



Brussels, 17 June 2020
(OR. en)

8755/20

Interinstitutional File:
2018/0152(COD)

LIMITE

VISA 59
FRONT 159
MIGR 43
IXIM 59
SIRIS 48
COPEN 151
COMIX 249
CODEC 493

'I' ITEM NOTE

From: Presidency
To: Permanent Representatives Committee (Part 2)
Subject: Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Regulation (EC) No 767/2008, Regulation (EC) No 810/2009, Regulation (EU) 2017/2226, Regulation (EU) 2016/399, Regulation XX/2018 [Interoperability Regulation], and Decision 2004/512/EC and repealing Council Decision 2008/633/JHA
– Progress report

I. INTRODUCTION

1. The Visa Information System (VIS) - established by Council Decision 2004/512/EC (the VIS Decision) and by Regulation (EC) No 767/2008 (the VIS Regulation) - is the EU information system for facilitating the short-stay ('Schengen') visa procedure and helping visa, border, asylum and migration authorities to check third-country nationals who need a visa to travel to the Schengen area. The VIS connects Member States' consulates around the world and all their external border crossing points. The system already performs biometric matching (of fingerprints) for identification and verification purposes. It has been operational since 2011.

2. After a thorough evaluation, on 16 May 2018 the Commission submitted a legislative proposal to amend the VIS Regulation¹, which is considered to be an important initiative in the context of ensuring interoperability between systems and databases in the area of justice and home affairs.
3. At its meeting on 19 December 2018, the Permanent Representatives Committee granted the Austrian Presidency a mandate to enter into negotiations with the European Parliament (EP)².
4. In the EP, the lead committee is the Civil Liberties, Justice and Home Affairs (LIBE) Committee. Mr Carlos Coelho (EPP, PT) was appointed rapporteur. The LIBE Committee voted on the report on 4 February 2019. Given the short time remaining before the end of the eighth parliamentary term, the EP negotiating team decided, on 24 January 2019, to postpone the start of the negotiations on the proposal until the new EP was constituted. On 13 March 2019 the EP adopted its legislative resolution on the proposal, thus concluding its first reading³.
5. Under the new EP legislature, on 4 September 2019, Paulo Rangel (EPP, PT) was appointed as the new rapporteur for the proposal. On 24 September 2019, the LIBE Committee decided to open interinstitutional negotiations after the first reading in the Parliament and that decision was subsequently announced in the plenary on 9 October 2019.
6. The European Economic and Social Committee adopted its opinion on 19 September 2018⁴.
7. The European Data Protection Supervisor delivered its opinion on 12 December 2018⁵.
8. Upon request of the EP, the EU Agency for Fundamental Rights delivered an opinion on 30 August 2018⁶.

1 8853/18.

2 15726/18.

3 T8-0174/2019.

4 EESC 2018/03954, OJ C 440, 6.12.2018, p. 154–157.

5 Summary of the Opinion of the European Data Protection Supervisor on the Proposal for a new Regulation on the Visa Information System, OJ C 50, 8.2.2019, p. 4–8.

6 FRA Opinion – 2/2018. <https://fra.europa.eu/en/publication/2018/revised-visa-information-system-and-its-fundamental-rights-implications>

II. THE INTERINSTITUTIONAL NEGOTIATIONS AND THEIR STATE OF PLAY

9. The interinstitutional negotiations started in October 2019 on the basis of a commonly agreed calendar.
10. Despite the short time available, the Finnish Presidency made considerable progress on the file. Seven technical meetings and two political trilogues were held under its term. At political level an agreement was reached on the repeal and incorporation of the VIS Decision, and the deletion/update of obsolete provisions.
11. Similarly, the co-legislators agreed that the missing technical amendments (the ‘VIS consequential amendments’) necessary to fully set up the VIS automated checks by amending the legal acts on the EU information systems that VIS queries, would be incorporated as part of the ongoing interinstitutional negotiations, i.e. without a new Commission proposal, in order to save time and simplify the process⁷.
12. More contentious points discussed in trilogues under the Finnish Presidency were the deadline for implementation of the Regulation and the EU information systems and databases to be queried by VIS as part of automated checks.
13. When the Croatian Presidency took over the role of negotiator for the Council in January 2020, it did so on the basis of a very ambitious calendar, the overall objective being to reach a political agreement with the EP by the end of the presidency, by building on the progress already made by the Finnish Presidency. This objective translated a political will shared by the three institutions and, albeit challenging, given the different strands of discussions ongoing (automated checks, consequential amendments, amendments to the Entry-Exit System and to the Interoperability Regulations and several other outstanding issues from the Commission proposal), it seemed reachable. The indicative calendar for the implementation of interoperability between EU information systems, of which VIS is a component, was present in the mind of the co-legislators and represented a source of external pressure which helped to keep the negotiations going at a sustained pace.

