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NOTE

From: Presidency

To: Terrorism Working Party (TWP)/ Working Party for Schengen Matters (SIS/SIRENE)

Subject: Discussion paper in relation to the implementation of Chapter 3 of the Roadmap to enhance information exchange and information management including interoperability solutions in the Justice and Home Affairs Area

Introductory remarks

At its meeting of 9-10 June 2016, the Council endorsed the Roadmap to enhance information exchange and information management including interoperability solutions in the Justice and Home Affairs area (9368/1/16 REV 1). It aims to contribute to tackling migratory, terrorist and crime-related challenges by enhancing information exchange and information management by implementing specific, practical short- and medium-term actions and long-term orientations. Work on the Roadmap is underway within respective working parties and committees. At its meeting of 18 November 2016 the Council endorsed the first implementation report¹ as well as the outcome of deliberations of the group of 13 Member States, together with Norway and Switzerland, most affected by the phenomenon of foreign terrorist fighters (FTFs) (then G13, now G15) on possible ways to enhance the information exchange on FTFs².

¹ 13554/1/16 REV 1

² 13777/16

State of play

The Terrorism Working Party (TWP) and the Working Party for Schengen Matters (SIS/SIRENE) already contributed to the first implementation report of the Roadmap.

In particular, some of the contributions in relation to Actions 17-20, 22, 24 and 27 were received following the meeting of SIS/SIRENE Working Party on 12 July 2016 (see 10945/16). The Chair of the SIS/SIRENE Working Party also invited Member States to provide their input in relation to Action 23 on the basis of 11088/16. The outcome of this questionnaire is set out in 14651/16. The SIS/SIRENE Working Party, at its meeting on 17 January 2017 also held a discussion on the use of SIS in the fight against terrorism on the basis of 5233/17, inviting delegations, inter alia, to indicate whether they consider that the relevant provisions of the new SIS Proposals³ satisfactorily address Actions 17 – 19 and 23 of the Roadmap on information exchange. 14 delegations provided written contributions to this question, half of them considering that the aforementioned Actions are sufficiently addressed in the new SIS proposals. Some Member States indicated that these Actions have already been addressed by the G15 group, and could be taken forward in the context of the revision of the SIRENE Manual, expected later this year. Some questions in relation to Action 23 and the new "inquiry checks" in the Commission proposal still remain (see below).

At the TWP meeting on 4 October 2016, the Chair invited delegations to provide their contributions in relation to the implementation of Action 35, and the ES delegation made a presentation on its cooperation with Morocco as an example of good practice with third partners in relation to counter-terrorism at the TWP meeting on 24 November 2016.

³ On 22 December 2016, the Commission presented three new SIS proposals: on the use of SIS in the field of police and judicial cooperation (15814/16), on the use of SIS for border checks (15813/16) and on the use of SIS for return decisions (15812/16).

In this context, as tasked by the Council, the Maltese Presidency is continuing the implementation of the Roadmap. To this end a joint TWP-SIS/SIRENE Working Party meeting will take place on 15 March 2017 (morning session) to discuss and agree on how to take forward the Actions from Chapter 3: "Strengthen the collection, checking and connection of information for the detection of persons involved in terrorism and terrorism related activity and their travel movements". A number of Actions in this Chapter are particularly relevant to both the TWP and the SIS/SIRENE Working Party, while some others are meant to contribute to detecting persons involved in terrorism in general. The conclusions of the discussion held between the two working parties will then be forwarded to COSI for its endorsement.

Chapter III of the Roadmap:

"Strengthen the collection, checking and connection of information for the detection of persons involved in terrorism and terrorism related activity and their travel movements":

Action 17: *Create a joint understanding of when a person should be entered in the SIS regarding terrorism and terrorism related activity: Agree on indicative criteria for inserting terrorism-related SIS alerts*

The first implementation report of the Roadmap (13554/1/16 REV 1) referred to a booklet of the common risk indicators (CRIs) for foreign terrorist fighters (FTFs) prepared by Frontex in cooperation with Europol, taking into consideration the CRIs developed by the DUMAS Group.

Member States may find it difficult to utilise the above-mentioned CRIs as indicative criteria for entering article 36 alerts on terrorists and persons involved in terrorism related activities. The reference material in the CRIs booklets is meant to raise awareness amongst first-line officers and to refer potential 'subjects of interest' for detailed second-line checks. The CRI booklets focus on visual observations, travel documents, personal items and/or contents in the possession of the persons in question and is not intended/designed for use with advance information systems (e.g. API, PNR). While some of the CRIs could be used in order to create and update 'risk profiles' for pre-border checks via advance information systems, these are not primarily meant for such use.

