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***A Revolutionary Schengen Information System?
From the first to the second-second generation of the SIS***

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Abstract

The Convention Implementing the Schengen Agreement of 14 June 1985 (CISA) firstly set down the Schengen Information System (SIS) to remedy the security gaps caused by the abolishment of controls among the States' borders. Thus, most SIS alerts supported the States' activity in the fields of police and criminal judicial cooperation. After the communitarisation of the SIS in the European Union (EU) and the European Community (EC) acquis, the SIS was revised twice. These reforms have progressively distorted the nature of the SIS to prevent and fight irregular migration. This post traces the development of the SIS under the intergovernmental and supranational legal frameworks to point out how the new SIS alerts on return mark a change of course in the objectives pursued by the SIS second-second generation and, consequently, in the policies underlying its implementation too.

1. Introduction

The Schengen Information System (SIS) is the ancestor of all European Union (EU) large-scale Information Technology (IT) systems. It was firstly envisaged in the [Convention implementing the Schengen Agreement of 14 June 1985](#) (CISA) according to which the abolishment of controls among the borders of the contracting parties would hinder maintaining internal security. The system was obtained from the interconnection of existing national databases, resulting in a unique structure compared to the other large-scale IT systems: it works through the provision of alerts, that is, instructions that one State sends to the others to undertake specific actions; in parallel, the [Supplementary Information Request at the National Entries](#) (SIRENE) Bureaux enable the exchange of additional information.

The SIS entered into operation in 1998, following its communitarisation into the EU's Justice and Home Affairs Area (JHA Area). From that moment on, it underwent two main revisions that, we claim, bring it closer to an instrument for the management of migration flows rather than a police cooperation tool. This paper retraces the evolution of the SIS from its first to its second-generation to highlight the significant stages that have progressively moved its nature from the criminal area to the prevention of and fight against irregular migrants.

2. The provision of refusal of entry alerts in the Schengen Information System

The SIS shifted from the intergovernmental to the communitarian framework in 1997 with the [Treaty of Amsterdam](#). The so-called “ventilation procedure” integrated the provisions of the CISA into both the Treaty on the European Community (TEC) and the Treaty on the European Union (TEU) in line with the Greek template imposed by the [Treaty of Maastricht](#) in 1992. Originally, the majority of alerts on persons, objects, and vehicles related to the trans-border police and judicial cooperation in criminal matters (PJCCM). Consequently, the SIS predominantly fell under the EU roof where a [Data Protection Framework Decision](#) (DPFD) was adopted in 2008 only. Thus, the Council of Europe's [Convention No 108](#) and its [Recommendation No R \(87\) 15](#) were taken as the main points of reference to regulate the protection of automatically processed personal data. At that time, the SIS did not contain any biometric but alphanumeric data. Access to the system was granted to border guards, police, and custom authorities.

PJCCM aside, Article 96 of the CISA provided for the insertion of an alert to refuse the entry of third-country nationals based on each State's national law. Specifically, such an alert could be issued if the presence of a third-country national posed a threat to public policy or public security or national security, or if the migrant was subject to enforceable measures of deportation, refusal of entry, or removal. Hence, each Member State could regulate the access of other administrative authorities – e.g., visa authorities and immigration authorities – that were competent for the issuing of residence permits under their national law. The provision

of a refusal of entry alert in a PJCCM system suggested that the SIS could become a multifunctional source of information, as we are demonstrating below.

3. The second generation of the Schengen Information System

The SIS needed to become more flexible in light of the big enlargement of 2004. Because of the discrepancies arisen within the Council of the EU on the choice of the correct legal bases underpinning its alerts, the new SIS regulation was proposed with a general reference to Article 66 of the [1997 TEC](#). According to this disposition: «The Council, acting in accordance with the procedure referred to in Article 67, shall take measures to ensure cooperation between the relevant departments of the administrations of the Member States in the areas covered by this Title, as well as between those departments and the Commission». The European Commission, instead, claimed that since the SIS had a “double nature” straddling the TEU and the TEC, an instrument based on Article 66 of the [1997 TEC](#) could have not regulated the rules belonging to the JHA Area.

