Immigration Law Practitioners' Association Submission to the European Commission's consultation on the proposed EU Visa Information System (VIS)

The Immigration Law Practitioners' Association (ILPA) welcomes the European Commission's initiative to enable members of the public and civil society to comment on the proposed establishment of the Visa Information System (VIS), which has important implications for the development of EU law and policy on immigration and the protection of the human rights and civil liberties of third-country nationals and EU citizens.

ILPA has been kindly provided with the comments and recommendations of the Standing Committee of Experts on international migration, refugee and criminal law (hereinafter "the Standing Committee"), which were sent to Mr. Vitorino in a letter dated 12th May 2004. ILPA is in agreement with these comments and recommendations, but would also wish to transmit the following views on VIS:

1. ILPA shares the concerns of the Standing Committee regarding the timing of the Commission's consultation process, which falls between the Council's decision to establish VIS and the publication of the Commission's proposal for a Regulation to define the content of VIS and the extent of its functions. In particular, ILPA regrets that the Commission did not ask for comments before the political decision was taken to establish VIS given that there are significant misgivings about the raison d'être of this proposed database. Moreover, the Commission's consultation questions do not raise all the relevant issues, which, for example, are referred to in the Council Conclusions on the development of the VIS.

2. With regard to the need for the VIS itself, ILPA agrees with the Standing Committee that the establishment of the VIS is a disproportionate response to the perceived "security" threat posed by third-country nationals travelling to the EU in terms of terrorist or criminal activity and irregular immigration. The available statistics indicate that the vast majority of third-country nationals issued Schengen visas are lawful travellers given that visas issued significantly outnumber visas refused. Consequently, the proposed establishment of a database that would record personal information, including biometric data, on every visa applicant as well as personal details on EU citizens and lawfully resident third-country nationals (in the case of sponsors) cannot be justified. The SIS, where only information on persons who are suspected of criminal activities or in respect of whom negative immigration decisions have been taken, constitutes a more proportionate response and should be sufficient, if operated effectively, to counter the security threats posed. However, ILPA's comments relating to SIS should be considered in the light of the problems encountered by third-country nationals in accessing, correcting or deleting the entry of their personal data in SIS.

3. ILPA is concerned that a system like VIS is contemplated as a first-step measure before any attempts are made to reform and improve the current system in place for issuing Schengen visas. Both the Council and Commission have recognised that there are problems with the workings of EU visa policy in that criteria for issuing visas to third-country nationals in like situations may differ substantially from region to region because of local consular cooperation and the serious distortion in the remedies available in Member States concerning negative decisions, which was patently recognised in answers by Member States to a Presidency questionnaire on notification, grounds for and appeals against visa refusals.[1] The Council has stated that the development of VIS will assist in improving consular cooperation. However, it is strongly arguable that the ambiguous rules in the Common Consular

Instructions, which provide for a large degree of latitude to Member State in making visa-issuing decisions, should be revised first before a system like VIS is put into place. The Commission has recently proposed a Council Regulation establishing a Community Code on the rules governing the movement of persons across borders (COM (2004) 391) with a view to recasting the Common Borders Manual and should therefore also first propose improved uniform rules concerning the issuing of Schengen visas and ensure that these rules provide for adequate safeguards in the visa-issuing process and remedies in the event of negative decisions.

4. It is unfortunate that, as underlined by the Standing Committee, the justification for VIS is provided solely in terms of repressive measures, such as the fight against fraud, the prevention of so-called “visa shopping” and assistance in the identification and return of irregular migrants. It is to be hoped that a well-functioning VIS, which complies with data protection guarantees and provides adequate safeguards and remedies to individuals affected by the system’s operation, can actually be viewed in beneficial terms, particularly by facilitating and speeding up visa applications from regular and bona fide travellers to the EU, who, as noted in point 2 above, are in the significant majority.

5. ILPA agrees with the recommendations of the Standing Committee to devote particular attention in a proposed Regulation to data protection. Such provisions should be detailed in the Regulation itself and not refer merely to other standards, such as Directive 95/46/EC, the ECHR or the Charter of Fundamental Rights. In particular, ILPA stresses that the data collected on individuals should be used for a limited purpose in accordance with such data protection guarantees. It should be “hard” data avoiding the inclusion of any “perceptions” officials may have of the visa applicant or sponsor regarding, for example, suspicions relating to criminal activities or possible links to terrorist organisations. The storage time for the data must also be strictly limited and be no longer than three years in duration rather than the period of five years (with a further period of five years storage in a central archive) proposed in the Council Conclusions. Finally, data should not be transferred to third (non-EU) countries or parties on the basis that protection of this data and controls in respect of its use can no longer be assured by EU institutions and Member States.

6. It is essential that the proposed Regulation on VIS includes detailed legal safeguards for third-country national visa applicants and sponsors. They should be informed in their own language or a language which they understand of the type of personal data that will be recorded and stored, the length of its storage, as well as their rights to delete or correct the data. This information should be transmitted to visa applicants on the moment of their application. The proposed Regulation should also ensure that clear and effective avenues of legal redress, uniformly applicable in all Member States, are available to all persons entered into VIS, which is particularly important for those third-country nationals whose visa applications have been rejected. Such avenues should include the right to challenge negative decisions before an independent and impartial court or tribunal.

7. VIS should not be used as the sole basis for arriving at an adverse decision relating to the individual in respect of their admission to or expulsion from EU territory. Similarly, the rejection of a previous visa application must not automatically result in a future rejection. Each application should be considered afresh on its merits taking into account any new information concerning the applicant’s change of circumstances.

8. ILPA shares the concerns of the Standing Committee about the proportionality of storing data on EU citizens and lawfully resident third-country nationals and the risk that this will lead to indirect discrimination against the latter, who are more likely to be visited by family members from a third country that is on the list of countries the nationals of which are required to have a visa to enter EU Member States participating in the EU visa regime. Similarly, it risks discrimination against EU

citizens of a different racial or ethnic origin or religious belief to the majority of the population in the Member State concerned, given that the third countries from which many of their family members come are also more likely to find themselves on the "negative" visa list.

9. ILPA agrees with the Standing Committee that a European supranational authority, with adequate financial resources and legally binding powers, should be established to supervise the use of VIS by EU institutions and the national authorities of Member States. ILPA also takes the view that the future adoption of revised instructions to Member State consular officials, which it considers a necessary precursor to VIS, should be subject to similar review.

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[1] Doc. 8929/02 VISA 69 COMIX 319 (21 May 2002).