Chapter 5

Negotiating access to the Visa Information System for law enforcement authorities

’Son, in the end, I think the outcome was acceptable because it suited the argued need for information’ (European Data Protection Supervisor Peter Hustinx, interview, 20 May 2011, Brussels).

5.1 Introduction

Strictly speaking, the Council Decision concerning access for consultation of the Visa Information System (VIS) for the purposes of the prevention, detection and investigation of terrorist offences and other serious criminal offences (Council 2008b) was taken in the context of a regular procedure under EU’s third pillar. Broadly speaking, it was not. Although the adoption of the decision took place in the formal framework of third-pillar decision making, it was influenced by elements that were typical of EU’s first pillar procedure. The decision was officially adopted by the JHA Council according to third-pillar procedure, but at the same its adoption was contingent on an agreement between the European Parliament and the Council – which was typical of decision making in the first pillar. The fact that the decision making leading to the decision had both third-pillar and first-pillar elements was related to the dual content of the decision. On the one hand, the objective of this decision was to regulate consultation of data by law enforcement agencies for the purpose of fighting serious crime and terrorism, which was a subject that belonged to the policies of the third pillar. On the other, it concerned access to a database system that was primarily meant to facilitate the exchange of data between member states on short-stay visas, which was a subject that belonged to the first pillar.

For the Council, the drafting and adoption of the decision in the third-pillar setting was just another legislative activity, like any other third-pillar business. For the European Parliament the situation looked different. Unlike the first-pillar procedure, the rules of legislative procedure in the third pillar did not afford the Parliament the power to act as full co-legislator alongside the Council. The Council was formally the only legislative power on the subject matter and practice of decision making in the third pillar has shown that the European Parliament did not have much of a say there.
A situation that, in itself already difficult to accept, was undoubtedly even more difficult for the Parliament to digest because the decision concerned was about access to a database that was to be a first-pillar instrument. And over the establishment and arrangement of this first-pillar instrument – i.e. the visa database – the Parliament had just as much competence to decide as the Council.

Before negotiations on the Council Decision began in November 2005 – after the Commission tabled the related proposal – there were already discussions in the first pillar on the financing, establishment, and arrangement of the visa database. Several legislative instruments were then proposed, discussed, and/or (already) adopted. Such was for instance the Council Decision for the technical and financial preparation of the VIS database. It was proposed by the Commission on 12 February 2004 and adopted by the Council on 8 June 2004. In the proposal, the Commission explained that the VIS database was to be the first large-scale European IT-system that would store, process, and retrieve biometric data. This would mean that such data as facial image and finger prints about visa holders were to be stored on a microchip of a travel document and stored in a central database. On 28 December 2004, a proposal was tabled by the Commission for a regulation that would provide for the legal framework of the VIS database. The Regulation – known more generally as the ‘VIS Regulation’ – was to be adopted by both the European Parliament and the Council (2008a).

In the Commission’s proposal for the VIS Regulation it was stated that the purpose of the database was to facilitate the administration of a common visa policy, checks at border checkpoints, the fight against visa fraud, and visa shopping, and the identification and return of illegal immigrants (Commission 2004c).

When the JHA Council invited the Commission, on 24 February 2005, to present a proposal for an instrument in the third pillar that would allow national law enforcement agencies to have access to the VIS database, both the European Parliament and the European Data Protection Supervisor (hereinafter: ‘EDPS’) responded. In an Opinion issued on 23 July 2005, the EDPS – which at the time took on its newly ascribed role of monitoring and advising EU institutions in the field of personal data and privacy protection – warned that “routine access by law enforcement authorities would not be in accordance with this purpose” (EDPS 2005: 17). It reminded that the purpose of the VIS was the facilitation of a common visa policy. A clear definition of purpose of the VIS was “critical” because biometric data would be used and the processing operation would be on a massive scale. The EDPS therefore argued that “systematic access [for law enforcement purposes] cannot be allowed”. In its view such access
could only be granted “on an ad hoc basis, in specific circumstances and subject to the appropriate safeguards”.

Alarmed by the Opinion of the EDPS and concerned about being side-lined from the decision making on a third pillar instrument, the European Parliament introduced a so-called ‘bridging clause’ in its Draft Report on the proposal for a VIS Regulation, which it issued on 8 November 2005. The Draft Report contained as many as 123 amendments to the proposed VIS Regulation and the bridging clause was one of them. This clause contained, as the Parliament described, “all the basic parameters on the availability of VIS data for law enforcement purposes” (European Parliament 2005: 8). Such access would, as far as the Parliament was concerned, only be granted in very exceptional circumstances. In the bridging clause the Parliament therefore set forth conditions and procedures that were to limit law enforcement access to the strictest minimum possible and to be observed when drafting a third-pillar instrument. The bottom line was that “access shall be an exception granted on a case-by-case basis”. It was not allowed to become routine.

With the inclusion of the bridging clause in the VIS Regulation the entire relationship between the European Parliament and the Council the situation changed fundamentally. Through the inclusion of the so-called bridging clause the Parliament ensured that the proceedings in the first pillar on the Regulation could only come to a successful end if it was heard on the amendments to the VIS-Access Decision. What the Parliament basically did is by staking out the "basic parameters" on the availability of VIS data in the bridging clause, it basically forced the Council to negotiate on a third pillar instrument with the European Parliament.

On 24 November 2005, the Commission issued a proposal for the intended third-pillar instrument. It concerned a Council Decision regarding access for consultation of the Visa Information System (VIS) for the purposes of the prevention, detection and investigation of terrorist offences and other serious criminal offences (Commission 2005a). The proposal of the Commission reflected very much the views that were expounded by the EDPS and the European Parliament on the matter of law enforcement access to the VIS (hereinafter: ‘VIS-Access’). In the explanatory memorandum of the proposal, the Commission pointed out that providing a legal basis for unlimited access to the VIS for national law enforcement services “would transform the VIS into a regular crime fighting database” (Commission 2005a: 5). Emphasizing that the VIS is meant for administration of a common visa policy and not for law enforcement, the Commission contended that providing a legal basis for unlimited law enforcement access “would unjustifiably impact on the fundamental rights of the
individuals whose data are processed in the VIS and who are to be treated as innocent individuals and not as suspects in a criminal investigation”.

In line with the basic idea of the bridging clause, the provisions of the Commission proposal were worded so as to avoid any possibility for routine and decentralised access. Consultation of VIS data for law enforcement purposes was only to be allowed if it was considered necessary for the prevention, detection or investigation of certain types of offences. These offences were only to be related to serious crime or terrorism. Moreover, access would only be possible if it is necessary in a specific case that is “connected to a specific event determined by date and place, or to an imminent danger associated with crime, or to a specific person 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 of clearly defined terrorist offences and of other serious criminal offences” (Commission 2005a: 14). On top of that, consultation of VIS data should only take place “if there are reasonable grounds, based on factual indications” and be limited to the extent that the data is necessary for the performance of prevention, detection or investigation of the offence concerned (the proportionality principle).

In addition to these key conditions, the Commission also included provisions on procedure for submitting a request for access. In the proposal it was provided that “a duly reasoned written or electronic request” should be submitted to a “central access point” (Commission 2005a: 13). Each member state would have to designate a single national authority as the central access point and to make it public. Only such a central access point would be allowed to directly consult the VIS for law enforcement purposes. The central access point would have to be a specialized unit comprising “officials duly empowered to access the VIS”.

In the last provision of the Commission proposal it was stipulated that the Decision shall apply only if the VIS Regulation was adopted in the first pillar. Moreover, the provision rendered the adoption and application of the VIS-Access Decision also conditional on the adoption and implementation of an envisaged Council Framework Decision that would provide for the protection of personal data processed in the framework of police and judicial co-operation in criminal matters. A similar instrument was already adopted in EU’s first pillar, but absent in the third pillar. The Commission tabled a proposal for such an instrument for the third pillar policies on 4 October 2005.

Negotiations on the draft text of the VIS-Access Decision officially started in the first half of 2006. The proposal of the VIS-Access Decision was discussed for the first time in the European Parliament, at Committee level, on 24 January 2006. In the
Negotiating the VIS-Access

Council, the proposal was discussed for the first time on 5 April 2006, at working party level. The Decision was officially adopted by the JHA Council on 23 June 2008. But it was already in April 2007 that the Council and the European Parliament reached political agreement on its final wording. In June 2007 the Council and the Parliament each separately agreed with the interinstitutional Council-Parliament agreement. The VIS-Access discussions thus lasted one and a half year.

As the discussions on the VIS-Access file took place in the third pillar, where the Commission and European Parliament officially did not have much influence on the final drafting of the proposal, the locus of the discussions on the drafting was supposed to be only within the Council. However, the Parliament became a serious institutional partner in the discussions, because of the bridging clause of the VIS Regulation. As explained earlier, owing to the clause the Parliament’s view on the “basic parameters” on the availability of VIS data for law enforcement could not be disregarded in the drafting of the third-pillar instrument. Therefore, VIS-Access discussions not only took place in the Council, but also in the European Parliament and at the interinstitutional level, between the Council, the Commission, and the Parliament. Consequently, discussion of the VIS-Access file proceeded in a series of meetings at various levels in the Council – ranging from the working party level up to the ministerial level of JHA Council – and at two levels in the Parliament – at the Plenary and the Committee level. It also proceeded at the interinstitutional level, which was subdivided in two specific levels: the technical or preparatory trialogue level and the political trialogue level.

In the next section an overview is presented of the timeline of the VIS-Access process, sequences and patterns of discursive events and the various issues that have featured on the VIS-Access agenda. In that light, seven discussion threads have been identified and analysed (see Table 5.2 for more details on each of the discussion threads). The aim of this section is to chart the changes or shifts that have occurred in each of the discussion threads. This aspect of analysis involved the identification and examination of changes or shifts that had a bearing on the course and progress of the discussions, such as acceptances of parts of compromises or complete agreements in various stages of the process. The analysis is based on the coding and structuring of data enclosed in 104 policy documents.

Then, in the third section, findings are presented on the nature or mode of the discussions and the conditions of the various settings in which the VIS-Access discussions took place. This analysis is based on the coding and structuring of data enclosed in thirteen fourteen transcripts. The aim of this part of the analysis is to
present findings (through narratives) of how the discussion at various decision-making venues and levels were held and in what sort of setting they took place. This chapter concludes with an overall analysis of the shifts that have occurred in the course of the process in conjunction with the nature of the discussions and the factors that have conditioned the nature of these discussions.

5.2 The unfolding of the VIS-Access process
This section presents findings that were mainly drawn from Council documents, as well working documents from the European Parliament. Council documents reporting the VIS-Access documents were more detailed, which enabled reconstruction of the contents of the VIS-Access discussions in a chronological sequence of events. On the basis of these data discussion threads could be identified of the discussions that took place in the working structures of the Council, as well as the discussions that took place at the interinstitutional (trialogue) level. This was however not possible with the working documents of the European Parliament. These documents mainly reported only the time and venue of a VIS-Access debate, with here and there a very few words on the contents of the meeting. The result is that the findings of the internal discussions in the European Parliament are presented in a less detailed manner than those in the Council and at the trialogue level (see Table 5.2).

In the next subsection (5.2.1), a timeline of the process is first presented. In Subsection 5.2.2 an overview of the seven discussion threads and an outline of the issue dominating in each discussion thread is provided. Also in this subsection, the findings of an examination of the frequencies of the formal meetings and of the appearances of the issues at the meetings are then presented. This subsection concludes with an overview of the shifts or changes in negotiation positions that occurred in the course of the process, as well as an assessment of the patterns of change.

5.2.1 The timeline of the VIS-Access process
As noted earlier, negotiations on the draft text of the VIS-Access Decision officially started in the first half of 2006. It was in the European Parliament that the VIS-Access appeared for the first time on the agenda. The proposal of the VIS-Access Decision was then discussed at the LIBE Committee level, on 24 January 2006.\(^{220}\) It appeared for the first time in the Council on 5 April 2006, where it was discussed at the level of

\(^{220}\) LIBE/PV 2006/0123-1, Minutes of the meeting of 23 and 24 January 2006.
the Police Cooperation Working Party (hereinafter: ‘PCWP’).\textsuperscript{221} The VIS-Access process covered a total of 42 (officially reported) meetings.

Discussions on the subject matter actually began before the Commission tabled the VIS-Access proposal in November 2005. Already on 28 February – 1 March 2005 the subject of law enforcement access to the VIS emerged at one of the meetings of the Council working party that was responsible for the examination of the VIS Regulation proposal – the Visa working party.\textsuperscript{222} It was in a meeting of this working party, on 26 July 2005, that the inclusion of a bridging clause in the draft VIS Regulation was suggested.\textsuperscript{223}

The legislative process on the VIS-Access Decision covered just more than a year (from the first PCWP discussions in April 2006 until the political agreement of June 2007). It covered three presidencies. The first Presidency in the process was held by Austria. The VIS-Access period under the Austrian Presidency lasted only three months (April- June 2006). Finland took over EU’s rotating Presidency from Austria on 1 July 2006. Germany took the Presidency over on 1 January 2007. It was during the German Presidency that the decision-making process on the VIS-Access file as well as that on the VIS Regulation file came to an end. During the German Presidency – i.e. during the first half of 2007 – considerably more effort was made to ensure a successful completion of the VIS-Access process. The German Presidency’s approach of more vigorous engagement in the VIS-Access process was more than likely to be part of the priority objective of the German Presidency program to transpose the Prism Convention of 2005 – the aim of which was to step up the fight against terrorism and organized crime – into the EU legislative framework (see Bellanova 2008).

In the Council, the VIS-Access discussions covered a total of 25 official meetings. They were primarily held at national expert and at senior official level. At national expert level, it was the PCWP that was charged with the examination. At senior official level, it was the CATS. The national experts of the PCWP discussed the draft text of the proposal in eight official meetings. The proposal or some of its elements appeared six times on the agenda of CATS. Only on a few occasions, the VIS-Access file was (briefly) discussed at the level of the JHA Counsellors’ group and the Coreper. Discussions at these levels occurred only in the month before the formal

\textsuperscript{223} Council Documents st11090 of 27/7/2005 (p.3) and st13225 of 13/10/2005 (p. 7).
Figure 5.1 Timeline of the VIS-Access process

24 November 2005: Commission proposal on VIS-Access Decision
5 January 2006: EDF opinion on VIS-Access proposal
5 April 2006: first Council discussion on VIS-Access Directive
22 November 2006: first meeting at political trilogue level
26 April 2007: Parliament and Council reach agreement at final political trilogue level
14 May 2007: LIBE Committee approves report on VIS-Regulation & Access Decision
12-13 June 2007: JHA Council adopts VIS-Regulation and Access Decision

27 April 2006: ‘European Parliament and common understanding on access to VIS (incl.’

28 March 2007: conditions for a compromised package identified at political trilogue level
May 2007: approval in Council outcome at first trilogue; (0625
April) at CATS and Consey

AU Presidency
FI Presidency
GE Presidency
political agreement was reached. During the VIS-Access process the national experts met on average once a month. The senior officials met on average once every two months. On a few occasions, the subject of law enforcement access was also discussed in the first-pillar working structures of the Council, where the draft text of the VIS Regulation was examined. The main venues of discussions there, were the Visa Working Party at national expert level and the Strategic Committee on Immigration, Frontiers and Asylum (hereinafter: ‘SCIFA’) at senior official level. There, the discussions in relation to law enforcement access were mainly, and only for a while, focused on the contents of the bridging clause of the draft text of the VIS Regulation. The file appeared only twice – and only during the German Presidency – at the ministerial JHA Council level (in April and in June 2007).

In the working structures of the European Parliament, the primary venue of discussion was the standing Committee on Civil Liberties, Justice and Home Affairs (commonly referred to with the acronym ‘LIBE’). In the LIBE Committee the member of European Parliament (hereinafter: ‘MEP’) (Sarah) Ludford was appointed as Rapporteur with the task to draw up a parliamentary report on the VIS-Access proposal. She was also elected as Rapporteur for the VIS Regulation proposal. Ludford was member of the liberal-centrist Political Group of the Alliance of Liberals and Democrats for Europe (ALDE). The Rapporteur presented a Draft Report on the VIS-access proposal on 10 March 2006. The VIS-access proposal and the related report appeared twelve times on the agenda of the LIBE Committee. One of these meetings was a ‘joint debate’, held on 27 April 2006, where the Draft Report of the Rapporteur and the amendments proposed by other MEPs were discussed. The frequency of the LIBE meetings was on average once a month. During these meetings discussions on the VIS-Access report and proposal were conducted concurrently with those on the proposal for a VIS Regulation. The Report was adopted by the LIBE Committee on 15 May 2007 and sent for the final voting to the plenary session of 6-7 June 2007.

The VIS-Access file appeared once at the plenary level in the Parliament (on 6-7 June 2007). There, the Parliament officially adopted the VIS-Access final draft text together with a parliamentary report amending the text in first reading. The proposal for a VIS Regulation and the related parliamentary report were also adopted on that occasion. The plenary session of the European Parliament (of 6-7 June 2007) was two weeks before both the VIS-Access proposal and the VIS Regulation proposal were adopted by the Council at the ministerial level.

224 For details see Chapter 3, in Table 3.1.
The interinstitutional exchanges that were reported in the initial stages of the VIS-Access process took place between the Commission and the Parliament and between the EDPS and the Parliament. Attendance of Commission delegates at LIBE discussions in the early stages of the process was also reported.\(^{225}\) Involvement of the EDPS at one LIBE meeting was reported as well.\(^{226}\) Interaction between the two key legislative institutions, the Parliament and the Council, has not been reported (at least officially) in the early stages of the VIS-Access process. The first officially reported discussion between the European Parliament and the Council however took place somewhat later in the process. It was on 22 November 2006 that they officially met for the first time at the level of political trialogue.\(^{227}\) Interinstitutional interaction was not reported – at least officially – in the period before, not even with regard to the VIS Regulation. In a letter, sent on 3 May 2006, the Rapporteur of the LIBE Committee, Ludford, informed the Austrian Presidency she was seriously concerned that the VIS subject matter was discussed in the Council “behind closed doors”.\(^{228}\)

The interinstitutional discussions at the political trialogue level consisted of five meetings. The first officially reported political trialogue (on 22 November 2006) was during the Finnish Presidency. The second was reported on 4 December 2006. More were reported during the German Presidency (first half of 2007). The final trialogue took place on 26 April 2007, which was the culmination of the exchanges between the European Parliament and the Council. Findings drawn from the evidence based on interviews suggest that there was also, mainly during the German Presidency, an indefinite number of (sometimes weekly) trialogue meetings at technical level.\(^{229}\) Only a few references to discussions at the technical trialogue level were made in official documents.\(^{230}\) The decision-making process on the VIS-Access file came to an end when a formal political agreement was reached respectively in the JHA Council and the European Parliament in June 2007.

\(^{225}\) See for instance LIBE/PV 2005/1123, Minutes of the meeting of 23 November 2005; LIBE/PV 2006/123, Minutes of the meeting of 23-24 January 2006; LIBE/PV 2006/323, Minutes of the meeting of 23 March 2006.

