



The National Commissioner of Police
Dept. E, Aliens Division (17 14 36 11)
Anker Heegaardsgade 5, 3
DK-1780 Copenhagen V

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**Review of reporting of data under Article 96 of the Schengen Convention
- National Commissioner's ref. no. 2004-5162-45**

The Danish Data
Protection Agency
Borgergade 28, 5.
DK-1300 Copenhagen K

Phone +45 3319 3200
Fax +45 3319 3218

E-mail
dt@datatilsynet.dk
www.datatilsynet.dk

J.no. 2003-851-0048
Ref.
Jakob Gøtze Pedersen
Direct +45 3319 3227

The Joint Supervisory Authority of Schengen has launched a review of the reporting of data concerning unwanted aliens to the Schengen Information System under Article 96 of the Schengen Convention. For that purpose, the Joint Supervisory Authority has asked the Danish Data Protection Agency to evaluate whether the Danish reporting concerned with unwanted aliens under Article 96 of the Schengen Convention has been consistent with the provisions of the Convention.

One of the reasons for the initiative of the Joint Supervisory Authority is the fact that the volumes of reporting by member states have been found to differ substantially. For example, as of 1 February 2003, Italy had entered 335,306 reports in the SIS, Germany had entered 267,884 reports, the Netherlands had entered 9,363 reports and Sweden 4,454 reports.

Therefore, by a letter of 21 September 2004, the Data Protection Agency asked the National Commissioner of Police to submit documentation of the reports entered by the Danish authority under Article 96 in the first quarter of 2004.

By a letter of 28 October 2004, the National Commissioner submitted the requested material.

The material showed that in the first quarter of 2004 data had been reported erroneously to the SIS in a number of cases.

Against this background, the Data Protection Agency asked the National Commissioner, by a letter of 17 December 2004, to review all of the reports made by the Danish authority under Article 96, in order to make sure that erroneous registration in the SIS had not taken place in other cases. In addition, the Data Protection Agency asked the National Commissioner to indicate whether the errors found in the reporting carried out in the first quarter of 2004 had given reason to change case handling and control procedures or similar measures.

By a letter of 3 May 2005, the National Commissioner of Police submitted a statement, explaining that the National Commissioner's Office had reviewed all of the 443 cases in which foreign citizens had been updated in the SIS as unwanted aliens according to section 58G of the Aliens Act.

The review comprised the judicial and administrative decisions on which the reporting had been based, the registration in the Central Register of Criminal Records and the SIS as well as the service of notice of the SIS reporting on the aliens concerned.

In connection with the review of the cases, the National Commissioner's Office found that the situation was as follows:

- In 22 cases, reporting had been made erroneously to the SIS. They were primarily concerned with EU citizens, or foreign citizens convicted of offences that did not meet the reporting criteria set out in section 58G of the Aliens Act in respect of the sentenced offence or the length of the sentence.
- In 17 cases, data was reported to the SIS correctly, but in connection with updating in the SIS and the Central Register of Criminal Records some data had not been keyed in correctly, or the reporting had not been complete in relation to the mandatory sections in the SIS.
- In 7 cases, reporting to the SIS was made correctly, but it had turned out subsequently that the persons reported were known under false names, and when it was discovered it had not been corrected in the SIS, or the persons concerned had been reported under two identities.
- In 11 cases, reporting to the SIS was made correctly, but by mistake no steps had been taken to allow the Immigration Service to carry through consultation under Article 25 of the Schengen Convention.
- In addition, the review of the sentences on which the SIS reporting was based showed that in 11 cases the sentences were wrong as far as the expulsion issue was concerned. In three of these cases reporting to the SIS took place – in accordance with the substance of the sentences passed – but the sentences had turned out to have been passed incorrectly in respect of the expulsion issue, and the reporting to the SIS had consequently not been correct. In eight of the cases concerned, the reporting to the SIS had taken place in conformity with the conviction related to the offences for which the sentences were passed, but the sentencing references to the expulsion provisions of the Aliens Act were wrong, and steps should therefore have been taken to have the sentences corrected before the decisions were reported to the SIS.
- In a small number of cases, in which the reporting to the SIS was correct, it had turned out that the notice of reporting to the SIS had not

been served on the alien in conformity with the internal guidelines of the National Commissioner of Police for such measures.

