COUNCIL OF THE EUROPEAN UNION

Brussels, 20 April 2006

8537/06

Interinstitutional File: 2005/0106 (COD)

LIMITE

SIRIS 81
SCHENGEN 34
COMIX 390
CODEC 367

NOTE

From:	Presidency
to:	Mixed Committee at the level of high officials Mixed Committee at the level of Ministers
No Prev. Doc.:	5709/2/06 REV 2 SIRIS 22 SCHENGEN 10 COMIX 86 5710/06 SIRIS 23 SCHENGEN 11 COMIX 87 CODEC 71 8082/06 SIRIS 72 SCHENGEN 32 COMIX 339 CODEC 311
Subject:	Selected issues concerning the legal basis for SIS II

Introduction / Context

1. On 31 May 2005, the Commission submitted legislative proposals setting out the legal basis for SIS II: two Regulations to be adopted in co-decision procedure and one Council Decision. The discussions on these proposals have reached a crucial stage. In order to allow the SIS II to be operational in 2007 and consequently to lift the checks at the internal borders for the new Member States, the legislative instruments have to be adopted by mid-2006. Realistically, this implies that the Council and the Parliament reach agreement on the proposed Regulations in first reading.

2. To reach that goal, a delicate balance must be found between the concerns of the Member States and those of the Parliament. Extensive discussions in the Schengen Acquis Working Party and regular contacts with the Parliament have allowed substantial progress to be made over the past months on the drafting of the texts.

3. However, to finalise the texts, delegations urgently need to close national consultations so that a final position can be given on the texts and all reservations can be lifted. Furthermore, concerted political guidance is necessary on the following questions, especially since they concern provisions that are of particular interest to the Parliament:

- use of biometrics for identification purposes
- competences of the different data protection authorities
- conditions for issuing alerts on refusal of entry or stay.

Use of biometrics for identification purposes (Article 14 C of the draft Regulation)

4. In 2004, the Council agreed on the following conclusions relating to the use of fingerprints in the SIS II (doc. 10125/04):

> *"Initially, fingerprints are to be stored for the purpose of assisting in the identification of persons after the hit has occurred; […]*
>
> *Fingerprints to be stored in such a manner as to enable, in the future, functionality for the purposes of identification of suspect persons in accordance with the Schengen Convention. This functionality is subject to further examination and requires an appropriate legal base to be agreed by Council; "*

5. The first phrase is a reference to the use of biometrics for verification purposes, i.e. to confirm the identity of a data subject whose identity was already established using other means e.g. documents ("one-to-one" comparison). The second concerns the possibility of using biometrics for identification purposes, i.e. to establish the identity of the data subject without using any other identification material (as a "primary search key"; "one-to-many" comparison).

6. The use of biometric identifiers is a sensitive issue and one which obviously depends on technological developments to be used correctly. It would seem generally accepted that one-to-many comparisons on the basis of photographs currently do not provide accurate enough results. As a consequence, photographs are not included as a search key in the VIS. It would seem logical to adopt the same approach for SIS II. The situation is different for fingerprints and the current result of the negotiations on the VIS Regulation provide for fingerprints to be used as a primary search key.

7. During the discussions in the Schengen Acquis Working Party, 13 Member States spoke in favour of using biometric identifiers as primary search key, allowing "identification". The Commission has equally indicated the importance of this tool in the fight against crime and for the reliable identification of persons. In order to accommodate concerns voiced by the Parliament and data protection authorities[1], it was proposed to start this use only in 2009. A number of other Member States have indicated that they have no objections or would even like to use biometric identifiers for identification purposes but have not spoken out in favour of it to avoid endangering the timely adoption of these legislative instruments.

8. The Council is invited to confirm that the operational needs for creating a European area of security require that fingerprints be used from 2009 onwards for identification purposes when searching SIS II.