\(^{226}\) See for instance LIBE/PV 2005/1123, Minutes of the meeting of 23 November 2005; LIBE/PV 2006/123, Minutes of the meeting of 23-24 January 2006; LIBE/PV 2006/323, Minutes of the meeting of 23 March 2006.


\(^{229}\) Interviews 09/06/2011 and 04/06/2012.

The outcome of the 26 April trialogue not only concluded the discussions on the VIS-Access Decision, it also marked an end to the discussions in the first pillar on the VIS Regulation and its bridging clause. In the European Parliament, the outcome of the 26 April trialogue was presented by the Rapporteur to the LIBE Committee on 14 May 2007. The Draft Report amending the VIS-Access draft Decision was adopted, by a vote of 25 to nil (with two abstentions).\(^{231}\) At the same time, the Draft Report on the draft VIS Regulation was adopted, with the same voting results.\(^{232}\) It was then sent to the plenary of the European Parliament for approval. Both instruments were adopted by the plenary on 7 June 2007.

In the Council, general agreement was reached on the outcomes of the 26 April trialogue at CATS level (on 3-4 May 2007) and Coreper level (on 10 and 16 May 2007). The draft texts of both the VIS Regulation and the VIS-Access Decision were then sent for a final approval to the JHA Council. Both instruments were adopted by the ministers during a meeting on 12-13 June 2007.

### 5.2.2 Identifying issues, frequencies and changes in the VIS-Access process

Seven discussion threads were identified in the VIS-Access process. Table 5.2 provides an overview of the discussion threads and an outline of the issues that dominated in each of the discussion threads (for a more detailed account see Appendix 4). The number of appearances of these issues in meeting agendas ranged from two to well over twenty. Overall, 37 official meetings at various levels in the Council, in the European Parliament and at the interinstitutional level were held where the VIS-Access file appeared. Examined in terms of number of appearances of the VIS-Access file and its various issues at each level, an overall picture emerges that provides some insight in the relative distribution of discursive effort across the various levels of discussion in the respective institutions and between them (for an overview see Table 5.1).

The VIS-Access dossier was most recurrent on the agenda of the LIBE Committee in the Parliament. The file appeared twelve times at that level. Its appearance on the LIBE agenda was evenly spread across the entire VIS-Access period. Second came the PCWP, with eight times. The last PCWP meeting on the VIS-Access file was on 12 January 2007, when the file was taken up already twice at

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### Table 5.1 Overview of the discussions in the VIS-Access process

<table>
<thead>
<tr>
<th>Date and Meeting</th>
<th>Topic Discussed</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>24 January 2006, LIBE Committee</td>
<td>discussed</td>
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</tr>
<tr>
<td>23 March 2006, LIBE Committee</td>
<td>discussed</td>
<td></td>
</tr>
<tr>
<td>5 April 2006, PCWP</td>
<td>discussed</td>
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<tr>
<td>27 April 2006, LIBE Committee</td>
<td>discussed</td>
<td></td>
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<tr>
<td>27 and 28 April, JHA Council</td>
<td>discussed</td>
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<tr>
<td>4 May 2006, LIBE Committee</td>
<td>discussed</td>
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<tr>
<td>16 May 2006, CATS</td>
<td>discussed</td>
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<tr>
<td>23-24 May 2006, PCWP</td>
<td>discussed</td>
<td></td>
</tr>
<tr>
<td>3 July 2006, CATS</td>
<td>discussed</td>
<td></td>
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<tr>
<td>6 July 2006, PCWP</td>
<td>discussed</td>
<td></td>
</tr>
<tr>
<td>12 July 2006, LIBE Committee</td>
<td>discussed</td>
<td></td>
</tr>
<tr>
<td>13-14 July 2006, PCWP</td>
<td>discussed</td>
<td></td>
</tr>
<tr>
<td>16 August 2006, PCWP</td>
<td>discussed</td>
<td></td>
</tr>
<tr>
<td>18 October 2006, PCWP</td>
<td>discussed</td>
<td></td>
</tr>
<tr>
<td>23 October 2006, CATS</td>
<td>discussed</td>
<td></td>
</tr>
<tr>
<td>22 November 2006, Political Trialogue</td>
<td>discussed</td>
<td></td>
</tr>
<tr>
<td>24 November 2006, PCWP</td>
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<td></td>
</tr>
<tr>
<td>4 December 2006, Political Trialogue</td>
<td>discussed</td>
<td></td>
</tr>
<tr>
<td>19 December 2006, LIBE Committee</td>
<td>discussed</td>
<td></td>
</tr>
<tr>
<td>12 January 2007, PCWP</td>
<td>discussed</td>
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<tr>
<td>24 January 2007, LIBE Committee</td>
<td>discussed</td>
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<tr>
<td>25-26 January 2007, CATS</td>
<td>discussed</td>
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<tr>
<td>1 February 2007, LIBE Committee</td>
<td>discussed</td>
<td></td>
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<tr>
<td>14 February 2007, Political Trialogue (broad context)</td>
<td>confirmed</td>
<td></td>
</tr>
<tr>
<td>28 February 2007, LIBE Committee</td>
<td>confirmed</td>
<td></td>
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<tr>
<td>28 March 2007, Political Trialogue</td>
<td>discussed</td>
<td></td>
</tr>
</tbody>
</table>

**Notes:**
- "internal Agr." indicates internal agreement.
- "discussed" indicates discussions occurred.
- "confirmed" indicates confirmation of discussions.
- "Acc." indicates agreement.
**Table 5.1 Overview of the discussions in the VIS-Access process**

<table>
<thead>
<tr>
<th>Date</th>
<th>Event Description</th>
<th>Resultant Agreement</th>
</tr>
</thead>
<tbody>
<tr>
<td>11 April 2007</td>
<td>LIBE Committee</td>
<td>discussed</td>
</tr>
<tr>
<td>19 and 20 April 2007</td>
<td>JHA Council</td>
<td>Internal Agr.*1</td>
</tr>
<tr>
<td>23 April 2007</td>
<td>LIBE Committee</td>
<td>Internal Agr.*1</td>
</tr>
<tr>
<td>3-4 May 2007</td>
<td>CATS (&quot;informal meeting&quot;)</td>
<td>confirmed</td>
</tr>
<tr>
<td>10 May 2007</td>
<td>Coreper</td>
<td>confirmed</td>
</tr>
<tr>
<td>14 May 2007</td>
<td>LIBE Committee (voting)</td>
<td>confirmed</td>
</tr>
<tr>
<td>16 May 2007</td>
<td>Coreper</td>
<td>confirmed</td>
</tr>
<tr>
<td>6-7 June 2007</td>
<td>Plenary Session European Parliament</td>
<td>confirmed</td>
</tr>
<tr>
<td>12-13 June 2007</td>
<td>JHA Council</td>
<td>confirmed</td>
</tr>
</tbody>
</table>

**Discussion Notes:**

- discussed = discussed but no shifts in position were reported
- Acc. (acceptance) = discussion resulting in an agreement reached on one aspect of the issue
- Internal Agr. = discussion resulting in an internal agreement, within the institution, reached on all aspects of the issue
- Inst. Agreement = discussion resulting in an interinstitutional agreement, between institutions, reached on all aspects of the issue
- confirmed = confirmation of agreement reached at an earlier occasion

*1 There was internal agreement in the Council on the deletion of the provision (art 5c) regarding the ‘specific case’ definition. But differences emerged with regard to the term ‘factual indications’. Only the Austrian delegation maintained reservations against the deletion of this term.

*2 Internal agreement was reached in the Council on the removal of the provision regarding issue ‘national access points’ (article 4). SWI discussions continued in order to find ‘an appropriate wording should be found […], as it will help to reassure notably the EP’ (Council Document st st10627 of 27/6/2006).

*3 Internal agreement was reached in the LIBE Committee on a mandate for the Rapporteur in view of the trialogue negotiations with the Council.
the trialogue level. The file appeared five times on the agenda of the senior officials of CATS. They had their last VIS-Access discussions on 25-26 January 2006, more or in the same period of time as the national experts ended their VIS-Access discussions. On 3-4 May 2007, the senior officials convened once more, in an informal setting, to be briefed on the outcome of the final trialogue of 26 April 2007.

The involvement of other actors in the VIS-Access discussions was, in terms of number of appearances on meeting agendas, far less substantial. In the Council, involvement of the ministers of the JHA Council, the Coreper ambassadors and the JHA Counsellors was not substantial. The appearance of the VIS-Access at these levels ranged from only once to twice. Moreover, participation of discussants at these Council levels was reported only in the final stage of the VIS-Access process. As regards the Coreper, it discussed on a few occasions the question of whether or not the VIS-Access file would be “Schengen-relevant”. Although not officially reported, the VIS-Access file appeared also once at the JHA Counsellors level. This happened only in the stage following the final trialogue of 26 April 2007. The file appeared twice on the agenda of the ministerial JHA Council. It appeared at a Council meeting on 19-20 April 2007. The ministers then agreed on a compromise package for further negotiations in the final trialogue of 26 April 2007. And it appeared in the JHA Council on 12-13 June 2007, after the ‘final’ trialogue of 26 April. There, the ministers “welcomed the agreement reached in first reading with the European Parliament”.

At the interinstitutional level, documents reported four political trialogues between the European Parliament, the Council, and the Commission. There was also another political trialogue during the German Presidency, where one aspect of the VIS-Access file was discussed. It was on 14 February 2007, where alongside other JHA dossiers – on for example the establishment of EDPS competence in the third pillar – the link of the VIS-Access Decision with the envisaged Framework Decision on data protection in justice matters was examined. Political trialogues were not

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233 If it were "Schengen-relevant" then Iceland, Norway, and Switzerland, and also the UK and Ireland would have been allowed to participate in the VIS-Access process. This participation would then take place in a mixed committee setting, alongside the PCWP working party. As associated countries they would be allowed only to participate in the discussions in this setting. They would not be allowed to take part in the voting. In April 2007 it was decided, in Coreper, that Norway, Iceland and Switzerland could participate in a mixed committee setting (see Council Document st8402 of 13/4/2007).
234 Interview 16/07/2012 (Qt 223:274), with a former national expert.
Table 5.2 Overview of discussion threads in the VIS-Access process

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<tr>
<th>Discussion thread &amp; issue(s)</th>
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<tr>
<td>‘Bridging clause and its four essential requirements’</td>
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<td>Discussions in the LIBE Committee basically centred on “four essential requirements” of the bridging clause (Amendments 133-136, PE370.101v01-00 of 1 March 2006) These requirements were reflected in the amendments that were included in the Draft Report on the VIS-Access Decision (European Parliament 2006). The first requirement concerned that access was only to be granted on a case-by-case basis. The second was about the limitation of the scope of access to the extent that access would be granted for the prevention, detection and investigation only of offences related to serious crime and terrorism. The third was that access could only to take place through single national access points (in order to exclude direct access to the VIS by national law enforcement authorities) upon prior request. And the fourth concerned the requirement that the adoption the VIS-Access Decision was to be made conditional on prior adoption of the VIS Regulation and prior entry into force of the envisaged Framework Decision for data protection in police and justice matters. In the draft report it was concluded that “only if [these four] elements are met can access by third pillar authorities to the VIS be considered justified and proportionate.” (European Parliament 2006: 19).</td>
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Common understanding on practically all aspects of the VIS-Access subject matter – i.e. the “four essential requirements” of the bridging clause – took already shape when the subject matter appeared for the third time on the LIBE Committee agenda. All in all, the VIS-Access file appeared eleven times on the agenda of the LIBE Committee. It appeared once on the agenda at the plenary level of the Parliament.
### Table 5.2 Overview of discussion threads in the VIS-Access process

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<tr>
<td><strong>1. ‘National access point’</strong></td>
<td>Should there be a procedure requiring a single ‘access point’ per member state and publication of a list of national access points?</td>
<td>The original provision (of the Commission provisional) on the requirement of a ‘single access point’ and publication of a list of access points was completely deleted. The agreed text, which replaced the entire provision of the Commission proposal, contained the obligation on each member state to keep a list of (several) units within designated authorities of which each having a “duly empowered staff” entitled to access. In order to reassure the Parliament “that no general access is envisaged and thresholds are set”, one sentence was later added to the provision but without altering substantially its meaning. (Council Document st11405/Rev1 of 16/10/2006).</td>
</tr>
<tr>
<td><strong>2. ‘Prior check’</strong></td>
<td>Should there be an obligation to submit first a duly motivated request to a central access point?</td>
<td>The original provision (of the Commission provisional) on the requirement to submit a duly motivated request to the central access point was cancelled. (Council Document st09641 of 7/6/2006: 7). Delegations held that, like the procedure requiring a ‘single access point’, the ‘prior check’ procedure “would indeed create a merely bureaucratic hurdle without added value, leading to a waste of resources and in urgent cases losing valuable investigation time” (Council Document st5456 of 22/1/2007).</td>
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<tr>
<td>3. 'Specific case'</td>
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<td>Should access only be allowed if it is necessary in a specific case? A specific case exists “when the access for consultation is connected to a specific event determined by date and place, or to an imminent danger associated with crime, or to a specific person 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” (Commission 2005a: article 5.1.c). Also, should access be restricted only to cases where an offence has already been identified (“factual indications”)?</td>
<td>Already on the second occasion the PCWP (on 13 June) agreed that the ‘specific case’ requirement should be dropped from the text. Instead, a provision was inserted that (merely) stipulated that “access for consultation must be linked to a specific case”. A definition of what is to be understood by ‘a specific case’ was inserted in a recital. Access granted only on the basis of “factual indications” would, according to some delegations, fail to allow for prevention of an offence. There was agreement on a formulation that access may be granted if there are “substantive indications” (Council Document st08711 of 23/4/2007).</td>
<td>The issue was settled at the ministerial JHA Council level, on 20 April 2006 (Council Document st08711 of 23/4/2007). It appeared six times at PCWP level, three times at CATS level, and once at the JHA Council level.</td>
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<tr>
<td>4. 'Framework Decision on data protection'</td>
<td>The provision in the Commission proposal that stipulated the conditionality of the adoption of the VIS-Access Decision on the adoption of the Framework Decision was deleted. Provisional data protection rules were included.</td>
<td>It appeared four times at PCWP level and twice times at CATS level.</td>
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officially reported during the Austrian Presidency (first half of 2006). Two were reported during the Finnish Presidency and two during the German. As in the case study of the EEW process, the assessment of systemic interaction on the basis of the policy documents yields an incomplete picture. Taking into account that not all discussions have officially been reported, it is difficult to arrive systematically at findings on how much effort has been put at each level of discussion for
Chapter 5

Table 5.2 Overview of discussion threads in the VIS-Access process

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<tr>
<td>5. ‘Transfer of data to third countries’</td>
<td>A meeting at PCWP level, on 18 October 2006, resulted in differences on whether to leave it to the member state to transfer (already acquired) data to a third country, to prohibit such transfer, or to allow it on the condition that sufficient data protection guarantees are provided by the third party. It was at the interinstitutional level that an agreement was reached on the issue.</td>
<td>In the Council, it appeared officially twice at PCWP level and twice at CATS level.</td>
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<td>5. ‘Designated authorities’</td>
<td>In the Commission proposal it was stated that authorities “responsible for internal security” were to have access. There were differences on whether this term should be replaced by a definition that would cover a broader range of authorities than those mentioned in the Treaty of the European Union. The Treaty (in Article 29) only referred to “police forces, customs authorities and other competent authorities in the Member States” (see Council Document st14196 of 19/10/2006). It was eventually agreed that “designated authorities” would replace the term “authorities responsible for internal security” (See Article 1 of the VIS-Access Decision).</td>
<td>It appeared twice at PCWP level, twice at CATS level and once at the JHA Council level.</td>
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sorting out differences on the VIS-Access dossier. Such is for instance the case with discussions at the technical trialogue level. There were only two references in the
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<tr>
<td>1. ‘Specific case’</td>
<td>Should access only be allowed if it is necessary in a specific case? <em>(for details see earlier in this Box.)</em> The text as redrafted by the Council seemed “to satisfy the EP requirement, even if the EP would have preferred the original Commission proposal” <em>(Council Document st5456 of 22/1/2007: 4).</em></td>
<td>It appeared twice at the political trialogue level.</td>
</tr>
<tr>
<td>2. ‘National access points’</td>
<td>Should there be one access point per member state or should there be more? The Parliament (i.e. the Rapporteur) was willing to accept more than one access point per member state. The Council on the other hand conceded to the Parliament that these access points or units conducting prior checks of requests for access to the VIS data should be different from the units which are in need of access to the VIS data.</td>
<td>It appeared all four political trialogues.</td>
</tr>
<tr>
<td>3. ‘Prior check’</td>
<td>Could a check be done after access to VIS data? The Parliament (i.e. the Rapporteur) was willing to accept that only in a case of emergency a check could be done after the search.</td>
<td>It appeared at four political trialogues.</td>
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documents to discussions at technical trialogue level.\textsuperscript{236} Even if references to ‘technical trialogues’ in documents were rare, it should already be noted that (as will be discussed further in the next section) there was an indeterminate number of technical trialogue meetings. The number by far exceeded the numbers of meetings held at each of the other levels of discussion, either in the Council or in the Parliament. Often, technical trialogues were held on a weekly basis, especially during the German Presidency, or sometimes even more.\textsuperscript{237}


\textsuperscript{237} Interview 12/12/2012 (Qt 220:99), with a MEP assistant.
Another critical observation is that the number of appearances of the file is not commensurate with the time spent on discussing the file. As has been discussed in the examination of the EEW process (see Chapter 4), discussants in the Council at the CATS and the Coreper levels had to cope with a manifold of different issues and files.

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<tr>
<td>4. ‘Framework Decision on data protection’</td>
<td>Should the adoption of the VIS-Access Decision be made conditional on the adoption of the Framework Decision on data protection in the field of justice and police cooperation?</td>
<td>The Parliament conceded that adoption of the VIS-Access was not to be made condition on the adoption of the Decision Framework Decision on Data Protection in the Third Pillar. On the other hand, a number of additional provisions on data protection that were set out in the VIS Regulation (on data security, liability, training, etc.) were inserted also in the VIS-Access Decision. Moreover, a political Council declaration would be added to express the Council’s intention to “quickly” reach agreement on the Framework Decision on Data Protection (Council Document st09104 of 30/4/2007: 2).</td>
</tr>
<tr>
<td>5. ‘Transfer of data to third countries’</td>
<td>Should transfer of data to third countries or international organizations not be allowed?</td>
<td>The Presidency presented the Council position that data could only be transferred to third countries “by way of exception”. The Parliament (i.e. the Rapporteur) was not in favour of such transfer, but accepted that transfer may take place only in “exceptional cases of urgency” (Council Document st8185 of 12/4/2007: 6-7).</td>
</tr>
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Discusants at these levels of discussion were faced with agendas that included many sorts of items of which the VIS-Access file (in its entirety) was but one. The Coreper ambassadors even had to address issues and files that covered several policy areas. Discussions on the various VIS-Access issues, at these Council levels, were certainly not an exception to that rule. More or less the same was the situation in the Parliament’s main venue of VIS-Access discussion, the LIBE Committee. Also there, time constraints were at play. The MEPs of the LIBE Committee had to cope with (mostly two-day) meeting agendas including twenty to thirty agenda items of which the VIS-Access file was, in its entirety, merely but one. Moreover, the discussions on the VIS-Access file was throughout the decision-making process coupled with the VIS-Regulation file. Time slots for discussing both files, in conjunction with each other, varied from only thirty minutes\(^\text{238}\) to not more than two hours (105 minutes)\(^\text{239}\).

