

Meijers Committee

Standing committee of experts on international immigration, refugee and criminal law

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To Ms Cecilia Malmström
Commissioner for Home Affairs
European Commission
B-1049 BRUSSELS

Reference CM1203
Regarding Note on the coordination of the relationship between the Entry Ban and the SIS- alert: an urgent need for legislative measures
Date 8 February 2012

Dear Ms Malmström,

The Meijers Committee would like to draw your attention to a serious legislative deficiency in present secondary EU law as it fails coordinating the relationship between the “entry ban” in the Returns Directive (2008/115/EC) and the “SIS alert” in the SIS II Regulation (EC) 1987/2006.

In the accompanying note, the Meijers Committee presents an analysis of the problem and proposes a series of concrete amendments to the Returns Directive and the SIS II Regulation.

The Meijers Committee is of the opinion that a reparatory legislative initiative is urgently needed, not only in the legitimate interest of the individuals affected, but also as a guidance for the Member States who must now implement ambiguous, unclear or even contradictory EU legislation.

Few measures in the field of immigration control are so intrusive as a prohibition to enter the common territory of 25 EU Member States and 4 non EU States: Norway, Iceland, Switzerland and Liechtenstein. It is necessary to effectively guarantee “clear, transparent and fair rules and to complete the “common minimum set of legal safeguards on decisions related to return” (recitals 4 and 11 Returns Directive).

It is essential that EU legislative measures are consistent and that their application is clearly subject to effective judicial review on lawfulness and proportionality.

We hope you will find these comments useful. Should any questions arise, the Meijers Committee is prepared to provide you with further information on this subject.

Yours sincerely,



Prof. dr. C.A. Groenendijk
Chairman

Note on the coordination of the relationship between the Entry Ban and the SIS-alert: an urgent need for legislative measures

Introduction

In this note, the Meijers Committee draws the attention to a serious legislative deficiency in present secondary EU law as it fails coordinating the relationship between the “entry ban” in the Returns Directive (2008/115/EC) and the “SIS alert” in the SIS II Regulation (EC) 1987/2006.

Both measures are designated to have the effect of prohibiting entry into and stay on the territory of the Member States (see Article 3(6) Returns Directive, and article 5(1)d Schengen Borders Code (EC)562/2006). As the law stands, there is no clear connection between the two and the criteria for issuing the measures are substantially divergent.

The Meijers Committee is of the opinion that a reparatory legislative initiative is urgently needed, not only in the legitimate interest of the individuals affected, but also as guidance for the Member States. As yet, the implementation of the Returns Directive in the Member States is hampered by this fundamental lack of clarity. In the view of the Meijers Committee, it would be far too late if the European Commission would await the period of three years meant in Article 24(5) of Regulation (EC) 1987/2006 - a period which still has to start¹.

Few measures in the field of immigration control are so intrusive as a prohibition to enter the common territory of 25 EU Member States and 4 non EU States: Norway, Iceland, Switzerland and Liechtenstein. It is necessary to effectively guarantee “clear, transparent and fair rules”² and to complete the “common minimum set of legal safeguards on decisions related to return”³.

Essential is that the measures are not only consistently regulated but also that they are clearly subject to effective judicial review on lawfulness and proportionality.

Hereunder, the Meijers Committee sets out the problem in more detail:

- Firstly, the legal character of the SIS–alert and the Entry-ban is analysed (Paragraph 1);
- Secondly, differences, overlaps and inconsistencies between the criteria for both measures are indicated (Paragraph 2);
- Thirdly, a number of questions resulting from this comparison are posed (Paragraph 3).

On the basis of this analysis, the Meijers Committee proposes amendments of both the Returns Directive and the SIS II Regulation (Paragraph 4).

1. The legal character of both measures

1.a SIS–alert

Entering a SIS–alert is not just a matter of data-storing without legal consequences for an individual. It is an individual measure effectively barring access to all participating states, that is, all EU Member States except UK and Ireland, and furthermore Norway, Iceland, Switzerland and, since 19 July 2011, Liechtenstein.

The Meijers Committee is aware that both the Schengen Implementing Convention (SIC) and the SIS II Regulation appear to leave room for ambiguity. The language used in Articles 92 – 96 SIC is about “a joint information system” (article 92) and “categories of data” (article 94).