Competences of the different data protection authorities (Article 31 A-C of the draft Regulation)

9. Within the SIS 1+, the supervision of the processing of personal data at the national level is carried out by national data protection authorities (provisions of Art. 114 SIC). Responsibility for the supervision of the technical support function of the Schengen Information System is held by the Joint Supervisory Authority (provisions of Art. 115 SIC).

[1] See documents 2504/04 and 2501/05 (opinions of the **Joint Supervisory Authority** (JSA)), document 2067/05/EN WP 116 (opinion of the **Article 29 Committee)** and 14091/05 (report of the **European Data Protection Supervisor** (EDPS) on the SIS II legal initiatives)

10. This system of control cannot be maintained in relation to the SIS II. Within the SIS II, Community institutions and bodies will be responsible for the processing of personal data. Under Community law, the authority responsible for the supervision of the processing of personal data by Community institutions and bodies is the European Data Protection Supervisor (see Article 41.2 of Regulation 45/2001[2]).

11. The role of the European Data Protection Supervisor in this respect has been recognised in the European Commission's proposal and the reports of the three data protection authorities consulted within the legislative procedure (JSA, EDPS, and Article 29 Committee).

12. During the Schengen Acquis Working Group of 10 April 2006, the Presidency presented a compromise in respect of the SIS II Regulation in which:

- The supervision of the processing of personal data at the national level is carried out by national data protection authorities;
- The supervision of the processing of personal data by the management authority is carried out by the European Data Protection Supervisor; and
- Horizontal SIS II data protection problems affecting both the national and central levels are addressed jointly by national data protection authorities gathered within a Joint Supervisory Authority and the European Data Protection Supervisor.

13. This solution, which is close to the views of the Rapporteur, the European Data Protection Supervisor and the Chairman of the Joint Supervisory Authority was acceptable to all but four Member States[3], which insisted on a common responsibility for the EDPS and the JSA for the supervision of the data processing activities of the Management Authority.

[2] OJ L 8 of 12.1.2001, p. 1.
[3] ES, FR, PT, EL

14. The Presidency has not yet presented a compromise proposal in respect of the SIS II Decision, but considers that an identical solution should be chosen in order to secure a single data protection supervision regime for the entire SIS II. The responsibility of the European Data Protection Supervisor for the supervision of the whole of a system that falls partly within the scope of Community law and partly outside it, as is the case of the SIS II, is expressly foreseen by Article 3 of Regulation 45/2001.

15. In view of the difficult compromise brokered, the Council is invited to indicate that it can accept the above-mentioned solution, recognising that:

- **it is compatible with Regulation 45/2001, whereas any other solution would require amending that Regulation, in particular its Article 3;**
- **it allows for and provides a single supervision regime for the entire SIS II**
- **any supervision going beyond the data processing activities of the Management Authority are addressed jointly by national data protection authorities, gathered within a JSA and the EDPS.**

Conditions on issuing alerts on refusal of entry or stay (Article 15 of the draft Regulation)

16. In the current SIS there is no common understanding of the Member States on the criteria for the introduction of alerts on third country nationals that are refused entry. This is in part due to diverging national legislations on this issue. The JSA has conducted a study in 2005 highlighting the absence of common criteria in the application of the corresponding provisions of Article 96 in the Schengen Convention. The Commission proposal therefore contained grounds for harmonisation of these alerts.

17. The latest draft of this provision (Article 15) still provides that the introduction of such an alert is a matter for national law. Nonetheless, it is stated that this introduction shall be decided upon on the basis of an individual assessment (with an exception in the case of sanctions' lists) and some "guiding principles" are specified.

18. While especially, but not only, the Parliament would prefer to set out common criteria for the introduction into the SIS of alerts on refusal of entry or stay, it is generally accepted that this will be impossible in the short term and definitely not before the deadline of mid-2006. The Council could, however, make a political commitment to work on greater harmonisation in relation to the introduction of this type of alert.

19. The Council is invited to confirm the current drafting of the provision on the introduction of alerts on refusal of entry or stay (document 5709/2/06) as well as its commitment to work on the harmonisation of the criteria to insert such alerts.