⁷ See part III below.

14. The spread of the COVID-19 pandemic in March had a severe impact on the process. Up to that moment, eight technical meetings (14, 15, 20, 22 and 31 January, 11 and 17 February and 4 March) and one political trilogue (20 February) had been held since the beginning of the year. A further 13 technical meetings and up to five possible political trilogues had been planned up to June 2020 but they could not take place. While a first round of written exchanges between the negotiators took place at technical level after the cancellation of the meetings, the process was eventually suspended as the EP was reluctant to engage in the negotiations under the new conditions.
15. The disruption of the negotiating process did not, however, prevent the Presidency from bringing the file forward and making some important progress, while keeping delegations constantly informed of the development of the negotiations and involving them in the preparation of political trilogues, through four meetings of the JHA Counsellors (28 January, 4, 18 and 24 February), as well as through a number of written consultations once physical meetings were no longer possible.
16. By the end of March, the negotiators managed to close the first reading of the draft Regulation, with the exception of the amendments to Regulation 2017/2226 (EES) and to Regulation 2019/817 (Interoperability - Borders), which, given their very technical nature, were preliminarily examined and discussed by the secretariats of the co-legislators, together with the Commission.
17. More specifically, under the Croatian Presidency, the following negotiating blocks of the draft Regulation were examined at technical level:
 - data protection rules (Articles 31, 36a, 37, 38, 39, 40, 41, 42 and 43);
 - access to VIS data for other purposes (Articles 45a, 45b, 45c, 45d and 45e);
 - access by law enforcement authorities (Chapter IIIb, Articles 6b and 22ra, repeal of Decision 2008/633/JHA);
 - architecture (Articles 2a, 26 and 27, incorporation of Decision 2004/512), data security (Article 32), security incidents (Article 32a);
 - amendments to the Visa Code (Articles 2, 21a (specific risk indicators), 39, 39a, 46 and 51a);

- responsibility for the use of data (Article 29), liability (Article 33), keeping of logs (Article 34), self-monitoring (Article 35), penalties (Article 36), exercise of delegation (Article 48a), committee procedure (Article 49), advisory group (Article 49a), monitoring and evaluation (Article 50).

A number of the above provisions were provisionally agreed at technical level, while others will have to be discussed and agreed upon during the second reading, once the negotiations resume.

18. Given their complexity and their political implications, Articles 9a to 9d on the ‘automated checks’, i.e. the EU information systems and other databases to be queried by VIS, involving automated processing of personal data (the ETIAS Central System, the Schengen Information System (‘SIS’), the Visa Information System (‘VIS’), the Entry/Exit System (‘EES’), ECRIS-TCN, Eurodac, Europol data and the Interpol databases (the Interpol Stolen and Lost Travel Document database (‘SLTD’) or the Interpol Travel Documents Associated with Notices database (‘TDAWN’)), were negotiated as a separate strand, in parallel with the first reading of the provisions mentioned under point 17 above. The Croatian Presidency built on the work already done by the Finnish Presidency under two perspectives. Firstly, to improve the Council mandate, so as to better streamline the procedure, fix some consistency problems, and improve the overall logic of the queries, also on the model offered by other Regulations (ETIAS, Interoperability). Secondly, to engage with the EP, particularly on two major issues: which EU information systems and other databases will be queried by VIS (the EP still having misgivings on ECRIS-TCN, Interpol TDAWN, Eurodac in case of applications for long-stay visas, and SIS as far as alerts for return are concerned), and which authority/ies will be responsible for the manual verification of sensitive hits. The negotiations on the ‘automated checks’ were well advanced at technical level and, had the pandemic not disrupted the planning, they could have been ripe for discussion at political level after some further finalisation of the text in technical meetings.
19. The political trilogue of 20 February 2020 dealt with one of the core issues of the amending Regulation: biometrics. After a thorough examination at technical level, the political trilogue addressed three outstanding issues: safeguards for children, age limits and retention of biometric data of children. The trilogue elaborated a compromise package deal to be subsequently scrutinised and validated by all sides. This package consisted of the following elements:

