



Statewatch summary

Schengen Information System (SIS) II

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Background

On June 2, 2006, the JHA Council, meeting as a 'Mixed Committee' with Schengen associates Norway, Iceland and Switzerland, agreed on the text of a Regulation establishing the second version of the Schengen Information System (SIS II). It is not yet clear whether this text will be accepted by the European Parliament (EP), which has 'co-decision' powers with the Council on this proposal and must agree to the text. The relevant EP committee is due to discuss this issue on Monday 12 June.

The Regulation is one of a package of three measures to establish the SIS II, which were proposed by the Commission in May 2005 (COM (2005) 230, 236 and 237). It deals with the issue of the use of the SIS for visas, borders and immigration purposes, in particular the use of the SIS when deciding whether to issue visas or residence permits to a non-EU citizen or to admit a non-EU citizen to enter the Schengen area.

The parallel proposals are a third pillar Decision which will regulate the application of the SIS as regards policing and criminal law, and another Regulation which will govern access SIS data on stolen vehicles by vehicle registration authorities. The Council does not appear yet to have agreed on these parallel measures, but agreement is likely soon.

The UK and Ireland are not participating in the immigration Regulation, as they are not participants in the Schengen free movement system.

A second version of the SIS is purely necessary for technical reasons, as the current version of the SIS cannot accommodate the EU's new Member States. This was also an opportunity to review issues such as the categories of data to be included in the system and the grounds for listing data, including personal data, in the SIS.

During the negotiations of this proposal, the Austrian Council Presidency sought to drop most of the changes to the existing Schengen Convention rules that had been proposed by the Commission. The final text is instead

closer to the Commission's proposal on a number of issues, due largely to the joint-decision making power of the EP, which also insisted that the text address some further issues of particular concern to it.

The Regulation will take effect as EC law, whereas at present the SIS remains almost entirely a 'third pillar' measure. This entails the 'direct applicability' of the Regulation in national legal systems, the Court of Justice's jurisdiction (although only in the truncated form applicable to EC immigration and asylum law, which will mean an increase in its jurisdiction in most new Member States and a reduction in its jurisdiction in most old Member States), and the application of EC rules and principles in other areas (such as the use of the EC budget, the rules on accountability of EC bodies, and the application of EC data protection rules).

The following summary looks at the main features of the text of the Regulation agreed by the Council, and compares them to the *status quo* (the current provisions of the Schengen Convention concerning SIS II) and to the Commission's proposal, indicating also the position of the EP.

Management of SIS II

At present, the SIS is managed by France. The Commission had proposed to take over the management of SIS II itself, but this was rejected by Member States. The agreed text provides that in the short term, the Commission will nominally be designated as the manager of SIS II, but that in practice the Commission will in fact delegate this management to France and Austria (where the backup site of the SIS II data will be located), who will nonetheless be held accountable in accordance with EC rules (Article 12 of the agreed text).

Categories of data

Currently the SIS contains only a few lines of 'alphanumeric' data (letters and numbers). Further data is exchanged between Member States after a 'hit' in the SIS (ie a consulate finds that an applicant for a visa is apparently listed in the SIS as a person to be refused entry). This is known as the 'Sirene' system.

The main change here is that 'biometric' data (photographs and fingerprints) will be included in the SIS. The EP had sought to limit the use of fingerprints, but the Council was insistent on this point (Article 14A).

Grounds for an SIS listing

The effect of listing a person in the current SIS, or the future SIS II, is that a person will be banned in principle from entering or remaining in any Schengen State. This is enforced by checking the SIS whenever a third-country national (non-EU national) applies for a 'Schengen visa' to enter the Schengen States, and generally when such persons cross the external

Schengen borders or apply for a long-term visa or residence permit (see in particular Articles 5, 15 and 25 of the Schengen Convention).

So a listing on the Schengen immigration 'blacklist' in principle prevents travel to or residence in any of the Member States except the UK and Ireland, once the new Member States apply the Schengen rules in full, plus Norway, Iceland and (in future) Switzerland.

The current criteria for listing a person on the Schengen blacklist are set out in Article 96 of the Schengen Convention, which reads as follows:

1. Data on aliens for whom an alert has been issued for the purposes of refusing entry shall be entered on the basis of a national alert resulting from decisions taken by the competent administrative authorities or courts in accordance with the rules of procedure laid down by national law.

2. Decisions may be based on a threat to public policy or public security or to national security which the presence of an alien in national territory may pose.

This situation may arise in particular in the case of:

(a) an alien who has been convicted of an offence carrying a penalty involving deprivation of liberty of at least one year;

(b) an alien in respect of whom there are serious grounds for believing that he has committed serious criminal offences, including those referred to in Article 71, or in respect of whom there is clear evidence of an intention to commit such offences in the territory of a Contracting Party.

3. Decisions may also be based on the fact that the alien has been subject to measures involving deportation, refusal of entry or removal which have not been rescinded or suspended, including or accompanied by a prohibition on entry or, where applicable, a prohibition on residence, based on a failure to comply with national regulations on the entry or residence of aliens.