Therefore, based on the work of the G15, as set out in 13777/16, **the Council at its meeting on 18 November 2016 endorsed the following indicative criteria in the context of FTFs to be used in the assessment regarding the exchange and sharing of information on:**

- *Individuals suspected to have the intention to travel or known to have travelled to or from an area of conflict with the intention of associating with terrorist groups;*
- *Individuals known to be engaged in facilitating the activities of these types of individuals.*

While these criteria should be used in the context of FTFs, the Presidency considers that further work on indicative criteria for inserting SIS alerts in the broader context of terrorism and terrorism-related activities is needed.

Article 36 of Decision 2007/533/JHA provides that alerts:

‘... may be issued for the purposes of prosecuting criminal offences and for the prevention of threats to public security:

(a) where there is clear indication that a person intends to commit or is committing a serious criminal offence, such as the offences referred to in Article 2(2) of the Framework Decision 2002/584/JHA; or

(b) where an overall assessment of a person, in particular on the basis of past criminal offences, gives reason to suppose that that person will also commit serious criminal offences in the future, such as the offences referred to in Article 2(2) of the Framework Decision 2002/584/JHA.

... may be issued in accordance with national law, at the request of the authorities responsible for national security, where there is concrete indication that the information referred to in Article 37(1) is necessary in order to prevent a serious threat by the person concerned or other serious threats to internal or external national security. The Member State issuing the alert pursuant to this paragraph shall inform the other Member States thereof. Each Member State shall determine to which authorities this information shall be transmitted.’

The Presidency, taking note of the existing work related to CRIs and the legal basis for the entry of Article 36 alerts in the Schengen Information System considers that in the context of terrorism or terrorism related activities alerts **for discreet checks** in the SIS could be considered whenever a person:

1. Is undergoing or will undergo criminal prosecution/s for terrorism or terrorism related activities where an article 26 alert or an alert for specific checks are not the adequate tool (Article 36 [2] discreet checks);
2. Is reasonably suspected of being a threat to internal or external national security as a terrorist or a person involved in terrorism related activities (Article 36 [3] discreet checks);
3. Is a third country national who for any reason cannot be expelled from Schengen territory and is involved or suspected of being involved in terrorism or terrorism related activities (Article 36 [2] or [3] discreet checks);
4. Is, on the basis of intelligence received by the competent national authorities responsible for public or national security, suspected of being in any way involved directly or indirectly to acts of terrorism or terrorism related activities but specific checks are not considered as proportionate (Article 36 [2] or [3] discreet checks)

The Presidency considers that in this same context alerts **for specific checks** in the SIS could be considered whenever a person:

5. Is reasonably suspected of preparing to commit acts of terrorism or terrorism related activities (Article 36 [2] or [3] specific checks)(see also 2 for use of discreet checks);
6. Is known for involvement in terrorism or terrorism related activities (e.g. convicted for such conduct) and authorities have reasonable grounds for suspecting that he/she may again perpetrate or attempt to perpetrate acts of terrorism or terrorism related activities (Article 36 [2] or [3] specific checks);
7. Is reasonably suspected of attempting to travel to join a terrorist group (Article 36 [2] or [3] specific checks);

8. Is reasonably suspected of having travelled to join a terrorist group and returned or is awaited to return (Article 36 [2] or [3] specific checks);
9. Is, on the basis of intelligence received by the competent national authorities responsible for public or national security, suspected of being in any way involved directly or indirectly to acts of terrorism or terrorism related activities (Article 36 [2] or [3] specific checks);

The Maltese Presidency does not consider the above list as an exhaustive list of circumstances warranting the entry of an alert in the SIS. Such a list would require regular review including possible changes which may result from the new SIS proposals. It would perhaps be beneficial if the most affected Member States could also suggest changes to the above list or additional circumstances which may be considered as warranting the entry of alerts in the SIS.

Pending the SIS revision, the Presidency would request SIS/SIRENE and TWP delegations to agree on the above-mentioned list as an initial joint understanding of when a person should be entered in SIS in the context of terrorism or terrorism related activities.

