even greater extent in respect of the proposal whereby the data of the so-called *mala fide* sponsors should be entered in the C-VIS – which would give rise to a sort of European database of such entities.

In this connection, we would like to recall the opinion of 23 June 2005 in which the Working Party had pointed out that the exchange of data concerning sponsors should be regulated by Article 7 rather than by Article 6 of the Regulation, in compliance with the proportionality principle. We fully share the considerations made in this regard by the European Data Protection Supervisor as well as the concern voiced by the European Parliament.

## **Article 13**

In the light of the above considerations, the Working Party is firmly opposed to the proposed amendment to Article 13, whereby the C-VIS search criteria should be expanded by including searches on sponsor-related data. The Working Party is also opposed to the amendments concerning Article 20, under which the said sponsor-related data should be entered in view of calculating the starting time of the data retention period. In this connection, we would like to reiterate the need for setting out the criteria and arrangements aimed at enhancing the selective nature of the information in question, as suggested in the Working Party’s opinion rendered in June 2005 and as requested by the European Parliament ‘s Report.

## **Biometric data**

As for the inclusion and use of biometric data, one cannot but reiterate the serious doubts mentioned in the Working Party's opinion, which are also shared by the European Data Protection Supervisor. There are unquestionably some problems in connection with envisaging a search function in the C-VIS that is based on photographs and fingerprints, given that – unlike Eurodac – the C-VIS contains, in addition to biometric data, a considerable amount of personal information (so-called alphanumeric data) that allow performing several matches and cross-matches of the personal data related to both the visa applicant and the other categories in the absence of adequate safeguards. The possibility to create links with other applications and information and the retention of the filed data are features that, among others, make it quite complex to assess proportionality of the data collection in the VIS.