¹ Council Document 16166/08 ADD 1 REV 1: "The Commission states that the review of the SIS II (envisaged under the review clause of Article 24(5) of Regulation (EC) No 1987/2006) will be an opportunity to propose an obligation to register in the SIS entry bans issued under this Directive."

² Recital 4, Returns Directive.

³ Recital 11, Returns Directive.

Article 96(1) SIC is mainly about entering data:

“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”.

Still, the clear rationale of entering these data is to secure that all participating Member States are able to detect in the Schengen Information System that a particular person seeking entry is liable to be refused admission to the territory. So, there is more at stake than just data storage; the issue is about listing a person in order to be refused entry.

The legal obligation to refuse entry to a person with regard to whom an alert has been entered in the SIS was originally secured by Article 5(2) SIC stating that aliens who did not fulfil all the conditions enumerated in Article 5(1), including the condition that they shall not be persons for whom an alert has been issued for the purposes of refusing entry, **must** be refused entry.

Presently, Article 5(2) SIC is replaced by a comparable provision in Article 13(1) of the Schengen Borders Code: “A third-country national who does not fulfil all the entry conditions laid down in Article 5(1) and does not belong to the categories of persons referred to in Article 5(4) **shall** be refused entry to the territories of the Member States”.

It is the combined functioning of the national decision and the SIS alert which brings about that a person is effectively barred entry to the territories of the Member States: the very applicability of the obligation of Member States to refuse entry under Article 13(1) Schengen Borders Code is inextricably linked with the decision to enter a national alert into the SIS. Without entering it in the SIS, a national alert remains limited to the territory of only one Member State, and there is no effect as to the capability of the person concerned to enter territories of other Member States.

Thus, any Member State entering an alert for the purpose of refusing entry in the SIS knowingly and intentionally effectuates that the person concerned will be refused entry to all participating States. Accordingly, under Union law such a decision must be proportionate and subject to appeal.

This is acknowledged in the SIS II Regulation 1987/2006, replacing the relevant part of the SIC referred to above. The SIS II regulation entered into force on 17 January 2007, but is not yet applicable as the date meant in Article 55 has not yet been fixed.

In this Regulation, it is laid down that a decision to enter an alert must be proportionate (Article 21) and must be based on 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 taken on the basis of an individual assessment (Article 24(1)). Such a national decision must be subject to appeal under national law. Further, Article 43 of the Regulation secures that any person can bring an action pertaining to an alert relating to him. However, the scope of the right to legal action should be clarified. The present text of Article 43 of the SIS II Regulation includes the right for any person to bring an action before the national competent court or authority, to access, correct, delete or obtain information or to obtain compensation in connection with an alert relating to him. Although this right to a legal remedy is an important safeguard with regard to the accuracy and justification of alerts in SIS II, its meaning and effect would be clarified if it would explicitly provide the right of any person to address the *lawfulness* and *proportionality* of the decision of a Member State to enter a national alert into SIS.

It is regrettable that the SIS II Regulation leaves room for doubt as to the legal character of entering an alert into the SIS, without providing the individual an explicit right to have an effective and judicial review of this decision.

The Meijers Committee is of the opinion that EU law should be clarified in the sense that not only the national alert, but also the entering of an alert in the SIS should unequivocally be regarded to be a decision subject to the principles of proportionality and effective judicial review.

1.b Entry Ban under the Returns Directive

In Article 3(6) Returns Directive, an entry ban is defined as: “an administrative or judicial decision or act prohibiting entry into and stay on the territory of the Member States for a specified period, accompanying a return decision”. The Directive contains no further provisions specifying the character and the working of such an entry ban. The very wide range of national “decisions” or “acts” falling within the ambit of this

definition suggests that any national variation of an “entry ban” is meant to be caught under the scope of application of the Returns Directive. Arguably, this would also include a national alert for the purpose of refusing entry as described above under the SIS-alert.

The Returns Directive does however not give any clue as to how the effect is reached that the issuing of an entry ban by a single Member State effectively prohibits entry and stay on the territory of “the Member States”. The mere fact that an entry ban issued by a Member State is labelled “EU entry ban” does not give any effect to such a measure with regard to other Member States. On the other hand, Articles 5 and 13 of the Schengen Borders Code have remained unchanged and still only refer to refusing entry to a person for whom a SIS alert has been issued.