The Commission had proposed that these rules be revised to read:

1. Member States shall issue alerts in respect of third country nationals for the purpose of refusing entry into the territory of the Member States on the basis of a decision defining the period of refusal of entry taken by the competent administrative or judicial authorities, in the following cases:

(a) if the presence of the third country national in the territory of a Member State represents a serious threat to public policy or public security of any Member State based on an individual assessment, in particular if:

(i) the third country national has been sentenced to a penalty involving deprivation of liberty of at least one year following a conviction of offence referred to in Article 2 (2) of Council Framework Decision

2002/584/JHA¹ on the European arrest warrant and the surrender procedures between Member States;

(ii) the third country national is the object of a restrictive measure intended to prevent entry into or transit through the territory of Member States, taken in accordance with Article 15 of the EU Treaty.

(b) if the third country national is the subject of a re-entry ban in application of a return decision or removal order taken in accordance with Directive 2005/XX/EC[on Return]².

2. Member States shall issue the alerts referred to in paragraph 1 in accordance with Article 25 (2) of the Schengen Convention and without prejudice to any provision which may be more favourable for the third country national laid down in:

(a) Council Directive 2003/86/EC on the right to family reunification³;

(b) Council Directive 2003/109/EC concerning the status of third country nationals who are long-term residents⁴;

(c) Council Directive 2004/81/EC on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities⁵;

(d) Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted⁶;

(e) Council Directive 2004/114/EC on the conditions of admission of third country nationals for the purpose of studies, pupil exchange, unremunerated training or voluntary service⁷;

(f) Council Directive 2005/XX/EC on a specific procedure for admitting third-country nationals for purposes of scientific research⁸.

3. Where the decision to issue an alert is taken by an administrative authority, the third country national shall have the right to a review by or an appeal to a judicial authority.

Comparing the current rules with the Commission's proposal, the changes would have entailed greater precision regarding the 'public policy or public security' ground for listing, including a requirement of a 'serious' threat to those interests, although Member States would still apparently have been free to develop further grounds for listing. A listing on grounds of a breach

¹ OJ L190, 18.7.2002, p.1.

² OJ XX

³ OJ L 251, 3.10.2003, p. 12.

⁴ OJ L 16, 23.1.2004, p. 44.

⁵ OJ L 261, 6.8.2004, p. 19.

⁶ OJ L 304, 30.9.2004, p. 12.

⁷ OJ L 375, 23.12.2004, p. 12.

⁸ OJ L XX

of immigration law would have had to be based on the more harmonized rules to be set out in an EC Directive on expulsion standards, which the Commission proposed in September 2005 (COM (2005) 391). Discussions on that proposed Directive are currently proceeding slowly in the Council and EP. There would also have been an express override where EC immigration and asylum law gave a person a right of entry or residence, as well an express right of appeal and an express requirement of individual assessment.

Also, whereas the current rules provide that ‘the Contracting Party issuing an alert shall determine whether the case is important enough to warrant entry of the alert into the Schengen Information System’ (Article 94(1), Schengen Convention), the proposal would apparently have made listings mandatory.

The Council’s agreed text provides as follows:

1. Data on third country nationals for whom an alert has been issued for the purposes of refusing entry or stay shall be entered on the basis of a national alert resulting from a decision taken by the competent administrative authorities or courts in accordance with the rules of procedure laid down by national law. This decision may only be taken on the basis of an individual assessment. Appeals against these decisions shall be carried out in accordance with national legislation.

2. An alert shall be entered when the decision referred to in paragraph 1 was based on a threat to public policy or public security or to national security which the presence of a third country national in national territory may pose. This situation shall arise in particular in the case of:

(a) a third country national who has been convicted of an offence by a Member State carrying a penalty involving deprivation of liberty of at least one year;

(b) a third country national in respect of whom there are serious grounds for believing that he has committed serious criminal offences or in respect of whom there are clear indications of an intention to commit such offences in the territory of a Member State;

3. An alert may also be entered when the decision referred to in paragraph 1 was based on the fact that the third country national has been subject to measures involving expulsion, refusal of entry or removal which have not been rescinded or suspended, including or accompanied by a prohibition on entry or, where applicable, a prohibition on residence, based on a failure to comply with national regulations on the entry or residence of third country nationals.

3b This Article does not apply in respect of the persons referred to in Article 15 AA.

3c The application of the provisions of Article 15 on the objectives and conditions for issuing alerts for the purpose of refusing entry or stay shall be reviewed three years after the date referred to in Article 39 (2). Based on this review the Commission may make proposals to modify the provisions of Article 15 in order to achieve a higher level of harmonisation.

