Statewatch briefing paper

Schengen Information System (SIS) II: Immigration Regulation

Background

On October 5, 2006, the Justice and Home Affairs (JHA) Council, meeting as a 'Mixed Committee' with Schengen associates Norway, Iceland and Switzerland, agreed on a revised text of a Regulation establishing the second version of the Schengen Information System (SIS II). On the same day, the civil liberties committee of the European Parliament (EP) voted in favour of the same text, with the exception of a provision concerning the access of security services to the SIS II database. The Council and the EP have reached agreement on this text (apart from the issue of security services' access) as a 'first-reading' agreement within the framework of the 'co-decision' process (according to which the Council and the EP must jointly agree on a legislative text for it to be adopted).

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 and the EP also agreed on these parallel measures on October 5, except (again) for the issue of security agencies' access to data.

The EP plenary is due to vote on the SIS II texts on Monday 23 October, and it remains to be seen whether the EP and the Council will agree to resolve the remaining point of difference between them. If they can, then the two Regulations will be adopted finally pursuant to the 'co-decision' procedure (which requires the EP and the Council to fully agree on the text of legislation), and the third pillar Decision will be adopted finally according to the consultation procedure (which, in this case, also requires a unanimous vote by Member States).

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 was argued to be necessary for technical reasons, as the current version of the SIS cannot accommodate the EU's new Member States. This was also, in the view of the Member States, 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 in the first half of 2006 sought to drop most of the changes to the existing Schengen Convention rules that had been proposed by the Commission. The final text, agreed under the current Finnish Presidency, 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 the EP, and compares them to the *status quo* (the current provisions of the Schengen Convention concerning SIS II) and to the Commission's proposal.

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, and the Joint Declaration on Article 12). In the longer term, an Agency will be established to manage SIS II. The legislative proposals to establish the Agency should be issued two years after the entry into force of the Regulation, and the Agency should take up its activities five years after entry into force of the Regulation (see the Joint Declaration on Article 12). Since the Regulation will likely enter into force early in 2007 (see Art. 39(1)), this means that the legislative proposals should be issued early in 2009, and the Agency should take up work early in 2012.

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). However, the Regulation does provide that biometric data will only be entered following a 'special quality check' in order to ensure data quality (Article 14C(a)). The specifics of this quality check will be established by the Commission pursuant to a 'comitology' procedure, which means that the Commission text must be approved by a 'qualified majority' of Member States' representatives (whose votes will be weighted in the same way as for qualified majority voting in the Council; see Article 35 of the Regulation). Initially, biometric data will only be used to 'confirm the identity' of a person whose name has been found in the SIS following an alphanumeric search (likely meaning that his or her name matches a name in the SIS; see Article 14C(b) of the Regulation).

But later biometrics will be used to 'identify' persons 'as soon as technically possible' (Article 14C(c)). This will entail a 'one to many' search (comparing one set of biometric data to much or all of the biometric data in the database), which is technically far less reliable than a 'one-to-one' search (which only compares one set of biometric data to the biometric data registered, for example, to the same name). There will be no further vote before this important functionality is put into practice.

Grounds for an SIS listing

The effect of listing a person in the SIS pursuant to Article 96 of the current Schengen Convention, or pursuant to the future SIS II immigration Regulation, 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, and now Articles 5 and 7 of Regulation 562/2006 establishing the Schengen Borders Code).

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.
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> 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.
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> This situation may arise in particular in the case of:
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> (a) an alien who has been convicted of an offence carrying a penalty involving deprivation of liberty of at least one year;
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> (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.
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> 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:
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> (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:
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> (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/JHA[1]on the European arrest warrant and the surrender procedures between Member States;

[1] OJ L190, 18.7.2002, p.1.

(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 reunification[3];

(b) Council Directive 2003/109/EC concerning the status of third country nationals who are long-term residents[4];

(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 authorities[5];

(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 granted[6];

(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 service[7];

(f) Council Directive 2005/XX/EC on a specific procedure for admitting third-country nationals for purposes of scientific research[8].

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

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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

grounds for listing. A listing on grounds of a breach 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.
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> 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.
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> 3b This Article does not apply in respect of the persons referred to in Article 15 AA.
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> 3c The application of this Article shall be reviewed by the Commission three years after the date referred to in Article 39(2). Based on this review

> the Commission shall, using its right of initiative in accordance with the Treaty, make the necessary proposals to modify the provisions of this Article to achieve a higher level of harmonisation of the criteria for entering alerts.