The shifts in positions, acceptances of parts of compromises or complete agreements that were identified in the various stages of the process and at various levels of decision-making show a pattern of a rapid internal understanding respectively in the Parliament and the Council and yet a slow development of understanding between the institutions at the interinstitutional level. In the initial stages of the process, discussion was focused on the alignment of the positions within each of the institutions.

In the Council, this was not such a daunting task. Differences between the national delegations were such that already broad consensus was noted in the first two meetings at the PCWP and the CATS levels. Already in the very first redrafted version of the VIS-Access proposal entire provisions on procedure and conditions were deleted from the proposal text without much ado. Four to five meetings at PCWP level and two at CATS level were enough to come to an internal agreement. Only on one issue the national delegations had to debate for a comparatively long period in order to sort out differences on the exact wording. It was the issue on the definition of a ‘specific case’.

In the Parliament as well, differences (if there were any) were not difficult to overcome. At LIBE’s third meeting – a ‘joint debate’ on 27 April 2006 – the position of the Rapporteur on the file broadly reflected the positions of the other MEPs. During this ‘joint debate’, when various amendments were proposed by different political groups, wide consensus clearly took shape on the conditions constraining

\[^{238}\text{See for instance LIBE 2006/504-1, Draft Agenda of the meeting of 4 May } 2006.\]

\[^{239}\text{See for instance LIBE/ 2006/427-1, Draft Agenda of the meeting of 27 April } 2005.\]
access and the rules on data protection. The amendments proposed by MEPs were broadly in line with the amendments proposed by the Rapporteur.

Although the effort to overcome internal differences was relatively low for both institutions, the settlement differences at the interinstitutional level required much more effort. Moreover, the documents showed that there was a difference in awareness of the need to settle interinstitutional differences. In the European Parliament, awareness of the interinstitutional dimension of the VIS-Access file was present almost from the outset. In the initial stages, the Parliament’s LIBE Committee already exchanged views with the Commission and the EDPS on the file. Also, the Committee quickly showed awareness of the (potential) differences with the Council. The amendments of the MEPs proposed for the ‘joint debate’ of 27 April 2006, demonstrated awareness that the bridging clause guaranteeing a concurrent adoption of both the Draft VIS Regulation and the draft VIS-Access Decision provided the LIBE Committee with a unique possibility to vigorously engage in discussions with the Council on the VIS-Access file.

According to official reporting, there was no awareness of this peculiar situation in Council circles until mid-June 2006. Focus during that period was almost exclusively directed on the alignment of positions between the national delegations within the Council. It was not until the PCWP meeting of 13 June 2006 when reference was made by the Presidency to the conditionality of the VIS-Access drafting on the drafting of the VIS Regulation and the bridging clause. Only a few delegations (for example the French\textsuperscript{240}) in the Council then were aware of the interinstitutional dimension. Few references were made in the Council to interinstitutional negotiation with the Parliament in the second half of 2006. Then, the national delegations of the PCWP and the CATS were officially briefed twice by the Finnish Presidency on the latest developments at the trialogue level.\textsuperscript{241} In the first half of 2007, the German Presidency updated national delegations in the PCWP and the CATS more regularly. Officially it reported back to the delegations seven times on interinstitutional developments.\textsuperscript{242}

As the VIS-Access process reached its final stages, official reporting demonstrated an increased focus on negotiations and outcomes at the interinstitutional – or trialogue – level. The interinstitutional differences reported in the documents


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were more pronounced than the internal differences in each of the two institutions. Diametrically opposed positions on data protection safeguards, procedures for granting access and conditions constraining access were reported, which required more effort to come to an understanding than the effort needed for overcoming internal differences. At this level, shifts in positions, acceptances of parts of compromises or complete agreements were however also identified.

All in all, instances of change in the entire VIS-Access process were identified on three occasions. First, major shifts in position and agreements (either partial or total) were identified that resulted from internal discussions in each of the two (co-deciding) institutions. Second, instances of change were identified in the discussions between the European Parliament and the Council at the trialogue level. Third, changes and shifts in positions were also found, when the outcome of the final trialogue of 26 April 2007 was conveyed to the national delegations in the Council and to the MEPs in the LIBE Committee.

5.3 Identifying the nature of discussion in the VIS-Access process

This section takes stock of the interpretations of participants, observers and first-hand accounts of the discussions that took place in and between the various institutions involved in the VIS-Access decision making process. The analysis – or narrativization – was conducted on the basis of fourteen interview transcripts. Alongside the examination of occurrences of reciprocity and reflexivity, the transcripts were also assessed on references to instances of insulation and (elements of) systemic interaction.

The analysis of the nature and setting of the VIS-Access discussions has been subdivided in three subsections. First (in Subsection 5.3.1), the findings are presented of the formal and informal aspects of the institutional and social setting in which exchange between the institutions took place. In this section not only the findings are presented on the share and influence of the two ‘co-legislating’ institutions (the European Parliament and the Council). It also includes the evidence found on the share and influence of two other institutional actors. These were the Commission and the EDPS. Then, in subsections 5.3.2 and 5.3.3, the focus is on the evidence regarding – the nature and conditions of – the internal discussions held at various levels in each of the two ‘co-legislating’ institutions: the European Parliament and the Council. Subsection 5.3.4 then shifts the attention to the findings on the nature and conditions of exchange at the interinstitutional level.
5.3.1 The interinstitutional setting
Unlike the EEW, the ‘communicative space’ on the VIS-Access Decision was not exclusively situated in the Council. And yet, strictly speaking, the entire decision-making process on the VIS-Access Decision was considered a third-pillar event where usually other institutional actors, notably the European Parliament, were to have only a marginal role in the discussions. As an administrator of the European Parliament stated: “formally speaking, we were not supposed to negotiate on the Visa Information System Decision, on law-enforcement access.”\(^\text{243}\) A senior official of the Council Secretariat, who himself had quite some experience with negotiations on co-decision files with the European Parliament, commented quite sternly that: “Normally, with a third pillar Council decision, when you have a simple consultation with the Parliament, it is: they give their opinion and we do what we want.”\(^\text{244}\)

In the Council working structures, it was considered the responsibility of the Council alone to discuss and draft the VIS-Access Decision.\(^\text{245}\) There was the argument that while the Council had all the necessary expertise to formulate policy measures in the field of JHA, the Parliament did not have the ability or capacity to formulate a balanced view between security and fundamental rights. An official of a Permanent Representation explained that, whereas now that the Lisbon Treaty has brought equality in the responsibility in the institutional setting of JHA policy making, at the time of the VIS-Access discussions a reasoned exchange of views between Parliament and Council on security and human right standards was quite difficult:

‘the European Parliament very often made amendments that were not, let’s say, had not “weight” enough or were not “professional”. It is perhaps exaggerated. However you would like to qualify it. And now, with Lisbon, we are seeking a balanced way, between, let’s say, professionalism, expertise and democracy. […] And they [in the Parliament] found a balanced way, whereby the Council is able to explain that there are limits. […] And, the European Parliament is able to obtain the main safeguards that they want to have! But this, at the time of the VIS, it could not work! Due to the decision process and due to a, let’s say, unbalanced .... in French it is “repartition” ...., an unbalanced division of responsibilities.’\(^\text{246}\)

In Council circles, reference has repeatedly been made to the lack of expertise that the Parliament delegates seemed to demonstrate at the time, when it came to discussing

\(^{243}\) Interview 4/6/2012 (Qt 220:70).
\(^{244}\) Interview 18/5/2012 (Qt 220:70).
\(^{245}\) Interview 24/6/2011, with a member of a Permanent Representation (Qt 211:20).
\(^{246}\) Interview 24/6/2011 (Qt 211:30).
JHA matters. It was for example pointed out how difficult it generally was to discuss with Parliament delegates the technical intricacies of issues such as the possibility of off-line databases copied from the then planned SIS II database. On that occasion an official of the Council Secretariat noted that:

‘the problem is that they [i.e. delegates of the Parliament] sometimes made a proposal that was completely pointless. That for example, technically speaking, was unworkable. Or [...] because they do not know the background. And to put all this effort! To explain!’

Scarcity of regard in Council circles for the Parliament’s input in discussions on JHA issues was reported on several occasions. The Legal Service of the Council Secretariat also had difficulty in seriously taking on board the considerations and arguments of the Parliament concerning the Council Decision on the establishment of Europol of 2009: “the more absurd the opinions of the Parliament were, the less attention was paid to them.”

It was even reported that when discussions in the Council involved the examination of an opinion of the Parliament on JHA dossiers:

‘most of them didn’t last more than five minutes. On all the amendments of the European Parliament. And even some presidencies were making fun whether they were the fastest or not. So this was an institutional game of power.’

Little regard on the part of the Council for the position of the Parliament was also reported in terms of representation of the Council in meetings with Parliament delegations. In that light, a senior official of the Commission expressed “full sympathy” for the objection of the Parliament that the Council often failed to send a minister as a delegate of the Council to discuss JHA matters with an MEP, who after all is an elected politician. He explained that in cases where it would have been more appropriate for the Council Presidency to send a minister for negotiating on the thorniest of issues with the MEP, it was often instead a national senior official (i.e. a civil servant of the country holding the Presidency) with whom the MEP had to conduct business.

247 Interview 26/5/2011 (Qt 222:27; translated).
249 Interview 24/6/2011 (Qt 211:28).
250 Interview 26/5/2011 (Qt 222:20).
251 Interview 21/6/2011 (Qt 212:13).
Unequal representation did not necessarily mean that the Parliament was disadvantaged in the discussions with the Council. At least, this was not the case in the VIS-Access debate. Reporting on the interinstitutional discussions in the VIS-Access process has rather shown the contrary. An official who attended a trialogue meeting between a national senior official of the country holding the Presidency (i.e. director-general of the national ministry), the director-general of the Commission and the Rapporteur of the LIBE Committee (Ludford), observed that for the Rapporteur it was:

‘not a problem. It was rather an advantage she had. Or any parliamentarian has. When you are in a trialogue with a director-general, you know that this is a civil servant. Although at political level, but still it is a civil servant. And he has a State Sec above him and the Minister. And Baroness Ludford can talk to everybody. So for example, we had a meeting with the director-general and there were discussions […] there was a point of tension. And Baroness Ludford was really not agreeing with what [the director-general] said. And I was sitting there and I had the impression that […] there was in a way a showdown. I personally thought that she would stand up and say: "that does not make sense! I will next week meet your boss. And I will talk to him." And of course, she, I guess, she knew that that puts him, although he is the director-general, in a very difficult position. If you then have to come back to the [national ministry] and say: "I tried to prepare your trialogue with Baroness Ludford, but she left the room. Leaving you with nothing." So, of course Baroness Ludford had a, like, perfect position!’

There was also reporting of another form of inequality in the interinstitutional discussions between Parliament and Council. In Parliament circles, there was little appreciation for the lack of openness in the discussions with the Council on JHA files. It has been mentioned that while the Parliament had the task, also by virtue of it being a democratic entity, to ensure that its proceedings were transparent and there was guaranteed access to them, in the Council “everything basically plays in secret”. It was observed that Parliament delegates had difficulty in understanding how a discussion went or a decision was reached in Council circles or why certain words or formulations were included in draft texts without any clear indication of why these passages were included.

For all the references to formal-institutional inequality and power struggle between the two institutions, practical explanation was also acknowledged for the scarcity of open and transparent debates with the Council. It was understood by a

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252 Interview 16/7/2012 (Qt 223:85).
253 Interview 27/6/2011 (3) (Qt 213:11).
254 Interview 4/6/2012 (Qt 220:26).
former staff member of the European Parliament, who later became a Commission official (and therefore having experienced internal Council discussions) that the reluctance of the Council delegations to engage in a more open debate with the Parliament was related to the Council’s difficulty to re-open issues with the Parliament that were already heavily disputed (and settled) between the national delegations in the Council itself.255

Reference was also made to another quite mundane explanation for the unequal relation in the interinstitutional exchanges. It was acknowledged that the Parliament working structures were, compared to the amount of human resources in the Council, too understaffed to engage fully and effectively in discussion on an equal basis with the Council.256 Generally, a Rapporteur of the European Parliament was, on each file, assisted by one personal assistant and an administrator of the Committee Secretariat.257 Like the secretariats of other parliamentary Committees, the staff LIBE Committee comprised of a maximum of ten administrators. Their work covered a wide range of JHA files. Since there were so few administrators in the Committee Secretariats and so many files or dossiers, it has been said that administrators, as well as the assistants to the MEPs, “frequently tend to be generalists rather than specialists” (Corbett et al. 2007: 133). In the Council Secretariat, 64 officials worked on JHA files (Hayes-Renshaw and Wallace 2006: 108). Moreover, the Council Secretariat could often count on the assistance of experts in the Brussels-based Permanent Representations and the capital-based ministries of the member states, especially those of the member state holding the rotating Presidency (130-131).

Taking into account that the LIBE committee, its Rapporteurs and staff had to cope with a wide range of JHA files, it is reasonable to assume that there was also a relation between the Parliament’s focus on data protection concerns and a tendency to rely more readily on the expertise that it already developed in the years before, which in this case was the expertise on data protection. As it was observed by an administrator of the European Parliament, a ‘copy-paste’ of knowledge from earlier, successful experiences, with another European database, was helpful in applying data protection rules to new database projects such as the creation of the VIS.

“I think, there was also another factor which sort of helps us a little bit. [...] Maybe ‘competence’ is too big a word but we have engaged a lot on data protection issues. Because of that, also in the

255 Interview 4/6/2012 (Qt 220:33).
256 Interview 4/6/2012 (Qt 220:102).
SIS II, it was the Parliament which had proposed most of the data protection provisions. Also for the third pillar. And they were the result of lots of efforts that we had undertaken here, by inviting all the data protection authorities, the working group 29. And then there was the Schengen Joint Supervisory Authority. And then there was the European Data Protection Supervisor. So we have invested like an enormous work in the SIS. And other databases. And as far as I recall, it was a copy and paste of those data protection provisions into the VIS.  

While acknowledging that the Parliament was considered a less-endowed partner in the discussions with the Council, a former Parliament delegate also observed that the peculiar VIS-Access situation (of quasi-co-decision) an excellent opportunity to show that the Parliament was still able to engage in technical discussion on a JHA file. 

"And the Parliament was very much seen as: "now it is the same, more or less, defending fundamental rights but without real arguments. Without having real expertise. Just defending general principles. But not necessarily being able to come down to particular issues. To find alternatives, and to substantiate them." So there was, like, a brilliant occasion because it was a very difficult technical dossier. It was a brilliant occasion for the Parliament to show that, even though, at the technical level, of course the MEPs are not experts on visa issues, on law enforcement issues. They are generalists of course. And their Advisers are not specialists either. However, we can be like a serious partner in negotiations."

Although the bridging clause provided a level playing field for discussion between the two institutions, the situation was not entirely similar to an average co-decision procedure in the first pillar. The bridging clause certainly upgraded the Parliament to the position of a co-deciding institution on equal footing with the Council, but it was also explained that unanimity was still the rule in the VIS-Access discussions. As a matter of fact, a senior official of the Council Secretariat who participated in the negotiations on the VIS Regulation in the first-pillar bodies of the Council (the SCIFA and the Visa Working Party), noted that the discussions on the VIS Regulation were adversely affected by the peculiar state of play in the third pillar. He pointed out that:

258 With “working group 29” the respondent referred to the ‘Article 29 Working Party’ consisting of representatives of the national data protection authorities, the EDPS and the European Commission. Its main task was to provide advice on data protection from the national level.

259 Interview 9/6/2011 (Qt 221:20).

260 Interview 4/6/2012 (Qt 220:95).
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‘there was a very strange situation because, the effect of the combination of the two instruments was that we needed, in the Council unanimity on the Decision. Whereas concerning the Regulation, you only needed qualified majority. As the two were linked, that meant actually that we needed unanimity on both. Because anybody could block, here, the process concerning Regulation by blocking, over there, concerning the Decision. Because everybody knew that the two had to be adopted together. And that was also the requirement from the Parliament: to accept the bridging clause. So, we ended up, procedurally, with a very particular situation where in reality we needed unanimity in the discussion concerning a co-decision file [i.e. the VIS Regulation].’

In Council circles, the Parliament’s move (i.e. combining the VIS Regulation and the VIS-Access Decision in one package) was certainly not described in appreciative terms. An official of a Permanent Representation mentioned that the Parliament basically “blackmailed the Council on the VIS Decision”. The senior official of the Council Secretariat who participated in the first-pillar negotiations on the VIS Regulation felt that these discussions, that were focused on “the real thing” (i.e. the Regulation), were taken hostage by third-pillar discussions on what was considered “kind of accessory, a by-product” (i.e. the VIS-Access Decision). Even officials of the Parliament voiced such words as the “hijacking” of first pillar discussions or the “blackmailing” of the Council working structures.

Yet, at the same time, there was widespread acknowledgement, also in Council circles, that it was a logical step for the Parliament to take. A Commission senior official who attended VIS-Access discussions in trialogue meetings (at senior official level), explained quite compellingly the reason why, according to him, the Parliament resorted to the use of the bridging clause:

‘The analysis is very simple. I mean, the Parliament was of course completely infuriated by the fact that what they saw as the most sensitive issue, i.e. access to the VIS to be given to the law enforcement services for data to be processed according to law enforcement criteria. This escaping their complete control. It drove them crazy! It drove them crazy. So, they took the first pillar instrument in hostage, toying with the bridging clause as their leverage. To make sure that they would at the end of the day get in the third pillar Decision what they wanted. In terms of

261 Interview 18/5/2011 (Qt 215:5).
262 Interview with a member of a Permanent Representation (3/6/2011; Qt219:2).
263 Interview 18/5/2011 (Qt215:3).
264 Interviews 9/6/2011 (Qt 221:30) and 27/6/2011 (3) (Qt 213:16 and Qt 213:27).
265 Interviews 26/5/2011 (Qt 222:105).
limitation of the capacity of the law enforcement services to process data and in terms of protection of the rights of the individuals. 266

The confrontation between the Parliament and the Council in the VIS-Access discussions was certainly not portrayed as a power struggle alone. Respondents referred equally often, if not more, to the interinstitutional dispute as a conflict between principles. Parliament and Council staff were equally aware of the principled stance taken by both institutions in the interinstitutional debate. In Parliament circles, it was acknowledged that the Council was “representing the security approach” and Parliament “representing the protection of liberties”.267 In Council circles, it was even admitted that in the JHA Directorate General of the Council Secretariat: “we have a tendency of focusing more on the crime-fighting, here in this Council formation of justice and home affairs”.268

For all the self-reflection showed on the principled stance of one’s own institution, recriminations were also expressed against the principled position of the other institution. An official of a national delegation who was involved in the VIS-Access discussions, complained that whenever there was discussion on yet another file concerning data access and data exchange, the Parliament “had this easy way to make these objections”.269 Telling is the way how a staff member of the LIBE Secretariat conveyed mistrust of the Council’s intentions:

‘The VIS is not a police tool. It is a visa tool. It was created for a communautarized policy. For a visa policy. It was not created for the third pillar. So, what we are talking about here is the access of which we had to lay down very clear rules. They need to be justified in every single case. It cannot be the big fishing expedition of ‘let’s go in it, take everything out and throw it in a big pot with information and data for many other sources and profile and do whatever’. 270

Even more telling is how a delegate of the Council Presidency saw how important it was in the discussions with the Parliament delegation to try first to defuse the political conflict, i.e. the conflict between principles, before getting down to the subject matter:

‘we came to a point where you could see that, in a way, [the Parliament delegation] had .. you could call it ‘prejudices’, or ‘experiences’, ‘bad experiences’ with police authorities, .. they were

266 Interview 21/6/2011 (Qt 212:3).
267 Interview 4/6/2012 (Qt 220:66).
268 Interview 18/5/2011 (Qt 215:12).
269 Interview 24/6/2011 (Qt 211:23).
270 Interview 9/6/2011 (Qt 221:23).
always suggesting that there could be a misuse of the data. Of the data access to the VIS. And of course, they said .. their main line was the same: “This is VIS data! These persons are not criminals! Just persons applying for a visa and nothing more.” And they saw the Access Decision like, in a way, criminalizing all the visa applicants. So, first, it was important to hear from them how they see it. And not only at the technical level, like “In article 3 paragraph 2 we want to change this word and that word”. No! Just to start in a little bit more general way, to see how do they really see politically the issue."