In case of agreement, the Presidency could invite the Commission to consider including the above-mentioned list in the next revision of the SIRENE Manual or the relevant Catalogue of Recommendations and Best Practices for guidance purposes.

Action 18: *Ensure structural information to SIRENE Bureaux and SIS end users on persons involved of terrorism or terrorism related activity: Member States will create alerts once criteria are met (unless there are operational reasons not to)*

The Presidency encourages the counter terrorism (CT) units of Member States to commit to supplying information to the national SIRENE bureaux in a systematic and timely manner unless there are genuine legal or operational reasons not to do so. The Presidency also proposes the below amendments to the wording in the Roadmap under Action 18 (new text underlined):

"Member States shall create alerts once the agreed criteria are met (unless there are operational reasons not to do so), and SIRENE offices will exchange supplementary information as soon as such information is made available. This should include relevant information in the alerts."

Member States are invited to agree to the proposed changes in the text.

In the context of this Action it is worth noting the ongoing discussions on the new proposal for the use of SIS in the field of police and judicial cooperation (15814/16), in particular Article 21(2) containing a novelty requiring Member States to create an alert under Articles 34, 36 and 38 (as appropriate) in all circumstances, on those persons or their related objects whose activity falls under Articles 1, 2, 3 and 4 of Council Framework Decision 2002/475/JHA on combating terrorism.

Action 19: *Ensure clear indication to SIRENE Bureaux and SIS end users that an alert concerns a person involved of terrorism or terrorism related activity: Use of marker ‘terrorism related activity’ where applicable*

Based on the work of G15, as set out in 13777/16, endorsed by the Council at its meeting on 18 November 2016, and the agreement at the SIS-VIS Committee on 9 February 2017, Member States are invited to note the following wording. intended for inclusion in the SIRENE Manual:

“When issuing an alert concerning terrorism-related activity under article 36.2 & 36.3 of the SIS II Decision, this information shall be entered in the field ‘type offence’ unless there are clear operational reasons at national level for not entering this information”.

In the context of this Action it is worth noting the ongoing discussions on the new Proposal for the use of SIS in the field of police and judicial cooperation (15814/16), in particular Article 20(3)(j), which expands the types of information that can be held about people for whom an alert has been issued, so as to also include information whether the person is involved any activity falling under Articles 1, 2, 3 and 4 of Council Framework Decision 2002/475/JHA.

Action 22: *Create a joint understanding on immediate reporting upon a hit in the SIS: Commonly define when ‘immediate reporting’ is required upon a hit as well as what action should be taken*

The Presidency notes that Member States often issue alerts with ‘immediate action/reporting requirements’. This decreases the urgency that is associated with real urgent alerts. If most alerts are marked as ‘urgent/for immediate action’, prioritisation is difficult.

On the basis of the work of G15 in 13777/16, endorsed by the Council at its meeting on 18 November 2016, ‘*immediate reporting*’ is of high relevance for, but should not be limited only to the FTFs representing a **high threat**, and **should include returnees**. Moreover, the marker “terrorist- related offence” should be used in such cases.

Member States are invited to use the ‘immediate alert’ cautiously taking account of the elements above.

Action 23: *Make possible that SIS alerts can call for preliminary and temporary holding or detention where sufficient national legal grounds are available: Create a new type of action.*

The new proposal on the use of SIS on Police and Judicial Cooperation (15814/16) includes under Article 36 a new alert styled as ‘Inquiry Check’, which will require Member States to empower their officers to *stop* and *question* the subject of these alerts. This is, in particular, intended to support measures to counter terrorism and serious crime. It is more in-depth than the existing discreet check, but does not involve searching the person and does not amount to arresting him or her. It may, however, provide sufficient information to the front line officer or investigator to decide on further action to be taken.

A few delegations in their feedback to questions raised by the Presidency in 5233/17 mentioned that ‘inquiry check’ does not entirely correspond to the initial Action in the Roadmap and said that further information and definition of “inquiry check” is needed. The Presidency believes that the Inquiry Check takes into consideration the current legal and operational scenarios and if properly backed by national practices and procedures, it has the potential to become a very efficient and potentially effective tool within the Schengen Information System for law enforcement.

Member States are invited to discuss internally all possibilities to eliminate any barriers of a legal nature at national level which would hinder the effectiveness of inquiry checks and specific checks.