Compared to the Commission's proposal, the 'public policy and public security' ground for listing and the 'immigration' ground for listing remain almost identical to the present text of the Schengen Convention. So there will be no requirement of showing a 'serious' threat to public policy, etc. and the ground of intending to commit offences expressly appears. In fact, the Regulation lowers the threshold for issuing an alert on the latter ground (the Convention presently refers to 'clear evidence' of an intention to commit serious crimes before an alert is issued, while the agreed Regulation will require only 'clear *indications*' of such an intention).

Also, unlike the present text of the Convention, it appears that issuing an alert on public policy, et al grounds appears to be mandatory ('an alert *shall* be issued'), as the Commission had proposed. On the other hand, 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' (Article 94(1) of the Schengen Convention) was revived during negotiations and (at the EP's insistence) was even expanded to require also that an alert can only be issued if the case is 'adequate, relevant and important enough' (Article 14B of the agreed text).

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 now planned for 2008, so the review would take place in 2011).

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.

A separate clause will govern the issue of persons subject to a UN sanction in the form of a travel ban, or a travel ban sanction imposed unilaterally by the EU (Article 15AA). In particular, it is provided that there is no obligation to include any specific categories of data on this category of persons; but it is hard to see how the travel ban could function without at least including the name of the person concerned on the SIS. Although the current Schengen Convention rules do not refer to issuing alerts on this category of persons, it is clear from Council documents that it has become an established practice to issue such alerts under the current rules. Since the entirety of Article 15 is inapplicable to such persons, it follows that the provisions on an individual assessment or concerning an appeal against an SIS listing do not apply to them expressly. However, the provision requiring an alert to be issued only if the case is 'adequate, relevant and important enough' will apply.

It should be recalled that there is extensive case law of the EU courts on the issue of financial sanctions imposed against individuals. Further cases are pending before the EU Court of First Instance, and a number of appeals from the first

judgments of that Court are pending before the EU's Court of Justice. So far the Court of First Instance has ruled that it will not in principle review the EU's imposition of financial sanctions against individuals where there is a UN Security Council requirement to this effect; but it has not ruled on whether it would review a travel ban, in particular a ban imposed by a unilateral decision of the EU. Another issue is that EU travel bans, unlike financial sanctions, are imposed pursuant only to foreign policy acts of the EU, which in principle removes these decisions from the jurisdiction of the EU courts anyway. It could, however, be argued that the EC should be giving effect to such sanctions pursuant to immigration law legislation, which would mean that the travel bans would be reviewable by the EU courts.

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 agreed text re-inserts family members of EU citizens into the SIS (Article 15A), subject to the provisions of EC free movement legislation. There is also an express requirement (at the insistence of the EP) to exchange information between Member States in such cases, using the SIRENE system for supplementary exchange of information. In fact, the Court of Justice has already required the application of this safeguard in its recent judgment.

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 agreed 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. The final Council version of Article 17 contains the vague words (intended to refer to access by security services) which the EP has not (yet) consented to.

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).

The Regulation expressly specifies that, unlike the EC general data protection directive (which allows the transfer of personal data to a non-Member State ensuring 'adequate protection'), SIS data cannot be transferred outside the EU at all (Article 27AA).

Final provisions

SIS II will begin operations once the Council (made up of Member States currently fully participating in Schengen) decides unanimously (Article 39(1a)). As noted above, this is now planned for 2008.

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 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'). But there will be no control of the adoption of implementing measures by the EP; this appears to contradict the recent amendments to the general 'comitology' rules, which require the EP to have control over the adoption of particularly significant implementing measures.

The power to adopt implementing measures will apply to the following:

a) the adoption of the Sirene Manual (Article 8(3a));
b) technical compliance between the national and central databases (Article 9(1));

c) 'technical rules' concerning 'entering, updating, deleting and searching the data' (Article 14a(3a));
d) the specifications for a quality check before the uploading of biometric data (Article 14c(a));
e) 'technical rules' concerning 'entering, updating and deleting the data' concerning misused identity (Article 25(3a)); and
f) 'technical rules' for linking alerts (Article 26(4a)).

Existing SIS data will have to be subject to the new rules in the Regulation three years after the SIS II begins operations (Article 38); if SIS II is operational as planned in 2008, this means that the existing data will have to be amended by 2011. 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). However, during this three-year period (at the EP's insistence), any type of amendment made to a pre-existing alert must comply with the Regulation, and a Member State must 'examine the compatibility' of an alert with the Regulation in the event of a 'hit' (ie where a check in the SIS reveals that a visa applicant or person seeking to cross the border is listed as a person who must be refused entry). But in the latter case, this examination of compatibility will not affect the action to be taken (ie Member States will still refuse to issue the visa or to allow entry).

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).

Statewatch, October 2006

References:

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. 5709/10/06: agreed text of SIS II Regulation

Full-text documents available on:
http://www.statewatch.org/news/2006/oct/11eu-sis-II-sources.htm