- the EP would accept the lowering of the age from which children may be fingerprinted from 12 to 6 years;
- the EP would also accept checks on children’s biometrics within the territory;
- the derogation for law enforcement access to children’s biometric data would be set below 14 years of age instead of 18;
- the upper age limit for fingerprinting would be set at 75 years of age;
- on data retention, for children below the age of 12, upon the expiry of a visa and upon the child exiting the Schengen area (cumulative conditions), only biometrics would be deleted, not the entire application file.

The Presidency debriefed delegations on 24 February on the outcome of the political trilogue and, after a comprehensive discussion in the **JHA Counsellors** meeting and several bilateral contacts, it came to the conclusion that, despite some reluctance to accept certain elements of the package (notably the upper age limit for fingerprinting), overall a qualified majority could support the compromise package. A political trilogue scheduled for 18 March 2020 should have confirmed the outcome of the previous one and dealt with the additional issue of the facial image, so as to reach an overall agreement on the issue of biometrics. This would have represented a major step forward in the negotiations. However, it had to be cancelled as a result of the pandemic.

20. Because of the suspension of the negotiating process, some important political issues remain outstanding for the time being, including:
- the horizontal, cross-cutting issue of the relationship between the VIS and public health;
 - sharing of VIS data with third countries or international organisations;
 - the law enforcement access to VIS (notably the circumstances for such access and the issue of the ‘cascade’, i.e. the prior search in the automated fingerprint identification system under Decision 2008/615/JHA (Prüm Decision));
 - the issue of fundamental rights;
 - EBCGA access to VIS for return purposes;
 - the data retention period for residence permits after 10 years;
 - the automated checks (identification of the ‘VIS designated authorities’ and the EU information systems and databases to be checked);
 - the penalties;
 - the deadline for implementation/entry into force.

III. THE AMENDMENT TO THE COUNCIL MANDATE: THE VIS CONSEQUENTIAL AMENDMENTS

21. Despite the COVID-19 outbreak, the Croatian Presidency was able to make considerable progress on another track of the VIS file, the so-called VIS consequential amendments.
22. In the autumn of 2019, the Commission drew the co-legislators' attention to the fact that certain provisions were missing from the VIS proposal and thus from the Council and EP positions as well. In order to make the technical amendments necessary to fully set up the VIS automated queries, amendments would have to be made to the legal acts on the EU information systems and databases that VIS queries, involving automated processing of personal data. It was also necessary to take into account the new legislative landscape for interoperability, which had evolved since the VIS proposal was tabled in May 2018. Similar consequential amendments had been proposed by the Commission for ETIAS⁸.
23. Under the Finnish Presidency, at the **JHA Counsellors** meeting of 27 November 2019, delegations had broadly supported the Presidency suggestion that the missing technical elements would be incorporated as part of the ongoing interinstitutional negotiations, i.e. without a new Commission proposal, in order to save time and simplify the process. At the second political trilogue on 11 December 2019, the EP, too, had agreed to this approach.
24. On 17 April 2020, the Croatian Presidency presented a set of text proposals on these missing provisions. Due to the variable geometry in Member States' participation in EU policies in the area of freedom, security and justice, it was necessary to split the provisions into two separate legal instruments⁹ which would nonetheless work seamlessly together to enable the comprehensive operation and use of the system.
25. On 17 June 2020, Coreper amended the original Council mandate for negotiations with the EP, in order to include the VIS consequential amendments¹⁰.

⁸ See the Council mandate on the ETIAS consequential amendments (11300/19).

⁹ The 'Schengen text', i.e. the new provisions amending the VIS, EES, ETIAS, SIS Return, SIS Borders and Interoperability – Borders, and the 'non-Schengen and Schengen-Police text', i.e. the new provisions amending Eurodac, Europol Regulation, SIS Police, ECRIS-TCN and Interoperability - Police.

¹⁰ 8787/20.

IV. CONCLUSION

26. Against this background, the Permanent Representatives Committee is invited to:
- take note of this progress report with regard to the abovementioned proposed Regulation; and
 - ask the incoming German Presidency and Member States to continue work on this legislative proposal with a view to timely reaching a political agreement with the EP.
-