The National Commissioner of Police has indicated that the necessary steps have been taken to correct the identified errors and that the internal guidelines for the Aliens Division of the National Commissioner's office concerning case handling and control procedures for the processing of cases that have to be reported under Article 96 of the Schengen Convention will be specified further.

The National Commissioner has furthermore asked the Director of Public Prosecutions to point out to the police districts that in cases where expulsion may be relevant, the prosecution service must ensure requesting a correct order for expulsion and when receiving the sentences passed review them carefully, including their references to the expulsion provisions of the Aliens Act, in order to make sure that the expulsion orders that are part of the sentencing are correct viewed against the sentenced offences and, if required, the prosecution service must take steps to have such orders corrected.

In relation to this information, the Data Protection Agency - having submitted the matter to the Data Protection Council - has to point out as follows:

1. Pursuant to section 2(1) of the Act on Denmark's Accession to the Schengen Convention¹ the provisions set out in Title IV of the Schengen Convention (the Schengen Information System) apply in this country. Title IV of the Convention, comprising Articles 92-119, is concerned with the Schengen Information System.

It is determined in section 2(2) of the Accession Act that the National Commissioner of Police is the central authority responsible for the national section of the SIS under Article 108(1) of the Convention.

The National Commissioner is furthermore the controller under the rules of the Personal Data Processing Act and has in compliance with that Act notified the national section of the Schengen Information System to the Data Protection Agency.

The Data Protection Agency is the authority responsible for supervising compliance with the Personal Data Processing Act and in addition, according to section 2(2) of the Accession Act, the supervisory authority under Articles 114 and 128 of the Schengen Convention.

According to section 58(1) of the Personal Data Processing Act, the Data Protection Agency shall ensure at its own initiative or upon a complaint from a data subject that data is processed in conformity with the Act and the rules

¹ Act No. 418 of 10 June 1997 on Denmark's Accession to the Schengen Convention

laid down pursuant to the Act. As set out in section 62 of the Act, the Agency is entitled to demand any information of importance for its activity.

Under Article 114 of the Schengen Convention, the Data Protection Agency supervises the database of the national section of the SIS, controlling that the processing and use of the data entered in the SIS will not violate the rights of the persons affected. For this purpose the Data Protection Agency must have access to the database in the national section of the SIS.

Acting upon the initiative of the Joint Supervisory Authority, the Data Protection Agency controlled a cross section of the Danish reports, namely the 20 reports that had been entered in the first quarter of 2004.

When this cross section revealed that data had been reported erroneously to the SIS in a number of cases, the Data Protection Agency asked the National Commissioner of Police to review all of the reports entered by the Danish central authority.

As requested by the Data Protection Agency, the National Commissioner of Police has reviewed the mentioned cases. The Data Protection Agency has noted in this connection that the review comprised the judicial and administrative decisions on which the reporting was based as well as the registrations in the Central Register of Criminal Records and the SIS and the service on the foreign citizens of notice of the reporting to the SIS.

Against this background, the Data Protection Agency finds the report submitted by the National Commissioner of Police capable of forming the basis of the Agency's assessment of the reporting that had been carried out.

2. Alerts about unwanted aliens, who are refused entry, will be entered in the SIS on the basis of national reporting according to Article 96 of the Schengen Convention.

In Denmark, the criteria for reporting unwanted aliens are contained in section 58G of the Aliens Act and the reporting has to be made by the National Commissioner of Police.