Concerns about the implications of, for the first time, police access to a large European database with information about ‘common people’ that would, also for the first time, have biometric data (fingerprints and facial image) did certainly not smoothen out the difficulties arising from the political/principled divide between the institutions. For the Parliament, it was the occasion to press for the adoption of a Framework on Data Protection on matters of justice and police cooperation.\footnote{Interview 4/6/2012 (Qt 220:69) and 16/7/2012 (Qt 223:27).} In that light, it was observed at the final meeting (i.e. trialogue) between the Council Presidency and the Parliament delegations that the Rapporteur of the LIBE Committee (Ludford):

‘was using all the arguments and mixing it and making this huge bubble. It was complicated to stay on track […] when Baroness Ludford was proposing a compromise, mixing again data protection, the third pillar data protection, regulation, everything.’\footnote{Interview 16/7/2012 (Qt223:147).}

The stakes were high not only because of the VIS itself, but also because of the prospect of further steps towards creating more EU-level information and control systems containing data of people who are generally presumed to be innocent. It was clear for many that the VIS-Access case was to become the first instrument in a series of common data and control systems related to the management of EU’s external borders.\footnote{Interviews 18/5/2011 (Qt 215:65) and 16/7/2012 (Qt 223:230).} Although it was only in February 2008 that the Commission announced\footnote{It was announced by the Commission in a Communication of 13 February 2008 Preparing the next steps in border management in the European Union, COM (2008) 69 final (Brussels).} its intention to assess and develop proposals for such surveillance systems as an Entry/Exit System (EES) to register entry and exit data of all third country nationals
and an EU Electronic System for Travel Authorization (ESTA)\textsuperscript{276}, ideas already circulated that the VIS system would just be a beginning. Moreover, as one official of a national delegation said, law enforcement access to “Eurodac was already on the horizon.”\textsuperscript{277}

Another element that certainly did not ease the VIS-Access discussions, was that the VIS did not yet exist, or as a Commission official said: “it was all hypothetical”.\textsuperscript{278} Implications of an as yet inexistent VIS were particularly felt by the Council, which, as an official of the Council Secretariat pointed out, lacked the concreteness of experience and example to make their case in the discussions with the Parliament:

’in the main discussion between the Council and the Parliament, the Council being absolutely in favour of law enforcement access, to my knowledge, there was not any proof provided that this could be systematically of assistance. And it is largely, because, you know, the VIS doesn’t exist. So it is impossible to …. I’m not sure to what extent the point made by the Council was based on fact, calculation, kind of possibility analysis. But, in part, it is kind of very difficult to do. You will only find it out once you start using it.’\textsuperscript{279}

Respondents have quite regularly referred to the lack of relevant practical experience and hence to the inability of the Council and national delegations to convincingly argue that law enforcement access to the envisaged VIS would be useful.\textsuperscript{280} A Permanent Representation official explained it as follows:

‘access to the VIS, this access is for a system that would only work in the future. It was still not operational. […] So they [i.e. the member states] didn’t have, let’s say, the right feeling of what can be the benefit in the future of this system.’\textsuperscript{281}

\textsuperscript{276} A proposal for EES was issued on 28 February 2013. See: Proposal for a Regulation of the European Parliament and of the Council establishing an entry/exit system (EES) to register entry and exit data of third country nationals crossing the external borders of the Member States of the European Union, COM 2013/95 final (Brussels).

\textsuperscript{277} Interview 16/7/2012 (Qt 223:230). Together with a (amended) proposal for a Regulation establishing the Eurodac database for examining asylum claims through a fingerprint database (COM 2009/342 final), a proposal for a Decision was tabled on 10 September 2009, which would introduce the possibility for law enforcement authorities to access the Eurodac system (COM 2009/344 final).

\textsuperscript{278} Interview 27/3/2009 (Qt 214:16).

\textsuperscript{279} Interview 27/5/2011 (Qt 217:2).

\textsuperscript{280} Interviews 3/6/2011 (Qt 219:41), 26/5/2011 (Qt 222:37, 24/6/2011 (Qt 211:7), 16/7/2012 (Qt 223:232).

\textsuperscript{281} Interview 24/6/2011 (Qt 211:7).
Equally regular were the reports of a resolute and dismissive posture adopted by the Parliament delegation in interaction with the Council’s inability, or that of the Council Presidency, to (convincingly) demonstrate the usefulness of law enforcement access. An official of the Council Secretariat, who at the time worked at the Legal Service, observed during trialogue discussions the Rapporteur “made the Presidency’s life very difficult” with insisting on satisfactory, concrete answers to the basic question about whether law enforcement access would be useful.\(^{282}\) About the resolve and confidence of the Parliament delegation in the discussions with the Council delegation – on the issue regarding ‘transfer of data to third countries’ – a member of the Parliament delegation said the following:

> ‘the Council had to come up with some justification [...] and the Parliament was very much challenging the Council to give us concrete examples for certain issues, not only this one. I just pick up one issue. But for certain issues: "please give us concrete examples." And they were struggling to find examples. Because this was the reality. I mean, honestly, I don’t know how much of that all is going to be very useful for the fight against terrorism. But okay, [...] in some other cases they were providing examples. So, even though the Parliament was not fully convinced but "maybe there is an issue here, maybe let’s try to accommodate it."\(^{283}\)

It could be said that the Parliament was, thanks to the hypothetical nature of the subject matter, in a comfortable position. It found itself (at least) on a par with the Council in the VIS-Access discussions, because, as an official of the Council Secretariat has put, “ultimately, the database did not exist, so theoretically they [in the Parliament] knew it equally well”.\(^{284}\)

In short, one might say that the VIS-Access process was a peculiar case due to the equalizing effect on the interinstitutional discussions between the Parliament and the Council that resulted from the inclusion of the bridging clause in the VIS Regulation, and also from the largely hypothetical nature of the subject matter. Or, as the senior official of the Commission has put:

\(^{282}\) Interview 27/5/2011 (Qt 217:5).
\(^{283}\) Interview 14/6/2012 (Qt 220:77).
\(^{284}\) Interview 26/5/2011 (Qt 222:37; translated).
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"at the end of the day there were concessions from both sides. But the most important was for the European Parliament to show that they were able to force the Council to negotiate on a third pillar instrument with the Parliament."

In the interinstitutional debate, two other institutions were quite prominently involved: the Commission and the EDPS. While involvement of the EDPS was reported only in relation to the initial stages of the VIS-Access process, influence of the Commission was felt throughout the VIS-Access process. Appreciation was expressed of the constructive role that the Commission played in the interinstitutional discussion. A Council Secretariat official, who participated in the interinstitutional VIS-Access discussions, noted that the Commission delegates involved in the discussions at technical level made considerable effort to explain technical details and share evaluations of the situation in member states with the Parliament delegation. The official however also added that the Commission was more oriented to the needs of the Parliament than strictly necessary for an honest broker. A Commission official noted that the Commission provided "the Parliament with the information they could use in consultation with the member states". The opposite was however also observed. In Council circles it was for instance noted that "the Council and the Commission [...] were arguing against the Parliament." In Parliament circles, reference was for instance made to the Commission's general reluctance to consider LIBE's amendments because Commission officials "don't take on board what might put at risk the fragile compromises [they] have found in the Council."

Regardless of whether the Commission was more oriented toward one or the other institution, it appeared that the Commission was always inclined to follow its own line of interest. The Commission contributed to the decision-making process to the extent that it took the effort to ensure that its proposal would be maintained as much as possible in its original form. While this sort of behaviour was generally ascribed to the Commission's involvement in first-pillar/co-decision process, it did not go unnoticed that much the same was happening in the VIS-Access process.

285 Interview 21/6/2011 (Q212:5).
288 Interview 27/5/2011 (Q2 217:12).
289 Interview 27/6/2011 (3) (Q2 213:19), with a political advisor of the 'Legal and Home Affairs Working Group' for the political group 'European People's Party'(EPP).
In doing so, the Commission basically added substance to the discussions. As the senior official of the Commission, who attended VIS-Access meetings at the inter-institutional level has put:

> When looking at the co-decision process, the role of the Commission is to act as a facilitator. That is to say "okay, we have tabled the proposal. We believe in our proposal. We defend our proposal." I mean, if we took the time and the pain to present a text it is because we think that an EU standard is needed. I use the word 'standard' as a general concept. It's the legislation. It's the regulation. It is whatever you want. So we defend our proposal! And we facilitate an agreement between the two institutions! Provided that this agreement safeguards the substance of the Commission initial proposal. [...] And it's not only a theoretical approach. It's also happening in reality. Referring again to the few co-decision procedures where I've been involved in, we are not entering into that process as if we were coming from Mars. I mean, we have tabled the text! We are defending this text! We are supposed, usually, to have the necessary expertise, skill and arguments to explain why we have proposed it that way. This being said, once the proposal is tabled. In a way it is leaving the area under the control of the Commission. It then enters into a co-decision process where the Commission will not have the final say. The final say will be somewhere between the Council and the Parliament. So we are not neutral in substance. We defend our initial proposal.290

According to this passage, it appeared that the Commission was very much contributing to an exchange of arguments, informed views and expertise, but in a partisan fashion. It facilitated an informed dialogue between the two legislating institutions, by feeding it with “the necessary expertise, skill and arguments” it developed during the preparation of its proposal. In the case of the VIS-Access, it specifically meant that the Commission brought to the discussion an informed view on what it considered to be important: a set of conditions and procedures on law enforcement access ensuring a high standard of data protection.

It also appeared that, in preparing its proposal – and hence its position – the Commission was fully aware of the sensitive character of the law enforcement access and eager to consider the subject matter from various points of view. A task unit was established which brought together the various fields of expertise and services, including the Commission’s Legal Service, enabling the Commission to take in all the

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290 Interview 21/6/2011 (Qt 212:69).
pertinent various points of view, including those on data protection. An official of the Commission who was involved in the drafting of the VIS-Access proposal, explained that it was exceptional that the Commission engaged the services of lawyers specialized in data protection law from other departments in the Commission.

Also, before it tabled the final draft of the proposal, the Commission consulted the EDPS on several occasions. According to a Regulation on data protection the Commission had the obligation to do so, but only with regard to first-pillar legislative proposals. And the VIS-Access proposal was for a third pillar instrument. So there was no legal obligation for the Commission to subject the VIS-Access proposal to the scrutiny of the EDPS. Nor was it legally obliged to consult the EDPS on this proposal. Nevertheless, the Commission readily accepted the EDPS’ determination to advise also on third pillar instruments affecting personal data rights. The EDPS himself, (Peter) Hustinx, explained that at the time there was a growing practice in the Commission of consulting the organization of the EDPS on third pillar issues. He noted that while the Commission was working on the VIS-Access proposal and the EDPS indicated that it would be available for consultation:

‘they [in the Commission] actually did it. They wanted to check with us.[…] They started to do this gradually. But they did it really on a frequent basis. By now, it is virtually routine. […] But, the VIS came in where there was a practice, a growing practice, of being consulted, formally and informally, on third pillar matters’.

Once the VIS-Access proposal was tabled, it was received with positive feedback from the EDPS in its Opinion of 20 January 2006. The aim of access on a case-by-case basis and under strict safeguards was “achieved by the proposal in a globally satisfactory way”. With this “informal consultation methodology”, as Hustinx defined, the Commission and the EDPS have “set the scene. Together! And it was consensual!”

292 Ibid. (Qt 214:23).
294 Regulation 45/2001/EC of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies.
295 It was announced in a Policy Paper of 18 March 2005, The EDPS as an advisor to the Community Institutions on proposals for legislation and related documents, pages 5-6.
296 Interview 20/5/2011 (Qt210:2).
297 Ibid. (Qt 210:41).
298 Ibid. (Qt 210:46).
the Commission and the EDPS and his staff continued after the tabling of the VIS-Access proposal, but were less frequent.299

There were also exchanges between the EDPS and the European Parliament. Before the tabling of the VIS-Access proposal there were already contacts between both institutions, which were focused on the drafting of the VIS Regulation. During the VIS-Access process “side meetings” were held between the EDPS and his staff, and the Rapporteur and her staff, and key representatives of the Political Groups in the LIBE Committee.300 Also in the later stages, when the negotiations between the Council and the Parliament started off in the form of trialogues, contacts were still maintained between the Rapporteur and the EDPS in the form of “briefing meetings”.301

In Parliament circles, these exchanges, described as frequent and informal, were welcomed. They helped the Parliament in developing its amendments and in preparing the Draft Report on the VIS-Access proposal of 10 March 2006.302 The then assistant to the Rapporteur described the exchanges with the staff of the EDPS as follows:

‘At the time, when I was the assistant to the MEP, I was calling the desk of the EDPS, knowing that he or she is an expert on a particular issue. And because, in the Parliament, we didn’t have particular expertise on that, on data protection, we were calling them. To try to understand what can be the best compromise from the data protection point of view. So they were really helping the Parliament to give substance to its argument and, you know, to help us finding a good compromise. So for that, yes! I think it was also very much due to the fact that we had a very good relation, very good contact. Because it was not formal! It was really unofficial. Because we knew each other. That it is very easy to take up the phone and call them. But all this with a very good objective, and a good result. I would say. But again, a bit of, you know, unsettled working methods. And unofficial contacts.’303

Words similar to the above-referred idea of “giving substance to the argument” were used by the EDPS himself, Hustinx. He defined his role as EDPS and that of his staff during the VIS-Access process as an independent actor providing “input” for the discussions. More specifically, he noted that:

299 Ibid.
300 Ibid. (Qt 210:16).
301 Ibid. (Qt 210:54).
302 Interview 4/6/2011 (Qt 220:13).
303 Ibid. (220:16).
"Our role was, actually, to highlight them [i.e. the data protection principles]. To highlight: Why they were important. To highlight: Under what conditions could they be set aside. And giving follow-up, in informal conversations on the fine tuning of these conditions."³⁰⁴

The EDPS, Hustinx, expressed similar words with regard to the exchanges between him, his staff and the Commission in view of the preparation of the VIS-Access proposal. According to him, it was:

'An example of a structured procedure by which an independent institution takes a look. And it doesn't say "we like it" or "we dislike it". It is not a one page resolution or 'we encourage you to do better'. No! It is a refined analysis. On details. With suggestions. So there is a lot of substance! Fed in the system! That's it.'³⁰⁵

The bottom line of the passages referring to the involvement of the EDPS in the VIS-Access discussions is that its contribution was seen as a disinterested third party that provided substance to the interinstitutional debate. Knowledge, expertise and insight in the intricacies of data protection law were fed into the interinstitutional discussions between the Parliament, Council and also the Commission (as the initiator of the process). Basically, as Hustinx explained, the EDPS brought substance to the debate by assisting the Commission and the Parliament in adopting a nuanced position on data protection in the discussions. With regard to the trialogue discussions between the Parliament – represented by an able Rapporteur – and the Council – represented by an able Council Presidency – he said that this feeding of substance into the discussion:

'made them, in the Parliament, successful. But it also helped the other side. It helped the Council to accept the conditions under which it is only acceptable in a society under the rule of law. So we managed to come to a joint outcome. And in that sense, that's really interesting.'³⁰⁶

5.3.2 Discussions in the European Parliament

The main venue of VIS-Access discussion in the working structures of the European Parliament was the LIBE Committee. The Committee included in its list of responsibilities, firstly, the protection of human rights and, secondly, "civil liberties in the

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³⁰⁴ Interview 20/5/2011 (Qt 210:51).
³⁰⁵ Ibid. (Qt 210:58).
³⁰⁶ Ibid. (Qt 210:61).
European Union and the security and free movement of persons. Asylum policy came third and combating racism, xenophobia legislation and immigration were mentioned in the fourth and fifth place. The fight against terrorism, crime, drug-trafficking and fraud and the measures in the fields of customs, police and judicial cooperation were mentioned next as LIBE’s areas of concern.

The LIBE Committee had a total of 60 MEPs. Since committee meetings were in principle public, more people attended these meetings, including MEPs who were not members of the LIBE Committee, delegates from the Commission and Council Presidency. The delegates from the Commission and the Council were allowed to present their view on the file to the Committee or answer questions posed by the LIBE MEPs. Different from a traditional negotiating setting such as the one in a Coreper or JHA Council meeting or a trialogue meeting, the MEPs sat in a bloc of seats facing the chair and not each other.

As noted earlier (in Section 5.2), the VIS-Access file – and the bridging clause of the VIS Regulation – appeared twelve times on the agenda of the LIBE Committee. The frequency of appearance of the file on the LIBE agenda was, on average, once a month. The duration of the meetings was one to three half days (often in the afternoon). According to the minutes of the LIBE debates, the time slot reserved for discussion on the VIS-Access file – which was discussed always in conjunction with the VIS Regulation file – varied from 30 minutes to not more than an hour. Both files were set as one of a wide range of agenda items (all on JHA subjects), ranging from eight to well over twenty.

One would expect of the MEPs of the LIBE Committee that they interacted quite frequently and were likely to see each other occasionally to discuss files because they worked most of the time in the same building (either in Brussels or Strasbourg). Yet, evidence showed that exchanges at the Committee level on a specific file like the VIS-Access file were quite sparse and perhaps even fragmentary. This should not come as a surprise, considering the frequency of LIBE discussions of once a month and the constraints of the agenda for each LIBE meeting. On top of these constraints in the LIBE Committee setting, MEPs generally faced difficult choices arising from a monthly agenda that required of them to be present for one week in plenary session (in Strasbourg) and for three weeks in Brussels for a multitude of activities. These activities included discussions on a wide range of files in various – not just one – Committee or Political Group meetings, meeting lobbyists and keeping in

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308 Interview 9/6/2011 (Qt 221:3).
touch with their constituencies at home in the member states (see also Corbett et al. 2007: 57-59). All this is compounded by the time it took to travel between Brussels, Strasbourg and member states.