So, in practice, any entry ban will only be effective with respect to the territories of **other** Member States if it is accompanied by an alert in the SIS. Accordingly, in recital 18 of the Returns Directive, it is stated that Member States should have “rapid access to information on entry bans” issued by other Member States, in accordance with Regulation (EC) No 1987/2006 (SIS II).

This practical notice leads to some unsolved legal issues.

If an entry ban must, in order to be effective in “the Member States” always be accompanied by a SIS alert, the **criteria** for both measures should also be applied in combination. It is defensible that this should mean a mutual **limitation** of applicability: if a SIS alert is not allowed, an entry ban cannot be allowed either, and vice versa. But there is a risk that Member States argue that they should have a **cumulative** scope, according to which one provision may offer options in which the other does not foresee. The Meijers Committee is of the opinion that this issue should be settled in a clear and unambiguous text.

2. Differences, overlaps and inconsistencies between both measures

2.a Criteria SIS II

Article 24 (2) and (3) SIS II provides extensive **criteria** for entering an alert in cases of threat to public policy, public security or national security, or in relation to measures of immigration control:

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

(a) a third-country national who has been convicted in a Member State of an offence 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 a serious criminal offence or in respect of whom there are clear indications of an intention to commit such an offence in the territory of a Member State.

3. An alert may also be entered when the decision referred to in paragraph 1 is based on the fact that the third-country national has been subject to a measure involving expulsion, refusal of entry or removal which has not been rescinded or suspended, that includes or is 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.

The proportionality of the measure is secured in Article 21:

Before issuing an alert, Member States shall determine whether the case is adequate, relevant and important enough to warrant entry of the alert in SIS II.

2.b Criteria Returns Directive

In contrast, Article 11 Returns Directive does not contain comparable criteria. It primarily links – in general wording - the mandatory issuing of an entry ban with the situation that a return decision has been taken and that the person concerned did not return in time. Further, the circumstance that the person concerned may

pose a threat to public policy, public security or national security is not mentioned as a separate ground for issuing an entry ban and is only linked – in general terms – to the **length** of the entry ban:

1. Return decisions shall be accompanied by an entry ban:

(a) if no period for voluntary departure has been granted, or

(b) if the obligation to return has not been complied with.

In other cases return decisions may be accompanied by an entry ban.

2. The length of the entry ban shall be determined with due regard to all relevant circumstances of the individual case and shall not in principle exceed five years. It may however exceed five years if the third-country national represents a serious threat to public policy, public security or national security.

The proportionality of the measure of an entry ban as such is not addressed in Article 11 Returns Directive. Only the length of the entry ban must, according to paragraph 2, “be determined with due regard to all relevant circumstances of the individual case”.

It cannot be neglected that recital 6 of the Returns Directive states: “According to general principles of EU law, decisions taken under this Directive should be adopted on a case-by-case basis and based on objective criteria, implying that consideration should go beyond the mere fact of an illegal stay”. Recital 13 reads: “The use of coercive measures should be expressly subject to the principles of proportionality and effectiveness with regard to the means used and objectives pursued”.

Furthermore, paragraph 3 of Article 11 Returns Directive enumerates a number of reasons for which an entry ban may be withdrawn or suspended; namely, when a third-country national who is the subject of an entry ban issued in accordance with paragraph 1, second subparagraph, can demonstrate that he or she has left the territory of a Member State in full compliance with a return decision; with regard to victims of trafficking in human beings who have been granted a residence permit pursuant to Council Directive 2004/81/EC of 29 April 2004 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; and when a third-country national cooperates with the competent authorities provided that the third-country national concerned does not represent a threat to public policy, public security or national security.

Moreover, Member States may refrain from issuing, withdraw or suspend an entry ban in individual cases for humanitarian reasons and may withdraw or suspend an entry ban in individual cases or certain categories of cases for other reasons.

