EUROPEAN DATA
PROTECTION SUPERVISOR

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Panel II: Improving EU governance of Schengen area: protecting freedom of movement, promoting solidarity between Member States, securing borders

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"Data Protection and Schengen Governance"

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Introduction

- An EU wide large scale information system (currently SIS I+) is at the heart of the Schengen mechanism. It affects the rights of millions of people on a daily basis. Data protection is essential for its legitimacy and success in practice. This surely raises some governance issues. I am therefore very pleased to be able to contribute to this conference.
- In my intervention, I would like to focus on the crucial importance of robust data protection for SIS, our role in the development and supervision of SIS II, and also on the link with the recent data protection reform package and other future developments.

EDPS and SIS II development

- The EDPS has been involved in providing advice on the SIS II Regulation and many of our recommendations focused on the new functionalities and content brought by the system for processing personal data.
- Why does SIS II have such a big impact on data protection? SIS II develops new characteristics: widened access to the SIS (including Europol, Eurojust, national prosecutors, and vehicle licensing authorities), interlinking of alerts, addition of new categories of data, including biometric data (fingerprints and photographs).
- These additions have caused concerns for years about a shift of purpose of the SIS, from a simple control tool to a reporting and investigation system.
- It was important to ensure a high level of data protection. Consistency and clarity are needed in order to provide the data subject with the necessary legal certainty (see EDPS Opinion of 19 October 2005, 2006/C 91/11, on the SIS II proposals).
- Providing optimal security for SIS II is a fundamental requirement for ensuring an adequate protection of personal data stored in the database. In order to obtain this level of protection, proper safeguards have to be implemented for handling the potential risks related to the infrastructure of the system and to the persons involved.
- To this end, it should be stressed that interoperability of systems can not be implemented in violation of the "purpose limitation" principle. Interoperability should never lead to a situation where an authority, not entitled to access or use certain data, can obtain this access via another information system.

SIS I to SIS II migration

- Migration from SIS I+ to SIS II is a challenge that involves complex technical efforts at EU and Member State level.
- We expect from the Commission that adequate safeguards are provided to ensure a streamlined migration process.
- An in-depth security audit of the Central Unit and its business continuity system is required by Article 45.2 of the SIS II Regulation. For various reasons, it is advisable to conduct it before the "go live" is completed:
  - To check that the security measures mentioned in Article 16 of the SIS II Regulation and Article 22 of Regulation 45/2001 have been properly implemented. In addition to its conclusions, the audit might comprise recommendations which could complement the global test.
  - To provide a benchmark for a similar future exercise, four years after the system has been launched.

EDPS and Coordinated Supervision

- The SIS II Regulation also recognises the need to coordinate the supervisory activities of the different authorities involved.
- In recent years, the model of "coordinated supervision" was developed. This model of supervision, now operational in Eurodac and parts of the Customs Information System, has recently expanded to the Visa Information System (VIS) and will also apply to the second generation Schengen Information System (SIS II).
- This model has three layers: (1) supervision at national level is ensured by locally competent DPAs; (2) supervision at EU level is ensured by the EDPS; (3) coordination is ensured by way of regular meetings convened by the EDPS acting as the secretariat of this coordination mechanism.
- This model has proven successful and effective, and should be envisaged in the future for other EU wide information systems.

Migration and transition

- Considering that the members of the current Schengen JSA will probably be members of the SIS II coordinated supervision, a smooth transition can be expected. The migration phase will be the obvious opportunity to initialise this "partnership".
- We also look with great interest to the manner in which the Commission will transfer its competences to the new IT Agency, especially as regards the security policy aspects. We expect from the Commission to develop and also to implement security policies in terms of data protection with accurate and efficient objectives.
- We see a tendency in large IT systems to underestimate important aspects such as having a proper security policy in place, approved at director general level, before the start of the operations. We would like to ensure that the handing over of systems to the new Agency is properly executed.

One single system - three instruments

- There is also an issue as to the legal architecture of SIS. First, after the entry into force of the Lisbon Treaty, it would have been better to have one legal instrument to regulate SIS II instead of three different legal instruments.

- Second, the Commission has just adopted a data protection reform package consisting of proposals for a general Regulation and a Directive for the former third pillar. Both instruments are not consistent with each other. Although the proposal for a general Regulation is an excellent starting point for adoption of European rules on data protection, the Commission has not lived up to its promises to ensure an equally robust system for police and justice.
- In our press release following the Commission proposals, we have criticized the inadequate level of protection in the police and justice sector: "*These are areas where the use of personal information inevitably has an enormous impact on the lives of private individuals. It is difficult to understand why the Commission has excluded this area from what it intended to do, namely proposing a comprehensive legislative framework.*"
- Since activities in and around SIS (at national level) will partly be covered by the new Regulation, partly by the new Directive, the question arises how this lack of balance will work in practice.
- In fact, SIS is an excellent example to demonstrate why we would need one single, comprehensive data protection regime.

Future developments

- Improved governance for Schengen is closely related to the issue of "smart borders". The Commission announced that it will come with a legislative package on smart borders by June this year. We will have to see how SIS will function in this wider context and whether any new elements are provided in a way that complies with necessity and proportionality tests.
- The recent Communication on Smart borders highlights the challenges and even mentions more "Privacy by Design" as an option. That makes us really curious.

Conclusions

- SIS II: a new system, new functionalities, new challenges. The EDPS will remain involved in all phases of developing the system. The migration part will provide a first test for how the system works but also for the future of the coordinated supervision.
- As already mentioned, development of SIS is closely connected to the new data protection package. An example: the new DP package introduces "data protection by design" as a general obligation.
- In the context of SIS, this means that solutions to data protection requirements, such as automatic deletion of data at the end of the permitted period, should be obligatory in the implementation of new and existing databases.
- Individuals must be adequately protected against the consequences of data inaccuracies or negligent data exchange and must be properly informed of their rights. This also feeds into the general need for greater accountability.
- The EDPS will closely follow the development of SIS II and any other proposals in this context, such as the much expected "smart borders" legislative proposals, and we are available for further consultations, in the spirit of good cooperation.