In relation to these constraints, reference was frequently made to the general nature of the VIS-Access discussions in the LIBE Committee. There was frequent reference to “reporting” or providing an account by either the Rapporteur or a Commission official on the broad outlines of the subject matter. Due to time constraints, as it was reported by an administrator, discussions in the LIBE Committee were more akin to a presentation by the Rapporteur of “the general state of play, and whoever wants to know more, can ask more questions”. 309 Exchange, as it was generally portrayed by respondents, did not extend further than presenting statements and posing questions to the Rapporteur and answers being provided by the Rapporteur. 310 Textual changes were generally not discussed in Committee meetings. 311 It has also been reported that constraints of time and attention for a multitude of files prevented MEPs from engaging in “real, enlightened discussions on the file”. 312 The LIBE Committee had still to arrive eventually at a decision on whether or not to adopt (by simple majority) the draft text of the VIS-Access report. An administrator of the LIBE Secretariat explained that while “the big lines were always discussed in the Committee”, it was in preliminary meetings where the more interactive exchanges on the more specific issues took place. 313 Another respondent referred to these exchanges as the “internal cuisine” of decision making in the European Parliament. 314

Reporting on the VIS-Access discussions in the Parliament showed that the Rapporteur and representatives of the Political Groups had a key role in the discussions at these small-group levels. Telling is the observation of an outsider, an official of a Permanent Representation who learned also when he had to negotiate with the Parliament on behalf of the Council Presidency how important the discussions ‘behind the scenes’ in the Parliament were. He plainly noted that:

‘look, I mean, the Parliament always wants to be the hyper transparent institution. But the contrary is true. Because that’s what happens in the committees ... I mean, okay, it is all trans-

309 Interview 9/6/2011 (Qt 221:3).
310 Interview 27/6/2011 (3) (Qt 213:59).
311 Interviews 9/6/2011 (Qt 221:5) and 4/6/2011 (Qt 220:45).
312 Interview 4/6/2011 (Qt 220:55).
313 Interview 9/6/2011 (Qt 221:5).
314 Interview 4/6/2012 (Qt 220:44).
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mitted by web stream and you can find things in archives. Even after a 100 years you could still see what the Committee has discussed now.

I mean, in the committees it is where the decision is done! That's where they are pushing the button and that then we are having a decision. [...] But the interesting issue, the interesting issue is done behind closed doors. Like: MEPs talking to the Rapporteurs, the Shadow Rapporteurs315. Maybe at assistant level they have already ticked off the issues. Maybe important MEPs do meet in the 'MEP bar', which is the closed door bar where the MEPs have access to. So it is interesting for member states to be in contact with these MEPs because they suddenly know more about the feelings in their own group and also in other groups on certain issues. So, this makes sense.316

The Rapporteur had a pivotal role in the proceedings leading up to the production of a Parliament report on a legislative proposal. The general rule was that when the Committee received a proposal, it allocated the task to draw up a report on the proposal to a Political Group according to a so-called ‘points system’.317 The Political Group would then appoint a Rapporteur among its MEPs. It was the liberal-centrist (liberal-democrat) Political Group ALDE that acquired the task to draw up reports on both the VIS-Access proposal and the VIS Regulation proposal, which then appointed Ludford as the Rapporteur to draft the reports.318

The ALDE Group was the third largest group in the Parliament, at plenary level and at the LIBE Committee level. In the LIBE Committee, the ALDE Group had ten MEPs. The largest was the Christian-Democratic EPP, with twenty-one MEPs in the LIBE Committee. Second came the ‘Party of European Socialists’ (PES), with fifteen MEPs. More to the left of the political spectrum, the Group of the Greens/European Free Alliance (hereinafter: the ‘Greens’) and the Confederal Group of the European United Left/Nordic Green Left (GUE/NGL) held seven seats in the Committee. The remaining seven seats were held by national-conservative and non-attached MEPs.

315 More on ‘Shadow Rapporteurs’, see next subsection.
316 Interview 3/6/2011 (Qt 219:33).
317 According to this system each Political Group receives a quota of points according to its size. Each report to be drafted on an incoming proposal is worth a certain amount of points. The Political Group with the most points left, takes precedence and is in principle entitled to drawing up a report on the proposal. See also: Corbett et al. 2007: 135; and Interview 20/6/2011 (Qt 218:3).
318 Interviews 27/6/2011 (3) (Qt213:1) and 20/6/2011 (Qt 218:3).
As the third largest Political Group the ALDE Group enjoyed leverage on the
drafting and adoption of reports and opinions in the LIBE Committee. The senior
official of the Commission observed that the ALDE Group, both at committee and at
Plenary level, was “making the balance” between the two big political groups, the centre-
right EPP and the centre-left PES. Yet, he also added that the MEPs of the ALDE
Group were “punching above their weight because of the mathematical situation in the Civil
Liberties Committee”. This meant among other things that, as another respondent
pointed out, a Rapporteur of the ALDE Group was always in need of the support of
other groups in order to ensure a secure majority at committee level and at plenary
level. In that light, it has been explained that while in other standing committees the
ALDE Group usually positioned itself more to the right of the political spectrum, in
the LIBE Committee, on justice and home affairs, it rather shared the views of the
PES and the Greens.

The political advisor of the EPP explained that in the LIBE Committee, there
was a “structural left wing majority”, to which the ALDE Group adhered itself. It broadly
agreed on such issues concerning high standards of protection of fundamental rights,
personal data rights and privacy rights. The EPP, for its part, followed a quite
steady course directed at, as another administrator of the EPP Secretariat has referred
to, the facilitation of “law enforcement authorities to carry out checks effectively, while making the
system as light and unbureaucratic as possible for the user”.

In drawing up a report with possible amendments on a legislative proposal,
Rapporteurs had to take into account the positions (and amendments) of other
Groups and MEPs in the Committee (Corbett et al. 2007: 140). Even though
appointed by their respective Political Groups, Rapporteurs were, strictly speaking,
acting on behalf of the Committee – hence the Parliament – and not their respective
Groups (Corbett et al. 2007: 143). By extension, it meant that Rapporteurs had the
primary role to secure majorities in Committees that were willing to support the draft
text of the Report.

Such was also the case with regard to the VIS-Access report. In the LIBE
Committee, the ALDE Rapporteur Ludford still had to secure a majority that would
have to support the VIS-Access report and the VIS Regulation report. She therefore
had to take good care of the relations with the other Political Groups, notably with

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319 Interview 21/6/2011 (Qt 212:34).
320 Interview 3/6/2011 (Qt 219:4).
321 Interview 27/6/2011 (3) (Qt 213:9).
322 Interview 20/6/2011 (Qt 218:11).
the two biggest, the EPP and the PES Groups. More specifically, in pursuing a policy of restricting law enforcement access to the VIS, Ludford had to take good care of the relations with the ‘Shadow Rapporteurs’ of these groups. Shadow Rapporteurs were the MEPs who on behalf of the other Political Groups monitored the drafting of the report assigned to the Rapporteur. Shadow Rapporteurs (or ‘Shadows’) could make use of the possibility to add amendments to the draft text on behalf of their Political Group or reformulate those tabled by the MEPs of their respective Political Group (with the consent of the latter). They often also attended trialogue meetings between the Rapporteur and the Council and Commission delegates. In ensuring support of the Political Groups represented by the Shadows, the Rapporteur had to keep a good working relationship with the Shadows.\(^3\)

In preparing the Report on the VIS-Access Decision, Ludford kept close contact with four Shadows. (Ewa) Klamt acted as Shadow Rapporteur on behalf of the EPP Group, (Michael) Cashman on behalf of the PES Group, (Tatjana) Ždanoka for the Greens and (Sylvia-Yvonne) Kaufmann on behalf of the GUE/NGL Group. It was reported that in the early stages of the VIS-Access process Ludford had less difficulty in securing political support for her position from the other Political Groups.\(^4\) This may be accounted for, as the Commission senior official explained, by the difficult negotiations with the Council at the interinstitutional level. At the trialogues on the VIS-Access file he observed that

‘Ludford’s position […] was strongly backed by the European Parliament, as long as the negotiation was in a kind of a deadlock […] during the Austrian and the Finnish presidency. Her frustration was largely shared by the other Shadow Rapporteurs.’\(^5\)

But later on, as interinstitutional negotiations started to take shape, particularly during the German Presidency, internal support for the Rapporteur’s position on restrictions on law enforcement access became less unconditional. During that stage, it was reported by an administrator of the EPP Secretariat in the Parliament that an understanding emerged between the EPP and the PES – or more specifically between the Shadow Rapporteurs of the EPP and the PES – on a more relaxed approach to regulation of law enforcement access.\(^6\)

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\(^3\) Interviews 21/6/2011 (Qt 212:38) and 26/6/2011 (Qt 213:56).
\(^4\) Interview 4/6/2011 (Qt 220:59).
\(^5\) Interview 21/6/2011 (Qt 212:38).
\(^6\) Interview 20/6/2011 (Qt 218:12).
The senior official of the Commission deduced in a compelling way why this shift in positions in a later stage happened. He explained that once the Council understood that it “could not endlessly play the third pillar game” with the Parliament and that “the time has come to negotiate”, the Rapporteur “started to get messages from Shadow Rapporteurs […] that the time had come to show some flexibility on the substance”. He also pointed to the very real possibility that the Shadow Rapporteurs “themselves got more and more influenced by an active lobbying of the member states”.

He also pointed to the very real possibility that the Shadow Rapporteurs “themselves got more and more influenced by an active lobbying of the member states”. Similar observations were made by the then assistant to the Rapporteur, who noted that discussion with the Shadow Rapporteur and the coordinator of the EPP in the LIBE Committee eventually became more “difficult”. She also had the impression that “they were briefed by the Council”.

It can thus be said that at the level of exchanges between the Rapporteur and the Shadows and those between these leading discussants and their respective Groups, there was far more interaction than at Committee level. While it is difficult to exactly gauge the volume of exchanges at these levels, the following passage provides a good illustration of their magnitude and importance:

“That’s the standard practice in Parliament: that you had to discuss a lot internally in order to shape positions, which then are defended in a trialogue [with the Council]. A lot! And I mean, this takes place at all levels, and in different settings. You have meetings where really the members are there and discuss. Where the Rapporteur and Shadow Rapporteurs from the other political groups. But there are also numerous other informal contacts. Advisors of the political groups, secretariat staff members, assistants.….. So it is difficult to say: “It was only [official] meetings”. Yes, there were meetings but there were also a lot of informal …. bilateral […] I mean, this is the basic way how the Parliament works. It works so in any procedure. There is a lot of, simply, people know each other and speak to each other. Sometimes informally. Occasionally.”

Exchange outside the Committee meetings thus took place in various forms, ranging from informal, occasional and bilateral contacts to the more formal exchanges such as those in “Political Group meetings”, “preliminary meetings” or “sub committees”. The regularity of these more formal meetings also provided a basis for identifying points of agreement between the Groups and monitoring progress of the negotiations con-

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327 Interview 21/6/2011 (Qt212:43).
328 Ibid.
329 Interview 4/6/2012 (Qt 220:56).
330 Interview 9/6/2011 (Qt221:13).
331 Interviews 27/6/2011 (3) (Qt 213:57) and 9/6/2011 (Qt221:2 and Qt211:6).
Negotiating the VIS-Access

ducted by the Rapporteur in trialogue meetings with Council delegations. The preliminary meetings, as the then assistant to the Rapporteur explained, also contributed to confidence building between the Rapporteur and the Shadows, which was needed for developing a mandate for the negotiations with the Council delegation. She noted that:

‘there were some sensitive discussions with the MEPs at the time. […] But I had the impression that there was a general agreement on the line to take. And that the Shadow Rapporteurs had confidence in her about defending this position [on “access of law enforcement authorities limited to exceptional cases”] in the trialogues. There is always a bit of internal cuisine, you know. Building up trust. Before the meetings, especially with the EPP. I remember that it was not always easy to convince them on certain positions. But in the end, on the overall, it worked quite good.’

Similar observations were made in EPP circles. The political advisor to the EPP Group in the LIBE Committee basically reported exchange of trust and reassurance that the line agreed would be respected. He described this exchange with the following words:

‘Sarah Ludford is a very reasonable person. And, yes! Her aim was also to get as many groups on board as possible. If the results would have been bad, desperately BAD! She would never had agreed to any compromise. And she wouldn’t have done only to please the EPP group [which was in a minority due to the ‘structural left wing majority’ in the LIBE Committee]. So the major concession Sarah Ludford made, was to basically agree in principle to an access of law enforcement authorities to the VIS data system. Which for her, this is not […] by definition given. She, basically, refuses this idea: to collect data for one purpose, in this case for visa, to use them then, afterwards, for law enforcement.

But she realized, and this is why I said she is a reasonable person, that she also would have had hard times selling to the public, to the people that vote for us, that: ”Yes, we have an instrument in place. And we have criminality. We have abuse. But we don’t use this instrument that we have […] to structure our immigration policy, for also, at the same time, fighting all sorts of crime.” I am not speaking about terrorism. But also organized crime. She realized that.’

332 Interviews 9/6/2011 (Qt221:8); 27/6/2011 (3) (Qt 213:37) and 4/6/2011 (Qt 220:43).
333 Interview 4/6/2012 (Qt220:44).
334 Interview 27/6/2011 (3) (Qt 213:37).
The political advisor not only reported, in this passage, that the EPP and its Shadow Rapporteur basically had trust in the Rapporteur’s acknowledgement of a more lenient position towards law enforcement access. More importantly, he also indicated the Rapporteur’s preparedness to accept the EPP’s position even though the bargaining position of the EPP in the LIBE Committee was not that strong (due to the presence of a “structural left wing majority”).

For all the potential for a reasoned discussion an exchange between the Rapporteur and the Shadow Rapporteurs may provide, even at this level of discussion some inhibition to arriving at a deeper understanding was still reported. It was noted that discussions in preliminary meetings usually were restricted to exchanges on subjects that were technically not so demanding, for instance on subjects such as the issue concerning “transfer of data to third countries”. It was an exchange of views only on principles and not on legal, institutional, organizational or technical issues.

Due to time constraints, heavy programmes, understaffing and a multitude of other legislative files, the challenge for the Shadows (and MEPs in general) to engage in an informed debate on all the (politically relevant) ins and outs of the file appeared to be too much. The consequence was, as it was reported by a respondent, that the Rapporteur enjoyed a certain degree of marg de manoeuvre for conducting negotiation with the Council delegation (i.e. delegates of the Council Presidency and the Council Secretariat). In that light, the respondent noted that in a preliminary meeting with the Shadows:

“They didn’t have a huge expertise on this issue. When there were these, like, extremely technical dossiers, the Shadow Rapporteurs were just, you know, involved in the discussions on the principles. They were not able to start a fight with her [the Rapporteur] on the technicalities, because no one was really like following the substance of it. Which had a good part. I mean, we were a bit more free for […] defending our position with the Presidency. But okay, the bad part of it was that we didn’t have an informed debate in the Parliament. You know, like really discussing.

That’s crazy, but the Parliament did not have, and even now, say, a huge expertise, in general, because … they have a Secretariat with a limited number of people who will have to be experts in everything that is justice and home affairs. Whereas in the Commission, you have one official dealing with one file. And even that is not enough! […] Which is not at all due to incompetence […]. But it is linked with the system. This is how it works in the LIBE. The only advisers in

335 Interview 4/6/2011 (Qt 220:55).
At the Parliament’s plenary level (where a total of 732 MEPs convened), the VIS-Access file appeared only three times. The first time was on 16 February 2006, when the VIS-Access proposal (which just came in from the Commission) was declared as one of the “documents received”. It was then forwarded to the LIBE Committee for further examination. Only on 6 June 2007, almost at the end of the VIS-Access process, it appeared the second time. Then, a “joint debate” was held on a final version of the Report on the VIS-Access Decision, as well on that of the Report on the VIS Regulation. The next morning (7 June 2007), both texts were put to the (final) vote in Parliament. Both documents, including the amendments to the VIS-Access proposal and those to the VIS Regulation proposal (including the bridging clause) as they were agreed with the Council, were adopted by a simple majority.

The only discursive event of any significance at the Parliament’s plenary level was the “joint debate” of 6 June 2007. Amendments were not tabled then. The group of discussants involved in the joint debate included only those who were closely involved in the discussions at the level of LIBE Committee and in the trialogue meetings between the Parliament, Council and Commission delegations. Among the discussants were the Rapporteur responsible for the parliamentary reports on the two VIS instruments (Ludford), a senior official of the (German) Council Presidency, the responsible Commissioner (Frattini) and a limited group of MEPs who took the lead in the discussions on both VIS instruments in the LIBE Committee. Rather than an interactive exchange of positions and arguments, the “joint debate” at the plenary level consisted of a series of presentations of statements or views of each of the discussants.337

5.3.3 Discussions in the Council
The main venue of VIS-Access discussion in the working structures of the Council were the PCWP and the CATS. In parallel to the VIS-Access discussions in the PCWP and the CATS, there were discussions on the VIS Regulation in the Visa Working Party (at national expert level) and the SCIFA (at senior official level). Strictly speaking, the two VIS processes in the Council took place in two different settings, each with different rules. Still, despite formal differences between the first-

336 Ibid. (Qt 220:48).
pillar and third-pillar working structures, there was no difference between the two legislative cultures. It was indicated that “the dynamic was exactly the same”. This observation was made by an official of the Council Secretariat who took part in the discussions on the VIS Regulation – hence in the Visa Working Party and the SCIFA – and also attended VIS-Access discussions. He explained that at the time of the VIS discussions, after the entry into force of the Treaty of Amsterdam and the ensuing five-year period of transition from third-pillar to first-pillar procedure, the national experts in the Visa Working Party “working in the migration area” were still not fully accustomed to the practice of ‘co-decision’ with the European Parliament. He observed that

‘in general, in the migration area you were moving from an area with little involvement of the European Parliament to an area where there is a major involvement, of co-decision. And there, ... when the transition was made, everybody still had to get used to the fact that the European Parliament would have a bigger role. But I think, for the delegations it was clear that there was a big learning curve as to the procedures. And the realization that ... you had to start to take into account of what the European Parliament was saying.[...] And I suspect that the people working on police cooperation had a similar kind of shock as the 'border' people, when it came to that. But it is just an inevitable learning curve when new priorities turn up. Especially at that time, when the LIBE Committee was quite dominated by ALDE characters.’

It was widely acknowledged that discussions among national experts, in the PCWP, were not held under the best of circumstances. They came to meet once a month in the ‘Justus Lipsius’ Council building in Brussels. There were 27 delegations to be facilitated and there were 23 official languages to be translated simultaneously. The costs of each working group meeting amounted to € 60,000, covering translation, interpretation and room hire. Usually, there were just as many interpreters (60 to 70) during a working group meeting as there were national experts. Two large adjacent rooms were needed to provide sufficient space for both national delegations and interpreters for a meeting.

