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NOTE

From:	Presidency
To:	Working Party for Schengen Matters (SIS/SIRENE) / Mixed Committee (EU-Iceland/Norway/Switzerland/Liechtenstein)
No. prev. doc.:	11088/16
Subject:	Fight against terrorism: Article 36 alerts

The Presidency has put forward an initiative in the Working Party for Schengen Matters (SIS/SIRENE) via a questionnaire (11088/16) aimed at identifying problems, possible solutions and procedures related to the use of Article 36 alerts and the creation of a new type of action to facilitate preliminary and temporary holding or detention in the context of the fight against terrorism.

Twenty-three Member States provided responses to specific questions aimed at collecting information on the Member States' views on the main proposal, namely the creation of a new category of alert in the Schengen Information System to allow for temporary holding of a person.

A new action to be put in place in connection with the threat of terrorism in Europe is currently being discussed within various platforms and forums at the European level. The Presidency therefore decided to draw up a questionnaire to gain more detailed information on the Member States' positions.

Question 1

Fourteen Member States consider a new kind of action involving temporary holding of a person to be an appropriate, adequate and applicable solution in a specific situation, especially in cases where there is an imminent threat of terrorism. Of course, many Member States point out that such an alert category could raise the question of compliance with fundamental rights. Precise rules for using such an action should therefore be adopted, especially to define the time limits for detention and specify the exact conditions under which the action could be requested.

Three Member States do not see any added value in such a new alert category. Six Member States do not express a firm position or are more sceptical of the value of such an alert category. Above all, since specific checks are currently not widely used by Member States, introducing a new kind of alert category without harmonising national laws in Member States could lead to an ineffective system which would in fact not be used in practice.

Many discussions were held on enhancing the Schengen Information System as a tool to combat terrorism, and as a result it was established that a new action could be proposed to provide a solution going beyond information collection in situations where there is a threat of terrorism.

One Member State pointed out that detention is not an objective in itself but could be a means of ensuring that sufficient time is available to achieve another objective, which has as yet not been specified and is not very clear among Member States. In implementing such a temporary detention measure, the intended purpose should be clearly stated. Using temporary detention, the executing Member State can gain time in which to take appropriate decisions if there are clear indications of terrorism-related activity, while the issuing Member State should be ready to provide the necessary information proving reasonable need so that in the dedicated time the issuing Member State could request the arresting person on the base of EAW. On the other hand, the executing Member State can act based on information provided according to the measures allowed by its national law, which are various in Member States.

On a less important point, the opinions of Member States vary on the question of whether to adopt such a new action as a new stand-alone alert category or to incorporate it in already established measures as an advanced procedure as part of specific checks. In practice, it is hard to imagine that a measure such as temporary holding or detention of a person could be part of a discreet check. However, one Member State found that it would be useful if the temporary holding could be done without informing the person in question that he or she has been reported in the SIS II under Article 36(3).

Questions 2 and 3

As regards the matter of national legal grounds in the area of combating terrorism, there are various tools for combating terrorism which have already been established in Member States. Several Member States have recently adopted new legislation enabling them to take reinforced measures to combat terrorism, which include temporary holding of a person for time periods which differ from country to country. More Member States are in the process of changing their national laws or are currently considering changes to their national laws related to terrorism, which could lead to them also adopting national requirements to act with regard to the new alert category in the Schengen Information System currently under discussion.

On the other hand, there are also Member States which stressed legal concerns, especially since such a proposal involving the restriction of fundamental rights would be very difficult to adopt in their national legislative environments and would also have constitutional implications. They therefore would not consider changing their national legal framework in this context.

Question 4

A significant number of Member States confirm that various measures have been adopted in their national laws in connection with combating terrorism. Widely used measures include entry/exit bans and confiscation of travel documents. The exit ban tool in particular was commonly and effectively used by police before Member States abolished checks at internal borders on joining the Schengen area. The idea of implementing and using this tool at the external Schengen border could therefore be considered in the context of combating terrorism.

The collection of Member States' views highlighted the following concerns, which should be taken into consideration if a new alert category is adopted in SIS II legal instruments:

- fundamental rights protection could be an obstacle to adopting such a measure;
- the possibility of implementing such a measure under national law in executing Member States should be taken into account, to guarantee the wide efficiency of such a tool;
- specific and strict circumstances should be identified in which such an action to be taken could be executed, and the exact procedure following a hit in the Schengen Information System should be defined;
- time limits should be laid down for such a temporary detention, within which the objective of the temporary detention should be achieved.