According to section 58G of the Aliens Act, the National Commissioner has to enter an alert in the Schengen Information System about foreign citizens who are non-nationals of a Schengen state or a member state of the European Union if

- 1) the alien has been expelled from this country under sections 22, 23 or 24(1),
- 2) the alien has been expelled from this country under section 24(2) upon an unconditional prison sentence of at least one year or another criminal sanction that involves or allows deprivation of liberty for an offence that would have resulted in a sentence of the mentioned duration,
- 3) the alien has been expelled from this country under section 25,

- 4) the alien has been refused a residence permit under section 10(1) or (2)(1) or (2),
- 5) the alien's residence permit has been revoked under section 19(2)(2) or (3), or
- 6) the alien has been provided with a visa under section 4 or 4A and been expelled from this country under section 25B after the alien has received a rejection of an application for a residence permit under section 7.

It follows from section 58H(1) of the Aliens Act that the Immigration Service is in charge of consultations with the authorities of another Schengen state under Article 25 of the Schengen Convention.

If, after the consultations referred to in section 58H(1) the Immigration Service finds that an alert entered under section 58G should be deleted from the Schengen Information System, the National Commissioner of Police has to delete that alert from the Schengen Information System under section 58H(2).

It follows from Article 105 of the Schengen Convention that the reporting contracting party is responsible for ensuring that the data entered in the Schengen Information System are correct, up-to-date and have been lawfully reported.

3. The Data Protection Agency has found that both the review carried out on a spot check basis for the first quarter of 2004 and the subsequent review of all reports have demonstrated that there have been errors in the Danish reporting to the SIS on a number of points.

The Data Protection Agency thus has to observe that in several cases the National Commissioner of Police has reported data to the SIS even though the criteria set out in section 58G of the Aliens Act had not been satisfied.

It is the Data Protection Agency's view, in addition, that the National Commissioner of Police has failed to meet the requirements of Article 105 of the Schengen Convention, since the National Commissioner has not ensured that the data entered in the Schengen Information System are correct, up-to-date and lawfully reported.

Furthermore, it is the Data Protection Agency's view that the National Commissioner has failed to live up to section 5(4) of the Personal Data Processing Act according to which the processing of data should be organised in a way which ensures the required up-dating of the data. Furthermore, necessary checks should be made to ensure that no inaccurate or misleading data are processed. Data which turn out to be inaccurate or misleading shall be erased or rectified without delay.

The Data Protection Agency has taken note of the fact that the National Commissioner has taken steps to correct the identified errors.

In addition, the Data Protection Agency has noted that the National Commissioner will specify the internal guidelines for case handling and control procedures for the processing of cases in which data are reported under Article 96 of the Schengen Convention.

Finally, the Data Protection Agency has taken note of the National Commissioner's request to the Director of Public Prosecutions to point out to the police districts that in cases in which expulsion may be relevant, the prosecution service must ensure requesting a correct order for expulsion and when receiving the sentences passed review them carefully, including their references to the expulsion provisions of the Aliens Act, in order to ensure that the expulsion orders that are part of sentencing are correct viewed against the sentenced offences and, if required, take steps to have them corrected.

4. In conclusion, the Data Protection Agency has thus found that, out of the 443 Danish reports of unwanted aliens to the SIS, the reporting has been erroneous in 25 cases as well as various other errors have been made in a further number of cases.

Reporting to the SIS may have serious consequences for the person concerned, as according to Article 5 of the Convention a person will, as a main rule, be unable to obtain permission to enter and stay in the Schengen area.

Considering these circumstances, it is the Data Protection Agency's view that the number of errors is unacceptably high, and the Agency therefore finds the results of the review criticisable.

5. Against this background, the Data Protection Agency has, by a letter dated today, informed the Ministry of Justice of the identified cases of failure to comply with the Schengen Convention, the Aliens Act and the Personal Data Processing Act.

6. The Data Protection Agency expects to publish this letter on the Agency's website. The Agency will also inform the Joint Supervisory Authority of the results of the review.

Sincerely

Asbjørn Jensen
Chairman of the Data Protection Council

Janni Christoffersen
Director General