The size of the meeting and the multilingual nature were certainly not considered as conducive to productive exchange between national experts. A senior official

338 Interview 27/5/2011 (Qt217:7)
339 Ibid.
341 Interview 18/5/2011 (Qt 215:36).
342 Interview 3/6/2011 (Qt219:13).
of the Council Secretariat noted that even in such a well-organized, interpreter-mediated event as a working party meeting misunderstandings were not entirely excluded.343 A bigger problem was the size of the group and the formal conduct of discussions. Interaction could barely take shape if in a group of 27 delegations a few wished to directly engage in an interactive exchange of arguments but would have to wait for their turn.344 Another problem arising from the group size was, as a senior official indicated, that the kind of discussion for which national experts were most needed, namely the examination of technical details, was quite difficult to conduct. In that light, he explained that:

‘at working party level, people are generally able to discuss tiny details. Because they are the experts. They are able to do that. But in a big setting with all these people around the table, it can be difficult to discuss a large number of details. Because you simply don’t have time! You can’t do it.’ 545

Under these circumstances, each working party meeting was seen as just another meeting where the expert only presented the position of his member state without reacting to the position of the colleague from another member state.346 An official who attended as national expert PCWP meetings on the VIS-Access Decision, had difficulty with the lack of interaction during these meetings. His portrayal of a colourless, routine visit of a national expert to Brussels for negotiations is telling:

‘there are people, like me, coming from the capital. Going to Brussels. The normal procedure is not to meet with other delegations, with representatives of the Commission. You just get into the room, take your place, you have your position, you raise your flag. You say “on article 4, [my country] thinks this and that”. And then you will have to make sure that you have completed all the orders you have in your mandate. And you raise your reservations, and so on.”347

A respondent of another national delegation, who also attended PCWP meetings, put it more or less in the same words. He thereby specifically referred to what he saw as the main feature of the expert’s contribution to discussions: i.e. indicating the ‘red lines’ in the national instructions.

343 Interview 18/5/2011 (Qt 215:36).
344 Interview 16/7/2012 (Qt 223:223).
345 Interview 18/5/2011 (Qt 215:45:44).
346 Interview 16/7/2012 (Qt 223:78).
347 Ibid. (223: 239).
"They have more or less their paper in front of them, with all the red lines. And if it is something in red then they say 'no'. If it is not red then it's 'okay'. This is not a dynamic negotiation process!"\(^{348}\)

Still, ways to circumvent inanimate exchange between national experts were reported as well. The delegations, for their part, tried to make full use of the exchanges during coffee breaks and lunch hours by finding ways to get the most out of the expert meetings.\(^{349}\) The official who attended as a national expert at the PCWP meetings, explained how some delegations, including his, found ways during the coffee break to build in a more interactive form of exchange in the expert meeting. It was on these occasions that he learned most from the ways in which other delegates, including officials from the Council Secretariat, considered the matter.\(^{350}\)

More reference was made to the ways in which the Presidency steered the course of the discussion, at expert level and in general. Summary reports were made by chairs who tried to avoid as much as possible "full table rounds", even though these rounds were in principle required according to the rules of procedure.\(^{351}\) A senior official of the Council Secretariat always advised chairs to avoid this formality:

\begin{quote}
  ‘In a big setting with all these people around the table, it can be difficult to discuss a large number of details. Because you simply don’t have time! You can’t do it. And that’s one of the things that we tried to rationalize. I always advise a given Presidency, the chair person, not to [with emphasis] conduct, what we call, a ‘table round’. If you have an issue, you should not go the whole way around the table because it takes too long! And you will never get down to the issue, and to the next question. So I would say: "once we have an idea of this is where people are going, heading, for, then we should say ‘okay, it appears that a majority of people would like to go down this road. So, unless somebody has a strong concern or objection in that regard, that’s what we then will do.”\(^{352}\)
\end{quote}

The Presidency was assisted by officials of the Council Secretariat in more than just providing advice for ensuring a smooth conduct of the discussions. They also assisted

\(^{348}\) Interview 3/6/2011 (Qt 219:12).
\(^{349}\) Interviews 18/5/2011 (Qt 215:34 and Qt 215:47) and 16/7/2012 (Qt 223:216).
\(^{350}\) Interview 16/7/2012 (Qt 223:62).
\(^{351}\) Interviews 27/3/2009 (Qt 214:39); 3/6/2011 (Qt 219:60); 16/7/2012 (Qt 223:221 and Qt 223:223). As regards, the rules on the conduct of discussions in the Council, see Council Decision of 1 December 2009 (2009/937/EU) adopting the Council’s Rules of Procedure.
\(^{352}\) Interview 18/5/2011 (Qt 215:45).
the Presidency in drafting working papers ahead of the meetings that served as a basis for a more focused discussion.\textsuperscript{353} Moreover, their presence during discussion – including that of officials from the Council’s Legal Service – allowed for a more informed exchange on issues that required insight from a European legal or administrative point of view.\textsuperscript{354} The same was true of the presence of Commission delegates during discussion. Their knowledge of the subject under discussion – which they acquired from preparing and drafting the proposal and related proposals – and their European perspective on the subject matter, made them not only able to provide substance to the discussions. Also, their presence allowed the national expert discussions also to become more interactive and dynamic.\textsuperscript{355}

Still, one challenge was to allow for an interactive debate in a large-group setting with inhibitions of formal procedure, another was to tackle the issues themselves. Proximity to detail of the subject under discussion – “word by word” – and the slow pace by which discussions proceeded – “article by article” – did certainly not help the national experts to address the thorny issues of the VIS-Access file.\textsuperscript{356} Moreover, they did not have the mandate to cope with difficult issues. National experts, as was reported on several occasions, had to stick to their instructions and all the red lines in it.\textsuperscript{357} As a respondent, who attended as expert the PCWP meetings, reminded: “we are normal civil servants, we have no political mandate”.\textsuperscript{358} The respondent reported that he had to refrain from conveying details on the position of his country until he received green light from the ministry.\textsuperscript{359}

The situation for the experts of the PCWP was compounded by the institutional oddity of the VIS-Access process that arose from the linkage between the VIS-Access Decision and the VIS Regulation. One of difficulties for the national experts was that they had to get used to an unusual practice of acknowledging and taking in the Parliament’s position already at a stage when they still had to sort out the issues between themselves and, more importantly, when contacts – i.e. trialogues – with the European Parliament were not yet made. Only in a more advanced stage,

\begin{itemize}
\item \textsuperscript{353} Ibid. (Qt 215:28).
\item \textsuperscript{354} Ibid. (Qt 215:27 and Qt 215:33).
\item \textsuperscript{355} Interviews 27/3/2009 (Qt 214:8) and 16/7/2012 (Qt 223:62).
\item \textsuperscript{356} Interview 26/5/2011 (Qt 222:71).
\item \textsuperscript{357} Interview 26/5/2011 (Qt 222:71); 3/6/2011 (Qt 219:11).
\item \textsuperscript{358} Interview 16/7/2012 (Qt 223:260).
\item \textsuperscript{359} Ibid. (Qt 223:202).
\end{itemize}
when the national experts had done most of the work at their level, contacts were made with the Parliament.360

The PCWP experts not only had to get to grips with a situation which they were not used to, they also had to explain this unusual situation to their superiors, the senior officials, in the ministries of the home capital.361 It was reported that coping with this unusual situation, which clearly had political implications, posed difficulties for the national experts. Experts were reported to be left in “limbo”,362 One expert was at pains to explain to his ministry in the home capital that the position of the Parliament on the various VIS-Access issues was not to be disregarded.363

An official of the Council Secretariat noticed that the VIS-Access file was more than just an average “expert file”.364 She pointed out that as the file was an extremely difficult one. It had to be forwarded “regularly” to the level of senior officials. The times that the VIS-Access file appeared at senior official level, was not much less than the number of appearances at national expert level (seven official PCWP meetings and six official CATS meetings). A JHA Counsellor who attended both national expert and senior official meetings, considered that once the national experts had identified the issues of which the shaping of a solution was beyond their competence and ability, it was up to the senior officials of the CATS to say, in principle:

“This was not my initial idea but anyhow I see that there is a majority in the room for another solution which we could live with. It is not ideal, but we could live with it. So I agree.”365

This sort of flexibility was expected more from the CATS, which made one to consider it a more suitable venue in the VIS-Access process, in particular for the examination of outcomes following from the trialogue debates between the Council Presidency and the European Parliament delegation.366 It was also assumed that, since the senior officials worked in close consultation with their respective ministers, when a reservation on an issue was raised by a director-general in the CATS then the issue was bound to have been already discussed between the ministers involved. This did

360 Interviews 26/5/2011 (Qt 222:3).
361 Interviews 26/5/2011 (Qt 222:71) and 16/7/2012 (Qt 223:72).
362 Interview 16/7/2013 (Qt 223:76).
363 Ibid. (Qt 223:6).
364 Interview 26/6/2011 (Qt 222:9).
366 Interview 26/5/2011 (Qt222:89).
however not occur in the case with the VIS-Access file. As the respondent (a Council Secretariat official) explained:

‘the issues were not big enough for the CATS member to say: “I’ll consult my minister. Brief my minister and convince him to convince the minister of Germany [that then held the Council Presidency] to go back and re-negotiate with the Parliament”’. 367

For all the advantages of hierarchical weight and proximity to the minister, short-comings were also reported at CATS level. These shortcomings had much in common with the constraints identified at working party level. The senior officials had much the same problems with the size of their meetings. Obviously, the setting and its limiting effects on interactive exchange were much the same. A respondent having attended CATS meetings, pointed out that when a delegation wanted to react to a rebuttal of another delegation, it would have to wait because “twenty countries or so wanted to take the floor”. 368 A CATS meeting was just as much of a carefully prepared and interpreter-mediated event where the same formal rules of procedure applied as a working party meeting. On top of that, whereas national experts of (any) working party dealt during one meeting with one file only, the senior officials had to discuss several files during one meeting. Deliberation on various elements of one file, let alone all the relevant aspects of an issue of a file, was difficult, because “in the CATS you simply don’t have the time for that”. 369

These shortcomings, in various degrees at the PCWP and CATS levels, could not have been much of a hindrance for the discussants in the VIS-Access process to reach agreement among themselves. As discussed earlier (in Section 5.2), agreement on all VIS-Access issues was well within their reach already from the beginning, except for the issue concerning ‘designated authorities’. The challenge for the discussants at the PCWP and CATS levels, rather, was the tackling of the issues that divided the Council and the European Parliament. Reaching an understanding at the inter-institutional level required more effort of the discussants at the two levels, because it was at the interinstitutional level, as the EDPS, Hustinx, pointed out, that the “differences in perspective” prevailed. 370

The tackling of these issues seemed to be a double challenge for the national experts of the PCWP and the senior officials of the CATS. Not only the reaching of

367 Ibid. (Qt 22:93; translated).
368 Interview 16/7/2012 (Qt 223:58).
369 Ibid. (Qt 223:165 and Qt 223:165).
370 Interview 20/5/2011 (Qt 210:34).
an understanding on the outstanding VIS-Access issues with the Parliament constituted a challenge. It was also said that it was first and foremost, a challenge to learn that the Parliament was a negotiating partner whose position and arguments could not be disregarded during discussion. A Commission official who attended the PCWP and CATS meetings on the VIS-Access file observed that “it took really a long time before the member states in the group realized that they actually had to do what the Parliament wanted”.

Equally relevant here is the observation, mentioned earlier, that national experts had hard times in explaining to their superiors in the home capital the unusual situation of (quasi) co-decision.

Not helpful either was that, as pointed out earlier, practically all references made by national delegations to possible benefits from access to the VIS remained “hypothetical”, because the VIS did not yet exist. What was observed during the discussions on the VIS-Access file was a lack of concreteness of experience and example that would otherwise have enabled the delegations to make their case for law enforcement access. A senior official of the Council Secretariat’s Legal Service perceived the attitude of the delegations as follows:

‘Let’s say, often it went like this: "yes, we want police access". But how it exactly was to be arranged, then it was: “Well, as long as there is access for the police whenever the police needs it.” […] Because they think that it would benefit. …… It can be questioned.’

A similar experience was, albeit a bit more sternly, expressed by the Commission official who on behalf of the Commission defended in several PCWP meetings the conditions on law enforcement access proposed by the Commission in the VIS-Access proposal:

‘We have constantly challenged the member states in the working groups. Challenged! Challenged! I felt myself, often when I took the floor, very sovereign. Very confident of our own argument. That is very arrogant, but the member states could not simply come up with good arguments! We have challenged them all the time “If you say this, then give us examples!” And they could not! Yet, that reflex of "direct access”, despite the fact that they could not come up with an argument. They did not give up. It is also typical of those dynamics, and of the group on police cooperation: "We

372 Ibid. (Qt 214:16).
373 Interview 27/5/2011 (Qt 217:2).
374 Interview 8/4/2011 (Qt 216:11; translated).
are the police, we know very well how it goes. Don’t come and tell us how the police should do its job. Listen to us.

These dynamics! That attitude! In nine out of ten cases, they came with that. Often also so uncreative. Arrogant! Ivory Tower! Typically, that’s what gives the police a bad name in the Parliament. We were expected to believe them. If they say that it is necessary then we just have to take their word for it. That’s exactly what the Parliament wanted to avoid.  

The JHA Counsellors and the ambassadors were not involved throughout the VIS-Access process. As a matter of fact, they featured only when a compromise between the Council and the Parliament was gradually taking shape at the trialogue level. It meant that it was only in the first half of 2007, during the German Presidency, that discussions moved from the capital-based to the Brussels-based decision-making levels of decision making in the Council. Various explanations have been put forward for why the Brussels-based levels were better suited to deal with resolution of outstanding issues of in the conclusive stage. Firstly, recurrent reference was made to the high frequency of meetings and the ease of arranging them at these levels. Both the JHA Counsellors and the ambassadors were in frequent contact with each other and they met regularly (without the use of interpreters) to discuss various sorts of files, at least on a weekly basis, if not more.

Immediate accessibility and availability gave the Brussels-based diplomats of the Permanent Representations an advantage over the capital-based officials in times when a compromise between the institutions was emerging and exchanges in Brussels were expanding at a rapid pace. On that account, a JHA Counsellor explained that:

‘And if you enhance the process, and, say, you’re in the very end of a negotiations phase with the Parliament, then, more or less you have a discussion at Coreper level. Then, the Presidency is going back to the Parliament and say: “well here, two of the five issues we can agree with”. And the others say: “No! We have to find a solution.” And then they are coming back within two days, five days, one week, ten days. There is simply no time to convene a meeting of experts from the capitals, providing all these translations and so on. It is a very practical way to do it, to arrange JHA Counsellors meetings. And, yeah, to get a debriefing on the trialogue from the Presidency.’

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375 Interview 27/3/2009 (Qt 214:7; translated).
376 Interviews 3/6/2011 (Qt 219: 18) and 16/7/2012 (Qt 223:80 and Qt 223:162).
377 Interviews 26/5/2011 (Qt 222:86) and 16/7/2012 (Qt 223:199).
It was also considered necessary that JHA Counsellors were involved in the more advanced stages of the process, because they were considered less attached to details of the file and therefore more able to develop compromises.\footnote{Ibid. (Qt 219: 23).} As one of the reasons why the JHA Counsellors were more able to find compromises it was indicated that it had a lot to do with the way consultations were held with the home capital. It was explained that by lowering expectations in the home capital the JHA Counsellor could afford himself a wider mandate for exploring alternatives with his colleagues in Brussels:

\begin{quote}
"it is also about expectation management. In some dossiers! In some dossiers, the ministry may say: "well, we need full access and no data protection rules!" Or: "just data protection rules which do not affect our efficient work on the data." And so on. And if you then say: "yes, we are doing that." Then ... well .... you have to give up many alternative positions in the further discussion process. Because there is the Parliament, and also colleagues from other member states with their positions [...] you have to downsize the expectations of your capital."\footnote{Ibid. (Qt 219: 25).}
\end{quote}

One of the primary tasks of the JHA Counsellors was to keep contact with all parties involved in the final stage of the process. These included their superiors at the Permanent Representations, the Coreper ambassadors, and the desk officers and senior officials in the home capital. An official of a national delegation who also acted as Council representative in the exchanges with other European institutions put it quite aptly: “you can use the JHA Counsellors’ meeting to send your message across”.\footnote{Interview 3/6/2011 (Qt 219: 25).} This observation was based on the experience he had when he briefed the JHA Counsellors on the outcome of the final trialogue of 26 April 2007 with the Parliament. There, the official observed that his fellow discussants, the JHA Counsellors, showed the preparedness to listen to the grounds of the Presidency’s acceptance of trialogue outcome. There he could notice that:

\begin{quote}
"in the JHA counsellors meeting someone could say: "well, I have no mandate to say that but I think that my capital sees this problem." Or there was another saying "my capital definitely sees this problem." So you can then react. That’s why I had this paper [on the outcome and explanations] and, and then they said: "well, we don’t get that! Explain this line! And that!" So I could explain it!"\footnote{Ibid. (Qt 223:164).}
\end{quote}
He considered the JHA Counsellors to have added value in the decision-making process because they were in the hub of communications. He explained this view with the following:

“That's the way I see the JHA Counsellors. The advantage is ... a JHA Counsellor for me is someone who is attending, or at least, he is following discussions at the working group level. But he is also part of the delegation, in the Council, and at least in the CATS meeting. These persons have contacts with the upper part of the hierarchy in their capital. So if you could convince a JHA Counsellor, you have the chance that he explains it, if you're lucky, in a positive way to his capital. So for me, in convincing a JHA Counsellor, it is crucial. [...] They have the flexibility! You can just use it [i.e. the JHA Counsellors' group] as an additional occasion to convince the others.”

It has also been pointed out that the JHA Counsellor was not as close “to what happens in the capital” as the national expert. The ability of the JHA Counsellor to successfully convince the ministry in the capital was therefore still considered to be conditional on the willingness of the national expert to cooperate with the JHA Counsellor in Brussels.

Developing and maintaining contacts with EU institutions was also seen as one of the assets of the JHA Counsellors’ involvement in the process. Reference was often made to the familiarity the JHA Counsellors had with seeing Commission officials, MEPs, administrators and advisors of the Parliament. It was for instance noted, by an official of the Council Secretariat, that even though much of the JHA Counsellors’ work was third pillar related, they knew the people from the Parliament well because as Brussels-based officials they happened to meet them and hear from them. A respondent who was JHA Counsellor, explained that he came to learn the importance of developing and maintaining “standing contact” with the MEPs in the LIBE Committee and staff members in the Parliament and following committee meetings during the half year when his country held Presidency. He also noted that he frequently made able use of this skill during the VIS-Access process, to “sense the mood of the MEPs there in the field” and to speak to other MEPs than the Rapporteur herself.