Action 26: *Ensure that information of extremist speakers, who are deemed to pose a threat to public order, is shared between Member States: Make optimal use of SIS, primarily through Article 24.3, and in accordance with national legislation, where appropriate issue alerts for third country nationals who are not present on the territory of MS.*

The Presidency would like to suggest an amendment to the text of this Action 26 as follows:

"Ensure that information on extremist speakers, who are deemed to pose a threat to public order, is shared between Member States".

This amendment is suggested to ensure that when a SIS Alert is created it will contain information relating to the extremist speakers themselves and not to the content that they preach.

The Presidency also makes reference to the document presented to the SIS-SIRENE Working Party on 17 January 2017 (5233/17 SIRIS 5) relating to the point on radicalisation. In reply to the questionnaire on radicalisation, some delegations asserted that radicalisation could be specifically targeted in the SIS proposal in order to increase the fight against terrorism while other Member States remarked that the proposal as it stands leaves space for optionality and flexibility. In both cases, delegations agree that it is an issue that requires further discussion.

The Presidency reminds the Member States about the ongoing discussions within the Schengen Acquis Working Party on the new SIS II proposals, in particular Article 21 of the proposal on police cooperation and judicial cooperation (15814/16), which requires Member States to create an alert under Articles 34, 36 and 38 in all circumstances, on persons or objects wanted in connection with conduct falling under Articles 1, 2, 3 and 4 of Council Framework Decision 2002/475/JHA on combating terrorism, and Article 24(2)(c) of the proposal on border checks (15813/16), which introduces an obligation in relation to the entry of refused entry and stay alerts.

Action 27: *Ensure that both law enforcement authorities and security services can quickly enter alerts into the SIS: Where necessary, change national practice to ensure that both law enforcement authorities and security services can insert alerts in the SIS directly without interference of judicial authorities.*

The Presidency invites Member States to facilitate as much as possible the creation of SIS alerts by their competent authorities and to reduce as much as possible any remaining barriers.

Action 30: *Ensure that information on FTF is consistently and systematically uploaded to European systems and platforms, and synchronised where possible: Implement a consistent three-tier information sharing approach regarding FTF by making optimal and consistent use of SIS, the Europol Information System (EIS) and the relevant Focal Points at Europol.*

According to the available statistics, the number of terrorism-related objects is increasing both in SIS and Europol's databases.

Member States are invited to continue implementing a consistent three-tier information sharing approach regarding FTF and continue making optimal and consistent use of SIS and Europol's databases.

Action 31: *Ensure better use of existing secure channels for exchange of information regarding terrorism and terrorism related activity:*

A) Make better use of SIENA as a secure channel for the exchange of law enforcement information regarding terrorism and terrorism related activity,

B) Consider introducing a 24/7 regime of work in order to improve the effectiveness of channels

According to information provided in the first Roadmap implementation report, Europol has upgraded SIENA to the confidentiality level of EU CONFIDENTIAL/UE CONFIDENTIEL in October 2016.

The Presidency invites Member States to continue improving their use of SIENA.

Action 32: *Ensure that Member States are informed of all prosecutions and convictions on terrorist offences in the EU: Transmit to Eurojust information on all prosecutions and convictions on terrorist offences.*

The Presidency invites Eurojust to report and inform delegations regularly on any recent prosecutions and convictions.

Action 35: *Ensure that national good practices regarding cooperation with third countries on counterterrorism are shared between Member States: share good practices on cooperation with third partners in relation to counterterrorism among MS and third country partners.*

The Presidency invites Member States to continue sharing good practices relating to cooperation with third countries on counter-terrorism within relevant fora, including TWP.

Action 36: *Ensure common understanding between end users, regarding the detection of travel movements of persons involved in terrorism and terrorism related activity: create joint and multidisciplinary training for CT, border and law enforcement experts in cooperation with existing expert groups such as SIS/SIRENE Working Party, regarding the detection of travel movements of persons involved in terrorism and terrorism related activity.*

The European Union already offers law enforcers a myriad of information exchange tools, the use of which has still not been maximised and which, if coupled with adequate training on the use of these systems for investigative and preventive purposes would be much more effective than they currently are. **During January 2017 the Presidency circulated a questionnaire on the training needs in relation to SIS and SIRENE matters with a deadline for replies set at the end of February 2017 (5038/1/17 REV 1). The Presidency is currently drafting the report on the outcome of the questionnaire. This outcome will be circulated to the Council, Commission, CEPOL and EU-LISA.**