3. SIS II and Returns Directive: comparison, questions

Comparing these two sets of criteria one cannot help noticing that they were apparently drafted from quite different angles and do not easily fit together. Some unanswered questions are:

- As the issuing of an entry ban under the Returns Directive is explicitly linked to the (previous) issuing of a return decision, the question arises what this means for the applicability of Article 24(2) SIS II in cases where no return decision is at issue. Does Article 24(2) SIS provide an additional ground for issuing a decision prohibiting entry in Member States, in cases not covered by the Returns Directive?
- If Article 11(1) Returns Directive can be described as falling within the scope of Article 24(3) SIS II, the question arises as to whether the scope of the latter provision should be limited to the scope of the former or not.
- Recitals 6 and 13 and the third paragraph of Article 11(3) Returns Directive raise the question as to whether the mandatory wording of Article 11(1) (“*Return decisions shall be accompanied by an entry ban*”) is as mandatory as it seems or whether there is in reality an obligation for the Member States to issue an entry ban only on a case by case basis, subject to the principles of proportionality and effectiveness.
- If an entry ban may, under Article 11(1) Returns Directive, in principle always be issued whenever a return decision is made, and this provision contains no specific criteria concerning the issuing of an entry ban based on a threat to public policy or public security or to national security, the question arises as to whether the criteria of Article 24 (2) SIS II still play any additional or limiting role.
- What is the mechanism securing that suspension of an entry ban leads automatically to suspension of the SIS alert, and vice versa?

- Do Articles 43, 21 and 24 (1) SIS II Regulation, taken together, guarantee an effective judicial review on proportionality of the SIS alert? Or may judicial review remain limited to control whether the data is “accurate, up-to-date”? Is control on the lawfulness of an alert sufficiently guaranteed by Article 34 which limits judicial control to the issue as to whether the alert was *entered* lawfully?”
- Is the remedy referred to in Article 43 SIS II the same as the remedy of Article 13 Returns Directive?

4. Proposal for a legislative adaption

In the view of the Meijers Committee, the observed need for amending the current secondary legislation offers an opportunity to draft a clear set of rules integrating both instruments, clarifying their scope of application, and securing proportionality and effective judicial review. In the amendments proposed hereunder, the Meijers Committee has tried to provide reasonable and satisfactory answers to the questions posed above.

Article A – connection of both instruments

A.I Article 3 (6) Returns Directive is amended as follows:

“Entry Ban”: an administrative or judicial decision or act prohibiting entry into and stay on the territory of the Member States for a specified period, accompanying *or preceding* a return decision, *which is entered as an alert in the Schengen Information System*”

Explanation:

Two goals are served by the proposed amendment.

First, it is put beyond doubt that a prohibition of entry and stay on the territory which is issued at a moment of legal residence of the third-country national is also falling within the scope of application of the Returns Directive. There are good reasons to lay this down in the Returns Directive. Even if an entry ban is issued during legal stay, this measure will inevitably lead to termination of the permission to reside, and, consequently, lead to the issuing of a return decision. So, even if the entry ban was promulgated during a stage of legal stay, it will end up as an entry ban which is “accompanying a return decision”.

Second, a solid link is brought about between the legal concepts of the entry ban and the SIS-alert. An entry ban cannot exist without an accompanying SIS-alert. Only if and as long as a prohibition of entry is entered into the SIS, it will be an EU entry ban, thus effectively barring “entry into and stay on the territory of the Member States”.

A. II Article 24 SIS II Regulation is amended as follows:

Paragraphs 2 and 3 are deleted as the subject is settled in the Returns Directive. The text of paragraph 1 is changed, and the numbering is deleted:

Data on third-country nationals in respect of whom an alert has been issued for the purposes of refusing entry or stay shall be entered on the basis of an *entry ban* resulting from a decision taken by the competent administrative authorities or courts *in accordance with Directive 2008/115/EC* on the basis of an individual assessment. *The third-country national concerned shall be afforded an effective remedy as referred to in Article 43, to appeal against or seek review of the entry ban including the connected decision to enter data in the Schengen Information System.*

Explanation:

In order to coordinate the working of the Returns Directive and the SIS II Regulation, the term “entry ban” is inserted in stead of “national alert” in the first sentence and a clear connection with the Returns Directive is established.

Further a right to an effective remedy is inserted by the second sentence, referring to a new text of Article 43, based on the wordings of Article 13(1) Returns Directive. This is meant to secure that a remedy against an entry ban also pertains to the linked SIS-alert.