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383 Ibid. (Qt 223:166).
384 Interview 16/7/2012 (Qt223:251).
385 Interviews 3/6/2011 (Qt 219:50); 3/6/2011 (Qt 219:17); and 16/7/2012 (Qt223:17).
386 Interview 26/5/2011 (Qt222:77).
387 Interview 3/6/2011 (Qt 219:50)
388 Ibid. (Qt 219:37) and (Qt 219:31).
The respondent who then was representative of the German Council Presidency, noted how important it was that the JHA Counsellors were well aware of the difficult relationship between the Council and the Parliament on the file when he briefed on the agreement reached at the final trialogue of 26 April 2007.\footnote{Interview 16/7/2012 (Qt223:160).} It was however also reported that, at a stage when negotiations with the Parliament was coming to a close, there was an atmosphere of “take it or leave it”, which was also clearly felt at the JHA Counsellors level.\footnote{Interview 3/6/2011 (Qt 219:27).} An official of the Council Secretariat explained that delegations came to understand that it became difficult to send the Presidency back to yet another trialogue and reopen discussions with the Parliament.\footnote{Interview 26/5/2011 (Qt222:93 and Qt222:108).}

For the Coreper ambassadors it was not only difficult to tackle outstanding issues, as they had to examine these issues under serious agenda constraints.\footnote{Interview 16/7/2012 (Qt223:251).} For them, it was also difficult to maintain a reservation considering that they would run the risk that at the following JHA Council meeting their respective minister would not make a case for it.\footnote{Interviews 19/7/2010 (Qt102:50) and 16/7/2012 (Qt223:190).} Maintaining a reservation in the Coreper while the minister remained silent on the issue would weaken the ambassador’s credibility in the group with the other ambassadors.\footnote{Interview 19/7/2010 (Qt102:50).} Maintaining a reservation would require the ability of the ambassador to effectively gauge the political seriousness for his country. It would also require the ability to focus only on the political implications of the issue during discussion in the Coreper.\footnote{Interviews 19/7/2010 (Qt102:50) and 16/7/2012 (Qt223:190).} Some of the outstanding issues were related to the wording of the bridging clause.\footnote{Interview 16/7/2012 (Qt223:291).}

Discussion on some outstanding issues continued at the meeting of the ministerial JHA Council of 12-13 June 2007, which took place in Luxembourg.\footnote{Ibid. (Qt223:184).} In the VIS-Access process, it was the second time that the file appeared at ministerial level. On a previous occasion (19 April 2007), the ministers principally confirmed the agreement reached at lower Council levels on a mandate for the Council Presidency to negotiate with the Parliament. Final discussion of the file at ministerial level was, together with the VIS Regulation, one of the well over fifty agenda items of a two-day ministerial meeting.\footnote{Press Release 10267/07 of 12-13 June 2007.} Items discussed on those occasions ranged from debates on
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recognition of suspended sentences and alternative sanctions, E-Justice or violent video games to adoptions of measures already agreed on for instance prevention of violence and disturbances at football matches.

As regards the VIS-Access file, discussion at the ministerial level threatened to get bogged down in controversies over detail. The official who was part of the German Presidency and attended the ministerial meeting, observed that:

'in Luxembourg, they wanted to discuss the wording of the bridging clause! [with enormous emphasis] Because if you start .. I mean, you can imagine that! .. if you start reading a text, in English, and every Minister does that. And of course, you see them asking their team: "explain me this?" And then hear them saying: "No! I have the impression that it sounds strange?" And then, they start sometimes a linguistic discussion! Like the British say: "Well, you surely mean this!" While the other says: "We should ask our British colleagues if that is correct English!" [...] And everybody has another understanding. They are not prepared for that! And that makes it very complicated.'

The Presidency, in the person of the German Minister for the Interior (Wolfgang) Schäuble, had a decisive role in providing focus to the ministerial discussions. It reminded the ministers that the Council has committed itself to a compromise that was reached after several trialogues with the Parliament. The ministers, on that occasion, were faced with the choice of either having access to the envisaged VIS system, which would be subject to conditions as required by the Parliament, or running the risk of serious delay of the VIS becoming operational and no law enforcement access.

It was observed that there was a widespread appreciation that one “definitely cannot get more” from the interinstitutional negotiations than what has been achieved with a Council Presidency that was held by EU’s largest member state and with a minister (Schäuble) who was widely considered a skilled negotiator. The respondent, the JHA Counsellor of a Permanent Representation, who made this observation reported that when:

'Schäuble presented it [i.e. the outcome of the final trialogue] he said: "That's it. You definitely cannot get more." And everybody knew: "Schäuble is a first-class character. And Germany is the

399 Interview 16/7/2012 (Qt223:191).
400 Interviews 3/6/2011 (Qt 219:60) and 16/7/2012 (Qt223:193).
401 Interview 3/6/2011 (Qt 219:60).
largest country. If they both cannot get more out of it, then we have to make up our minds and accept it, whether it hurts or not”. And so, most of the member states went on board.\textsuperscript{402}

5.3.4 Trialogue discussions
There was no standard, formal procedure for conducting trialogues. Reference was repeatedly made to the tentative or unsettled nature of conducting discussions at the trialogue level at the time of the VIS-Access process. A member of the Parliament delegation reported that:

'It was something ad hoc. It was like a working method. That we had at the time […] For the Parliament it was, at the time, maybe the Visa Information System, the Regulation, was even amongst the very first dossiers in co-decision. So it was something new for the Parliament. The codecision procedure has very clear procedural steps, et cetera. But at the working level we have tried to find a setting in which now to cooperate with the Presidency and the Commission. While respecting the strict procedural steps in codecision, which has first reading, second reading and so on. And the aim was to have a first-reading agreement. So, all the working methods were, like, something we decided 'on the spot' because it was not formalized. We just went along with meeting because we knew that that is the only way to get a political agreement, to find a technical compromise, a technical understanding at the technical level, first. And then, to come up with solutions we proposed to those who decide at the political level.'\textsuperscript{403}

The size of the meetings at the trialogue level were, at the time of the VIS-Access process, insignificant. Reporting indicated that during the trialogues on the VIS-Access file each delegation consisted of a relatively small team of representatives. Often, it comprised of two to three persons. At technical trialogue level, it was for instance reported that the total number of delegates from all three institutions was eight.\textsuperscript{404} During the final trialogue of 26 April 2007, at political level, some twelve persons were involved – including the German Minister for the Interior, the Rapporteur, and the Commissioner officially in charge of the file. The presence of Shadow Rapporteurs in these trialogues was not reported.\textsuperscript{405}

At technical level, the Parliament was represented by the assistant of the Rapporteur and a staff member of the LIBE Secretariat. Often, the Rapporteur was also

\textsuperscript{402} Ibid.
\textsuperscript{403} Interview 4/6/2012 (Qt 220:3).
\textsuperscript{404} Interview 16/7/2012 (Qt223:11).
\textsuperscript{405} Interview 26/5/2011 (Qt 222:65).
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present at technical trialogue meetings. For the Council it usually was the chair of the working party. This was usually a higher-ranking official – at director-general level of the ministry of the country holding the EU Presidency. For the Commission it usually was the desk officer in charge of the file and/or a senior official of the directorate general (e.g. head of unit or director-general) in charge of the file.

It was observed that whilst in the team of Council representatives the principle of hierarchy applied, in the team of the Parliament representatives there was a close and trustful working relationship between the Rapporteur, her assistant and the staff member of the LIBE Secretariat. On this aspect a then member of the Council delegation observed that:

'I always felt that the 'strategic advantage' was for Ludford. Because the relationship was much closer in the delegation, when you are working as a personal assistant to a parliamentarian. Working all day with her."

Interesting is the observation from the opposite side, from the assistant to the Rapporteur, on how well it worked in the Parliament team:

'From the part of the Parliament, we were very much briefing Sarah Ludford, before the meetings. She was prepared. She knew the file. We were sitting down and said: "these are the points. On this you can be more flexible. On that you have to insist." Etcetera. During the trialogues we were sitting close to her, so every step we made was kind of controlled: "On this we show flexibility and on that we will be a bit more firm." Etcetera. It was always easier, especially at technical level. Because you know much more the file into depth. But I think it worked also quite well at political level, I think. I do not remember cases where you would have said "Ah, this is a mess!" Or "What did she say! She gave up to this! For this only!"

Moreover, throughout the entire VIS-Access process the Parliament team was composed of the same persons. At technical level, the team of Parliament representatives involved the assistant to the Rapporteur and the staff member of the LIBE Secretariat, and sometimes also the Rapporteur. And at political level, the Rapporteur was throughout the process assisted by these two file experts. The same was observed about the Commission delegation. Even though at times Commission officials

406 Interview 16/7/2012 (Qt 223:128).
407 Ibid. (Qt 223:94).
408 Interview 4/6/2012 (Qt 220:88).
409 Interview 26/5/2011 (Qt 222:65).
changed at senior level, the desk officer in charge of the file was always present in the team.\textsuperscript{410}

The situation was different for the Council delegation. There, delegations changed due to the rotation of presidencies. Each half year, as the Presidency rotated, the Council team was composed of different officials. At least, it changed in part because the official of the Council Secretariat in charge of the file provided for a certain amount of consistency in the line adopted by previous presidencies.\textsuperscript{411}

Even though each member state took up the responsibility to prepare itself in the months before it would take up the next turn, drawbacks were still reported. On the part of the Parliament, it was for instance observed that “with every Presidency you basically lose three months, because they don’t know how to work with the Parliament”.\textsuperscript{412} The then assistant to the Rapporteur, pointed out that it was also a question of personal commitment of the persons working in the Presidency delegation. She observed that “you can have a very ambitious Presidency, but the person with whom you will have to work on the file, is not extremely cooperative or does not really trust you”.\textsuperscript{413} The term of six months, as she explained, did not provide enough time to build up trust or a cooperative working relationship. A JHA Counsellor, who took part in trialogue negotiations when his country held the EU Presidency, put quite aptly what the difficulty for a Council Presidency team was:

“Every six months. Every six months the Parliament has to deal with new people there. Although if you do a good handover, you cannot give all what happened. You cannot hand over everything what you experienced. What has been discussed, the arguments, the specifics and nuances of the Council’s opinion. The ways in which it has been discussed. You cannot hand over everything what you experienced. You can only, just hand over dossiers, papers. And maybe some ideas of how things would work out, but not always. And that’s it. And then, the Presidency starts introducing themselves like "hello I am ...", on the informal, on the tactical level. But there is no trust on the big sensitive questions.

[…] all these negotiations is about human beings talking to each other. And if you know the other person, the other side, about how does he or she react, how good we know each other. What are the tipping points making a person angry or content. Or how to manage your negotiations partner? That’s part of it! And if the Commission stays stable and the Parliament stays stable,

\textsuperscript{410} Interview 16/7/2012 (Qt 223:93).
\textsuperscript{411} Interview 26/5/2011 (Qt 222:65).
\textsuperscript{412} Interview 9/6/2011 (Qt 221:32).
\textsuperscript{413} Interview 4/6/2012 (Qt 220:110).
and the Council changes its chief negotiator, every six months, then nothing will come out! Especially the big dossiers! Perhaps on the many nitty-gritty files.414

In addition to coping with rotation, the Council Presidency was in the particular case of the VIS-Access process also faced with the challenge of handling a third-pillar file in an unusual quasi-co-decision setting. In the third-pillar structures of the Council a tradition or culture of engaging in a serious debate with the Parliament on security matters was absent. It was a double challenge for the Council. While delegations and Presidencies in the third-pillar working structures were used to focusing their effort primarily on ironing out the controversies between themselves, in the VIS-Access process they had to prepare the Presidency for negotiations with the Parliament delegation.415 The Commission and Council Secretariat took up the role of raising this awareness among Presidency and delegations.416 It appeared not to be so straightforward, as the senior official of the Commission explained:

“We were at pains [with emphasis], the Commission, and, by the way, the Council Secretariat General! To tell them: "now look, what you have to look for is not an agreement within the Council. It is a negotiation mandate for negotiations with the European Parliament that you will have to look for. Which is different! Because looking for a negotiation mandate means that you will have to look for some flexibility!”417

Once Presidency delegations became involved in discussions at the trialogue level and therefore acquired direct experience in debating with the Parliament, national delegations in the Council, at PCWP and CATS levels, were recurrently reminded of the particular situation of quasi-co-decision. An official of the Council Secretariat referred to this constant reminding as “the pedagogy of the Presidency”.418 The challenge was not only achieving change of practice. It was also combining the seemingly irreconcilable. The unusually difficult challenge was to shape a flexible mandate in the Council for the Presidency to negotiate with the Parliament and at the same time to secure a compromise at the trialogue level that would have to be agreed by unanimity in the Council.419

415 Interviews 16/7/2012 (Qt 223:8) and 21/6/2011 (Qt 212:26).
416 Interview 26/5/2011 (Qt 222:90).
417 Interview 21/6/2011 (Qt 212:22).
418 Interview 26/5/2011 (Qt 222:73).
419 Interview 16/7/2012 with a member of a Presidency delegation (Qt 223:281).
Interinstitutional exchange started first at the technical trialogue level. Technical trialogues did however not take place immediately after the tabling of the VIS-Access proposal. For the Council it took about three to four months before contact was made with the European Parliament. Interinstitutional exchange started first at the technical trialogue level. Technical trialogues did however not take place immediately after the tabling of the VIS-Access proposal. For the Council it took about three to four months before contact was made with the European Parliament. 

During that period, which covered mainly the first half of 2006, the national experts in the PCWP first had to come to an understanding among themselves on the subject matter. 

Afterwards, during the Finnish and the German Presidencies, “lots of meetings” took place at technical trialogue level. The frequency of exchanges ranged from twice to three times a month (during the second half of 2006) to three to four times a week, (during the first half of 2007). Exchanges at technical level occurred in arranged meetings or on an informal basis. Arranged meetings, where delegates of all three institutions convened, could take “hours and hours”. There was no mentioning of the presence of interpreters at these meetings. In addition to arranged meetings, there was regularly informal contact, particularly between the file experts. It can be said that informal contact covered the greatest part of exchanges between the file experts at technical trialogue level. For example in the first half of 2007, when Germany held the Presidency, a total of three to four arranged meetings were held between the file experts and one between senior officials, while informal exchange between the file experts was held three to four times a week. It was less in the second half of 2006, during the Finnish Presidency. In this regard, it was observed that the “human factor” varied as the Presidency rotated. With some Presidency teams there was more frequent and “reliable” contact and with others less.

Informal contact took the form of meetings outside office hours or at the café on the fifth floor of the Council building, (long!) phone calls and bilateral exchanges between the file experts. It was pointed out that alongside regular bilateral contact between the delegates from the Council and the Parliament, the delegates from the Commission, and the Council Secretariat were just as much involved in informal inter-

420 Interview 26/5/2011 (Qt 222:107).
421 Interview 4/6/2012 (Qt 220:20).
422 Interviews 4/6/2012 (Qt 220:104) and 16/7/2012 (Qt 223:131).
423 Interviews 26/5/2011 (Qt 222:21) and 16/7/2012 (Qt 223:109).
424 Interview 4/6/2012 (Qt 220:105).
425 Interviews 9/6/2011 (Qt221:37) and 16/7/2012 (Qt 223:131).
426 Interview 16/7/2012 (Qt 223:131).
427 Interview 4/6/2012 (Qt 220:24).
428 Interviews 27/3/2009 (Qt 214:41); 4/6/2012 (Qt 220:105) and 16/7/2012 (Qt 223:119; Qt 223:120 and Qt 223:40).
in institutional exchanges.\textsuperscript{429} The contribution of the Commission to these exchanges was described as “shouldering the Presidency in finding a technical compromise” or as “providing the Parliament with information it could use in the consultations with the member states”.\textsuperscript{430}

Exchanges at the technical triilogue level were not restricted only to frequent, informal contacts. There was also constant contact between the experts at the triilogue level and the hierarchy of his or her institution/home capital. As already discussed, the close and trustful working relationship between the Rapporteur, her assistant and the staff member of the LIBE Secretariat allowed for a continuous exchange on the file in the Parliament team.\textsuperscript{431} The same must have occurred in the working relationship between the Commission file expert and his superiors, who after all conducted their daily work in the very same working environment. In the case of the German Presidency team, it was reported that the expert in charge of the VIS-Access file was, while working temporarily in the (Brussels-based) Permanent Representation of Germany, in close and constant contact with his ministry in Berlin.\textsuperscript{432}

It was regularly emphasized that informal contact between the delegates at technical level was not meant to make deals or to strike compromises. It was “just trying to build up a package”, as one respondent explained.\textsuperscript{433} Discussions at technical level, whether through arranged meetings or informal contact, were meant to “prepare” or “clear” the ground for the discussions at the political triilogue level.\textsuperscript{434} They were, as was pointed out, “to exactly identify similar terms for both parties what the problems were”.\textsuperscript{435} Still, what also has been pointed out on several occasions was that at a certain point in time, long before a final agreement on the VIS-Access file was reached at the political triilogue level, the discussions at the technical triilogue level reached a threshold of saturation. All technical issues that needed to be discussed at the technical level were in fact discussed. It was noted that the subject matter was examined at great length, so much that it was long clear to both the file experts and senior officials at the technical triilogue level “how the political deal would look like”.\textsuperscript{436} A Commission senior official who attended discussions at the technical triilogue level explained that:

\textsuperscript{429} See particularly interview 16/7/2012.
\textsuperscript{430} Interviews 27/3/2009 (Qt 214:41) and 21/6/2011 (Qt 212:57).
\textsuperscript{431} Interview 4/6/2012 (Qt 220:88).
\textsuperscript{432} Interview 16/7/2012 (Qt 223:6; Qt 223:32; Qt 223:127; Qt 223:140).
\textsuperscript{433} Interview 4/6/2012 (Qt 220:105).
\textsuperscript{434} Interviews 21/6/2011 (Qt 212:60) and 4/6/2012 (Qt 220:86).
\textsuperscript{435} Interview 21/6/2011 (Qt 212:60).
\textsuperscript{436} Interview 4/6/2012 (Qt 220:119).
there was no need for further, endless, technical elaboration. It was more or less there. And, from the political point of view, we had absolutely no indication of: "okay, this is going in the right direction". Or not. Or that: "this should be amended in that way". Or not. Or that: "we should consider the following alternatives". We got no indications of that kind! We were stuck!}

While all technical issues were sorted out, tangible results on other – politically thorny – issues had yet to be achieved at the political trialogue level.

Still, discussions at technical level remained in the meanwhile intense and vivid. While most technical details were clarified, discussions on other issues (the politically thorny ones), such as ‘national access point(s)’, at times ended up in a word game. Two respondents (of whom one was a Council delegate and the other a Parliament delegate) referred to how discussions on the issue of ‘national access point(s)’ spiralled down to controversies of conflicting interpretations over words such as ‘services’, ‘authorities’ and ‘units’. On that occasion, the official of the Council Secretariat sensed that the Parliament team suspected the Council team of ‘cheating’ with words:

’sometimes we got the feeling that they thought that by including ‘authorities’ in the text [which in principle could cover more than just police force, such as intelligence services] we wanted to deceive them.’

Even when technical discussions were lifted to a more senior level, which were referred to by the assistant to the Rapporteur as “kind of semi-political meetings”, progress could not really be made. The meetings were called “semi-political” because the Rapporteur (who was after all an elected politician) was then present. At this level, the senior official of the Commission noted that,

‘For the European Parliament to be regularly confronted with senior officials, singing the same song about the Council position, was a clear indication that the political momentum was not there! And that therefore it could be a waste of political capital for them [in the Parliament team] to already start negotiating and showing their clout. And their understanding.’