Compared to the Commission's proposal, the 'public policy and public security' ground for listing and the 'immigration' ground for listing remain the same as at present. So there is no requirement of showing a 'serious' threat to public policy, etc. and the ground of intending to commit offences expressly appears. All references to the Directive on expulsions have been dropped. However, in a compromise with the EP, which also sought harmonization of the criteria for listing, this issue is to be reviewed three years after the SIS II begins functioning (this is planned for 2007). A separate clause governs the issue of persons subject to UN sanctions (Article 15AA). The express provisions concerning the right to an appeal and an individual assessment have survived, although the express override by other provisions of EC immigration and asylum law has not.

It appears that a listing on public policy, et al grounds is mandatory, but then the current proviso that 'the Member State issuing an alert shall determine whether the case is important enough to warrant entry of the alert into SIS II' was revived during negotiations (Article 14B).

EC free movement law

The Commission had proposed excluding persons who were family members of EU citizens with the right to free movement from SIS II (Article 3(1)(d) and (e) of the proposal). In the meantime, the Court of Justice ruled that a Member State had breached EC free movement law when it refused entry and a visa to family members of UK and Irish citizens, because of listings in the SIS of such persons by another Member State, without contacting the listing Member State to find out more detail to establish if such persons in fact could be validly excluded on the basis of the criteria *free movement law*, which sets a higher threshold for exclusion than the SIS rules (Case C-503/03 *Commission v Spain*, judgment of 31 Jan. 2006, not yet reported).

The Council's agreed text re-inserts family members of EU citizens into the SIS (Article 15A), subject to the provisions of EC free movement legislation. The EP had argued for an express reference to the safeguards insisted upon by the Court in its recent judgment, but this reference was dropped in the Council's final text.

Access by authorities

The Commission had proposed enlarging access to SIS immigration data to include asylum authorities, in order to determine the merits of an asylum application as well as to decide on which Member State was responsible for considering the application (Articles 17 and 18 of the proposal); also authorities responsible for expulsion would have access. This suggestion was dropped, in favour of retaining the rather less precise description of the authorities with access (Article 17 of the final text; compare to Article 101 of the current Schengen Convention). It might be arguable that this less precise description might nonetheless encompass those authorities that the Commission wished to refer to expressly.

Data protection

The Commission had sought to include new provisions on data protection, but the Austrian Presidency then sought essentially to return to the provisions of the Schengen Convention (see Articles 109-111 and 114-115 of the Convention). Following the EP's insistence, the Commission's provisions were largely reintroduced, along with other provisions, in the final Council text (Articles 27a-31c).

Compared to the current rules, the agreed text includes a right of information (subject to limitations), deletes a territorial limitation on remedies, requires a review of remedies rules, and replaces the Schengen Joint Supervisory Body with the European Data Protection Supervisor (an existing body with the task of supervising the EC institutions' and bodies' processing of personal data). The national supervisory authorities are now defined by reference to the EC's data protection directive, which *prima facie* gives them significant powers (see Article 28 of Directive 95/46).

Since the Regulation will be subject to the EC general data protection directive, it would appear that the rules in that Directive permitting transmission of data to a non-Member State ensuring 'adequate protection' for that data would apply.

Final provisions

SIS II will begin operations once the Council (made up of Member States currently fully participating in Schengen) decides unanimously (Article 39(2)). There are detailed provisions on monitoring and statistics (Article 34), going well beyond the current requirements for SIS public accountability. The Commission will have power to adopt implementing measures, subject to Member States' control (and limited EP oversight) in a 'comitology' committee (Article 35); it has some of these powers already as regards amendment of the 'Sirene manual' (which governs the transmission of further data between Member States following an SIS 'hit'). Existing SIS data will have to be subject to the new rules in the Regulation after three years (Article 38); but it should be recalled that the criteria for listing do not appear to have changed and three years is the normal period to review the inclusion of data in any case (Article 20).

Conclusions

The Commission's ambitions to amend the existing SIS rules in order to harmonize the grounds for listing, to remove expressly family members of EU citizens from the SIS blacklist, to alter the rules concerning access by authorities, to extend the management period for alerts and to take over management of the system have all been rebuffed by the Council. But the involvement of the EP appears to have influenced the final text as regards data protection rights, rights to an appeal against a listing, later review of

the listing criteria and remedies rules, and other provisions on publicity and training (Articles 11A, 11C and 14AA).

References (the links below are “live”, just click to access)

Current Schengen Convention: see Articles 5, 15, 25 and 92-119

COM (2005) 230: proposed third pillar Decision to establish SIS II

COM (2005) 236: proposed Regulation establishing SIS II as regards immigration

Council doc. 5709/06: Austrian Council presidency proposal for SIS II Regulation

Draft opinion of the European Parliament LIBE committee

Council doc. 5709/6/06: agreed text of SIS II Regulation:

<http://www.statewatch.org/news/2006/jun/5709-rev-6-06.pdf>

See also:

SIS II: *fait accompli*? Construction of EU’s Big Brother database underway:

<http://www.statewatch.org/news/2005/may/sisII-analysis-may05.pdf>

Joint Supervisory Authority (JSA) on the Schengen Information System issues critical report on SIS II proposals:

<http://www.statewatch.org/news/2005/oct/JSA-SIS.pdf>