A. III Article 43 SIS II Regulation is amended as follows:

1. *Any person has the right to an effective remedy to appeal against or seek review of the decision to enter data in the Schengen Information System, before a competent judicial or administrative authority or a competent body composed of members who are impartial and who enjoy safeguards of independence in the Member State issuing the entry ban, competent to judge the proportionality and the lawfulness of the measure.*
2. *Any person may bring an action before the courts or the authority competent under the law of any Member State to access, correct, or delete or obtain information or to obtain compensation in connection with an alert relating to him.*
3. *The Member States undertake mutually to enforce final decisions handed down by the courts or authorities referred to in paragraphs 1 and 2, without prejudice to the provisions of Article 48.*
4. *The rules on remedies provided for in this Article shall be evaluated by the Commission by [...].*

Explanation:

Here, the guarantees of an effective remedy are spelled out. The first paragraph follows the wordings of Article 13(1) Returns Directive. In addition, it is secured that the remedy encompasses a proportionality and lawfulness test. The second paragraph is derived from the first paragraph of Article 43 (1) SIS II Regulation. It secures that an action can be brought in any Member State. This may be important in order to guarantee the effectiveness of the remedy, for instance when the third country national is detained in one Member State on the basis of an alert issued by another Member State and may be hindered by practical or legal obstacles to lodge a procedure in the Member State issuing the alert. The third and fourth paragraph are identical to the present second and third section of Article 43.

Article B – proportionality, case-by-case basis

B.I Article 11 (1) Returns Directive is amended as follows:

1. *An entry ban can be issued accompanying a return decision, or accompanying a decision terminating legal stay.
Before issuing an entry ban, Member States shall determine whether the case is adequate, relevant and important enough to warrant the accompanying entry of the alert in SIS II.*

Explanation:

In the inserted first phrase it is clarified that an entry ban may also be issued in combination with a decision to terminate legal stay

Further, a sentence derived from Article 21 SIS II is inserted. The purpose of these amendments is to secure that the intrusive measure of an entry ban may never automatically be issued but must always be the result of a fair balancing act.

B.II Three new paragraphs are inserted after paragraph 1, and the present paragraphs 2, 3, 5 are renumbered as 5, 6, 7

2. *Return decisions may be accompanied by an entry ban:
(a) if no period for voluntary departure has been granted, or
(b) if the obligation to return has not been complied with.
An entry ban issued after a return decision or in connection with a decision to terminate legal stay can be based on a threat to public policy or public security or to national security which the presence of the third country national in question in the territory of the Member State may pose.
This situation shall arise in the case of:
(a) a third-country national who has been convicted in a Member State of an offence 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 a serious criminal offence or in respect of whom there are clear indications of an intention to commit such an offence in the territory of a Member State.*

3. Before issuing an entry ban Member States shall take due account of the nature and solidity of the person's family relationships and the duration of his residence in the Member State and of the existence of family, cultural and social ties with his/her country of origin⁴.

4. Before issuing an entry ban, Member States shall determine whether the case is adequate, relevant and important enough to warrant prohibition of entry in the Member States⁵.

Explanation:

The first sentence is derived from the former first paragraph of Article 11. The word "may" is inserted. The purpose of inserting the word "may" is to secure that an entry ban shall not automatically be issued.

The rest of the text is derived from article 24(2) SIS II Regulation, wherein it is established that reasons of public policy or public security or national security may justify an entry ban.

Article 24(3) SIS II has not been reproduced here. The Meijers Committee is of the opinion that the mere circumstance that a third country national is not complying with national immigration rules cannot be considered a sufficient ground for an entry ban and a SIS-alert. Trespassing immigration rules may only amount to a reason for an entry ban if it can be assessed that the personal behaviour of the third country national is a threat to public policy, public security or national security.

B.III Article 24, paragraphs 2 and 3 SIS II Regulation are deleted, as the same subject matter has already be dealt with in the new provisions of the Returns Directive

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CC Members of the Civil Liberties and Justice and Home Affairs Committee (LIBE) of the European Parliament, the Dutch parliament and various NGO's.

⁴ This sentence is derived from Article 17 Family Reunification Directive

⁵ This text is derived from Article 21 SIS II Regulation