437 Interview 21/6/2011 (Qt212:64).
438 Interview 26/5/2011 (Qt 222:43); and 4/6/2012 (Qt 220:90)
439 Interview 26/5/2011 (Qt 222:45).
440 Interview 4/6/2012 (Qt 220:6).
441 Interview 21/6/2011 (Qt212:47).
There was recurrent reporting that a change in discourse at technical level occurred when Germany took over the Presidency from Finland in January 2007. The staff member of the LIBE Secretariat reported for instance that the delegates of the German Council Presidency “invested a lot” in the exchanges. Stepping up data exchange – to improve the fight against cross-border crime and terrorism – was one of the objectives of the Treaty of Prüm of 2005, the transposition of which into the EU legislative framework was highlighted as a priority in the Presidency program of Germany (Bellanova 2008). In all likelihood, the approach of more vigorous engagement with the Parliament on the VIS-Access file was part of this policy. The senior official of the Commission noted about the ‘technical’ team of the German Council Presidency that:

‘they were actually preparing genuine political discussion! [...] if we managed to design a technical solution which is from a technical point of view agreeable for both parts, then we knew, we had the confidence, that from each side we were going to report in positive terms to our political masters.”

Upon taking over the VIS-Access file from his Finnish colleagues, the file expert of the German Presidency team noted that the relations with the file experts of the Parliament team were very distanced and “that it was also clear that what was needed was a trustful relationship” For him, it was therefore important to create “an atmosphere of constantly being in touch” with members of the other delegations. The respondents who reported frequent, informal contact at technical trialogue level, specifically referred to the first half of 2007, the period during the German Presidency. On the informal exchanges at the technical trialogue level the assistant to the Rapporteur noted that:

‘before that trialogue that took place in Strasbourg [in April 2007]. And also another trialogue, in Brussels [in March 2007], we had a lot of technical meetings. There were technical, formal meetings [i.e. arranged meetings]. But also a lot of informal discussions. On the phone with the representatives of both the Commission and the Presidency. Just trying to build up a package, to see whether it could fly.”

442 Interview 6/6/2011 (Qt 221:50).
443 Interview 21/6/2011 (Qt212:56).
444 Interview 16/7/2012 (Qt 223:134).
445 Ibid. (Qt 223:60).
447 Interview 4/6/2012 (Qt 220:105).
One instance was reported when during an informal exchange of views the discussants took the time and the effort in long phone calls to dispel the prejudices each delegate had of the other delegate’s institution. The file expert of the German Presidency team, who stayed in Brussels for a couple of months also in order to take part in the Brussels-based informal, social network, described quite vividly how exchanges between the experts of all three institutions were maintained at technical trialogue level:

> ‘what you also see, is that for example Jaap, working in Brussels. Nathalie, also working in Brussels. And Alexandra and Katrin, also. They know each other. They know how everything works. They meet each other also in other contexts. And when I was there for two months. […] You have this atmosphere of constantly being in touch. Knowing what the other thinks, and so on.’

Far less frequent were the exchanges at the political trialogue level. In the VIS-Access process a total of five political trialogues were reported. Two of them were held during the Finnish Presidency (on 22 November and on 4 December 2006). Three were reported during the German Presidency. As mentioned previously, the size of the meetings at the political trialogue level were not impressive. The final trialogue of 26 April 2007 involved (only) about twelve persons. It has been pointed out that regardless the size of the trialogue, one of the advantages of the political trialogue setting is that only three positions were to be defended. Such a setting allowed the key discussants “to prioritize their own position within the mandate that they both have.”

While in general use could be made of the services of interpreters (as needs dictated), they seemed not to have been present in the trialogues during the German Presidency. Reporting was however made of the presence of interpreters at the two political trialogues during the Finnish Presidency. During one of the two trialogues, with the Finnish Presidency delegation, it was observed that an interpreter was present:

> ‘It was a dreadful trialogue. Because the minister … we saw the experts every now and then rolling their eyes thinking “what is being told here”?’ As the minister was not able to find the...
words or the right notions of what the other four [experts and officials in the Presidency delegation] had in mind. And because the interpreter was not doing properly his job.452

There was recurrent reference of adamant behaviour on the part of the Rapporteur at the very beginning, even before discussions between the Parliament and the Council on the VIS-Access proposal started.453 Already during discussions on the VIS Regulation, in particular in relation to the bridging clause, the Rapporteur appeared to be immovable on the position regarding police enforcement access.454 An official of the Council’s Legal Service who attended political trialogues mainly on the VIS-Regulation (hence also the bridging clause), reported that:

'I always thought that she made the Presidency’s life very difficult. Because, she asked questions and expected answers. And unless the answers were convincing, she would not budge. Questions such as “why is this useful?” or “Prove to me that it has useful effect”. You know! To counter-balance! The impact that it will have on data protection. She will not accept answers such as “Our experts believe that this could be helpful.” She wanted really, you know, quite clear proof. But which, of course, in this case, when you are talking about something that has not been done before, police access to a database that wasn’t there and which was collected for reasons other than law enforcement purposes. It was hard. And in the EU this has never really been done before. So it is very difficult to give proof or any.455

Much in the same words, an official who was also a member of the Austrian Presidency in the first half of 2006 described the interaction at the interinstitutional level. He however was also convinced that the Council Presidency was able to provide arguments and examples. The official pointed out that:

‘at the very first moment, it was Sarah Ludford saying: “well, we don’t see any, any situation where VIS data would be helpful at all.” So, this was more or less killing the whole dossier. I mean, if you say: “there is any need for having the VIS information, the VIS data, for law enforcement authorities?” then you kill the dossier! You then kill the decision! [….] The Council was quite clear and had a very firm point of view. Saying: “well, we do think we have, at the moment, already access to our national visa data. If the VIS, which is a good thing, will more or less harmonize visa issues and put them in a, say, big database, then we won’t have the same

452 Interview 26/5/2011 (Qt 222:59; translated).
453 Interviews 18/5/2011 (Qt 211:20); 26/5/2011; 27/5/2011; 3/6/2011 (Qt 219:30); 9/6/2011 (Qt 221:26); 21/6/2011; 24/6/2011.
454 Interview 9/6/2011 (Qt 221:27).
455 Interview 27/5/2011 (Qt 217:5).
access as we have now.” And as some member states already had access to their national data bases, we had lots of cases, real cases, just to show, just to prove that this is needed. This was not just a theoretical issue saying: “we would like to have, because it could be, somehow interesting, maybe!” No, we had good cases […] Ludford was still out right opposed to it.”

A similar description was given by an official of the Council Secretariat who attended the political triologues throughout the VIS-Access process. She believed that the Parliament delegates “were sometimes unreasonable in their demands compared to practical reality.” She found that the Council delegation had hard times in explaining why the strict conditions and procedures related to the ‘national access point’ issue were unrealistic and counterproductive from the perspective of everyday police practice.

Although shifts on the subject matter, in relation to (partly) a few issues, occurred already during the Finnish Presidency, a major shift in understanding at the political triologue level was consistently reported in the period of the German Presidency. Without exception the observation was made that it was this shift that brought the VIS-Access process to a successful conclusion. In Parliament circles, the staff member of the LIBE Secretariat described the discussions between the German Presidency and the Rapporteur as “very intensive, frank, tough”. During the final triologue, of 26 April 2007, she noticed that “the Germans were really committed to have this deal, to arguing about it”. The then assistant to the Rapporteur noticed that both institutions were at last “listening to one another”.

In Commission circles, the official in charge of the VIS-Access file noticed that with the German Presidency, and more particularly with the German Minister, the Council showed “finally” commitment to engage into a serious debate with the Parliament. This commitment was reflected in the personal participation of the Minister in the triologues and his visit to the LIBE Committee on May 2007, to explain the Council’s position on the VIS-Access and VIS Regulation proposals.

Interestingly, the senior official of the Commission explained that during the last triologues “it was more about adding a few words here and there”, because “basically more or

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457 Interview 26/5/2011 (Qt 222:48).
458 Ibid. (Qt 222:44).
459 Interview 9/6/2011 (Qt 221:38).
460 Ibid. (Qt 221:45).
461 Interview 4/6/2011 (Qt 220:86).
462 Interviews 27/3/2009 (Qt 214:34) and 21/6/2011 (Qt 212:30).
463 Interviews 27/3/2009 (Qt 214:13) and 21/6/2011 (Qt 212:9) and (Qt 212:12).
Negotiating the VIS-Access

"less everything has been on the table for quite some time". This aspect was also observed by two officials who were present at the final trialogue of 26 April 2007. They both saw how an exchange over a choice of wording, which from a linguistic point of view was unlikely to change the substance of the matter, resulted in a final understanding on two related thorny issues, the ‘national access point’ and ‘prior check’ (which eventually became a ‘a posteriori’ check). For the senior official of the Commission, exchange at the trialogue level therefore was “rather than discussing hours after hours on different set of provisions, [...] more about confidence building and institutional gameplay”.

For all the confidence building, it still is to be noted that much of the effort was also focused on the substance and quality of the outcome. The exchanges at the inter-institutional level set forth a legal framework consisting of clear, unambiguous rules, procedures, and conditions on law enforcement access, which the EDPS described as acceptable to all parties interested “because it suited the argued need” for both information and protection.

Most respondents have indicated that it was also due to personality, quality and skills of the two key discussants that brought the two institutions together. Both the Rapporteur and the German Minister acting as chief of the Council Presidency delegation were consistently regarded by all respondents as two exceptionally skilled negotiators who were moreover well-informed on the subject matter. Reference was also made to the fact that the German Minister, Schäuble, himself has been a parliamentarian, which, as it was explained, facilitated discussion between him and MEP Ludford. This observation gains even more clout in view of what was brought to mind by several respondents, namely that Schäuble was experienced in various sorts of debates at national level, both as parliamentarian and as minister, on policies that gave rise to public concern on data and privacy protection. This aspect, as has been pointed out by more respondents, gave him an advantage over the previous presidencies. The senior official of the Commission observed that “there was certainly a better capacity of Schäuble to understand and listen to these concerns than with the previous Presidencies”.

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464 Interview 21/6/2011 (Qt 212:50).
465 Interviews 26/5/2011 (Qt 222:52) and 16/7/2012 (Qt 223:148).
466 Interview 21/6/2011 (Qt 212:48).
467 Interview 20/5/2011 (Qt 210:37).
468 Interview 21/6/2011 (Qt 212:15).
469 Interviews 27/3/2009 (Qt 214:38-39); 21/6/2011 (Qt 212:15); 27/6/2011 (3) (Qt 213:40).
470 Interview 21/6/2011 (Qt 212:15).
Chapter 5

What certainly also helped was that the qualities of the setting of the trialogues at the time, i.e. the restricted number of negotiating parties and the focus on outstanding issues, allowed the discussants to conduct exchanges on a more personal basis. The advisor of the EPP Group in the Parliament observed in that regard that:

‘Minister Schäuble in those days and Sarah Ludford managed to establish a relation on a personal basis which allowed them to compromise! There are constellations where it is, although you are not far, content wise, for the persons involved impossible to compromise. Because on a personal level, there are no grounds to compromise. You know, there is so much personal distance, not to use the words 'hate' and 'disrespect'. That although the gap is perhaps small, you can’t bridge it. While the gap on contents is small, the gap on personal issues is large. And there are cases where the gap on contents, like in the VIS case, is large and to the surprise of all, because there were completely contradictory kind of characters, but apparently they found a sort of a level on which they were able to communicate with each other. And to communicate in a very constructive way. Which basically managed to bridge the wider gap.”

Anecdotal accounts of respondents who were present at the final trialogue of 26 April 2007 further reinforced the belief that trialogues were sites that allowed to better reflect the personal quality and effort of the discussants and, even more important, to facilitate a mutual understanding between them. The extraordinary or “strange” circumstances under which the final trialogue was held, proved, as several respondents indicated, catalytic in creating an atmosphere of mutual respect and open dialogue between the Minister of the Council Presidency and the Rapporteur. It was told that for the final trialogue (of 26 April 2007) Minister Schäuble took the plane late in the afternoon from Berlin to discuss this one file alone – i.e. the VIS-Access file – with Rapporteur Ludford in an almost deserted building of the Parliament in Strasbourg until late in the evening.

It was thus in this setting, that an emergence of a deeper understanding occurred between the two co-legislating institutions, which boiled down to what an official of the Council’s Legal Service basically saw as a shift from a rather principled to a more constructive, flexible posture on both sides. He qualified it as follows:

471 Interview 27/6/2011 (3) (Qt 213:44).
472 Interview 9/6/2011 (Qt 221:39).
473 Interviews 26/5/2011 (Qt 222:50); 9/6/2011 (Qt 221:39); and 16/7/2012 (Qt 223:143-148).
I think, [...], the Parliament yielded on the principle and the Council yielded on the modalities. And that’s the nature of compromise. And that’s simply that. Both parties ultimately, the Rapporteur and the Presidency, they had an interest in, actually, achieving a result. And they realized that that was the best possible deal that could be taken. ⁴⁷⁴

5.4 Conclusion

Of all venues of VIS-Access discussion it was the interinstitutional arena of discursive exchange to which the locus of the VIS-Access negotiations gravitated. Interinstitutional exchange between the European Parliament and the Council became the primary driving force of progress towards an outcome of the entire process. While discussions in the Council working structures virtually remained bogged down on the question of whether and how to discuss the more contentious issues with the Parliament, it was mainly at the trialogue level that the VIS Access agenda was taken forward. To be sure, progress would not have taken place without shifts, acceptances and agreements in each of the two co-deciding institutions, but it is plausible to assume that the results of the interinstitutional exchanges were decisive on the eventual shaping of the final outcome of the VIS-Access outcome.

In the Council, circumstances did certainly not help the national delegations to reach a common understanding on how to settle the issues that divided the Council and the Parliament. A combination of relatively low frequency of meetings, big-size meetings, tightly scheduled procedures, proximity to national instruction and technical detail and the slow pace by which discussions proceeded have not helped to move discussion on these issues significantly further. An extra challenge was that the delegations in the Council were stuck to the traditional third-pillar bridle of reaching internal agreement by unanimity.

In the Parliament, most of the discursive effort in the Parliament structures was made in smaller meetings and the occasional contacts that were made outside the plenary meetings of the LIBE Committee. At the Plenary and Committee levels, agenda constraints and heavy workload prevented MEPs from engaging in informed interactive debates. It was at the levels of interpersonal and small-group exchange where instances of reciprocity in the Parliament were reported.

As regards the exchanges at the interinstitutional level, there is every ground to state that they became the primary driving force of deliberative progress towards a reasoned outcome of the entire process. In other words, the discussions between the

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⁴⁷⁴ Interview 27/5/2011 (Qt 217:15).
Parliament, Council, and Commission delegations constituted a succession of shifts, acceptances, and agreements most of which are to be considered mainly as occurrences of reorientation resulting from deliberative exchange. They tailored the subject matter into a set of clear, unambiguous rules, procedure and conditions concerning law enforcement access to the VIS.

There is every reason to conclude that interinstitutional exchange became a pathway leading up to a reasoned understanding on the final outcome after a shift in discourse took place in the first half of 2007. Highly interactive exchanges of views between discussants were reported in this period, in particular at technical trialogue level. There were also clear indications of reflexivity. The observation that during this period the discussants at the technical level started to build trust in each other and to take seriously into consideration the other’s position substantiates the view that discussants at this level went beyond their initial position.

Basically, the debate between co-deciding institutions which were first unwilling to fully integrate one another in the discussion, shifted in the first half of 2007 to a more open-minded debate between the two parties that considered their opposites as valid interlocutors. This shift coincided with the taking over of the Presidency by Germany in the first half of 2007 (from Finland). Germany pursued a policy of more vigorous engagement in the discussions with the Parliament, which resulted, among other things, in an increase of the frequency of – both formal and informal – contact with the European Parliament, especially at technical trialogue level.

In addition to increased informal contact and a significantly higher frequency of exchange, proximity to detail and subject matter was one of the most manifest conditions at the interinstitutional level. Shifts in position and understanding on formulations and wording were likely to have been the result of dense, reciprocal exchanges of substantiated arguments focused on technicalities and details of the draft text. It can be safely assumed that the use of bargaining methods and pressure were the least likely forms of discursive behaviour. Moreover, the focus on technical detail, which was highly likely difficult to follow closely for those who were not directly involved in the trialogues, provided a certain degree of insulation from the outside world. Also, it enabled the negotiating parties to demonstrate the fairness and usefulness of the trialogue outcome through referrals to practice and experience when they presented the compromise package of the trialogue discussions to the MEPs and the national delegations respectively in the European Parliament and the Council.

Although the discussions at the technical trialogue level resembled in this respect very much the dynamic of discussion at working party level in the Council,
there is still a major difference. Whereas national experts were prone to fall back on the exclusivity of knowledge of their national legal or organizational systems, which entailed little room for defining common ground, the file experts in the technical trialogues were likely to avail themselves of mutually acknowledged facts, examples and evidence and of shared knowledge related to daily practice of institutional law and governance in the EU. It can safely be assumed that due to this shared expertise the – mainly Brussels-based – discussants at the technical triologue level were much more likely to draw on a common knowledge base and more able to find and define common understandings than their colleagues in the Council working party. Even when during the first half of 2007, political pressure for a final resolution was mounting, evidence has convincingly shown that the discussants at the trialogue level were more inclined to engage in an exchange of informed argument closely related to subject matter than to resort to bargaining pressure.

Relevant in this regard are the references that were recurrently made in relation to the facilitating role of the Commission, the Council Secretariat, and the EDPS. Reference was made to their role in providing detailed knowledge and expertise concerning data protection law to the interinstitutional discussions enabling the discussants to refine their views on the subject matter. Specific reference was made to the role of the German Presidency in this regard. The German negotiating team was considerably more on top of the VIS-Access file than those of previous presidencies. The Presidency team availed itself of the extensive practical and legal experience in the field of data protection and law enforcement access that Germany had already acquired in the domestic field. It enabled the German delegation not only to make able use of practical examples and practices during the trialogues. It also helped the Presidency to demonstrate the fairness and usefulness of the outcome through referrals to practice and experience when it presented the compromise package of the triologue discussions to the national delegations in the Council.

Also, the limited size of the interinstitutional meetings appeared to have had a facilitating effect on deliberative discourse. With only two sets of aggregated interests to be defended and with the absence of time constraints – there were only three delegations taking the floor and one file on the agenda to discuss – it appeared to have given full shape to individual effort and demonstration of dossier knowledge, skill, mutual trust, and the mutual willingness to rethink positions. As in the working structures of the European Parliament, these circumstances enabled the key interlocutors to establish a relation on a personal basis which allowed them to engage in an open
and informed debate on issues that divided the two co-deciding institutions for quite some time on the VIS-Access dossier.

In conclusion, while there is enough evidence to support the view that interinstitutional discussions became a pathway of deliberative exchange leading up to a reasoned understanding on the final outcome, internal agreement in both the Council and the Parliament on the interinstitutional outcome originated in a situation where bargaining pressure was not entirely excluded. In the case of the Council, it was rather due to the warning from the Presidency that there would be no access to VIS data at all if national delegations failed to reach consensus on the outcome of the trialogue discussions. For the Rapporteur of the Parliament, it was necessary not to lose sight of the declining support in the Parliament from the moment the Council started to consider the Parliament as a serious partner in the decision-making. It was in the concluding stages that the Rapporteur started to receive signals to step back from the rigorous position on the rules regulating law enforcement access. Nevertheless, there is every reason to conclude that interinstitutional exchange became the pathway that led the process to a final outcome which was based on reasoned understanding.