3.1 Another step toward enhanced security: The Spanish Initiative

While the negotiations on the second generation of the SIS were still ongoing, the Spanish delegation proposed to use the SIS to combat terrorism. The initiative materialised in the [Council Regulation \(EC\) No 871/2004](#) that was proposed based on Articles 62, 63, and 66 of the [1997 TEC](#), while the [Council Decision 2005/211/JHA](#) was advanced based on Articles 30(1)(a) and (b), 31(a) and (b), and 34(2)(c) of the [1997 TEU](#). Again, the legal service of the Council of the EU argued that Article 66 of the [1997 TEC](#) should be the sole legal basis for regulating ex-first pillar fields since no substantive policy would be actually affected. As a result, the legal basis for the administrative cooperation was presented, in a manner of speaking, as a “neutral” one to keep the SIS anchored to the intergovernmental framework – i.e., qualified majority voting within the Council of the EU after consulting the European Parliament.

Among other amendments, these instruments expanded the number of authorities having access to the data entered in the SIS by including the judicial branches, Europol, Eurojust, the authorities responsible for examining visa applications and issuing visas, as well as authorities responsible for issuing residence permits and for the administration of immigration legislation. Consequently, the blurring of the lines between the provisions of the TEU and the TEC was promoted on a double track: the criminal and freedom sections overlapped with one another, confusing its purpose.

3.2 Refusal of entry alerts in the second generation of the Schengen Information System

In June 2005, the European Commission presented a new SIS II package made of: a [decision](#) for the development of the SIS II under the criminal law framework; a [regulation](#) for the use of the SIS II by administrative authorities, and a [regulation](#) for the access to the alerts on stolen, misappropriated or lost vehicles by national authorities responsible for the registration of vehicles.

Even if the European Commission would have opted for grounding the latter on Articles 66 and 62(2)(a) of the [2002 TEC](#), Article 63(3)(b) of the [2002 TEC](#) was added to highlight that the SIS alerts on the refusal of entry were not limited to the support checks on persons at the external borders, but also implemented the Community's policy on illegal immigration and illegal residence, including repatriation of illegal residents. This rationale was later on embraced by [Directive 2008/115/EC](#) laying down common standards and procedures in the Member States for returning illegally staying third-country nationals. It was the so-called Return Directive that formally linked the SIS alert on the refusal of entry to the EU policy on the prevention of, and fight against, irregular migrants.

The new legal framework introduced crucial changes to the SIS. First and foremost, the SIS II would store new types of data, including biometrics to perform one-to-one searches, and would enable the linkage of correlated alerts. Also, the SIS II was equipped with its own set of rules on the protection of personal data that, arguably, were found to be more flexible than those outlined in the CISA by the [European Data Protection Supervisor](#) (EDPS) and the [Article 29 Data Protection Working Party](#).

Because of the technical difficulties encountered in the implementation of the second generation of the SIS, the SISone4all was provisionally implemented until 2008 when the European Commission's mandate was extended to enable the migration of the SIS 1+ to the SIS II. The SIS II could finally be set into motion on 9 April 2013.

4. The second-second generation of the Schengen Information System

In 2016, the European Commission presented a new [report](#) on the integration of the Automated Fingerprint Identification System (AFIS) into the SIS II to enable one-to-many biometric searches. The report was accompanied by a new SIS II package that would include: [Regulation](#) 2018/1860 on the use of the SIS for the return of third-country nationals illegally staying in a Member State; [Regulation](#) 2018/1861 on the establishment, operation, and use of the SIS in the field of border checks, and [Regulation](#) 2018/1862 on the establishment, operation, and use of the SIS in the field of police and judicial cooperation in criminal matters.

The three Regulations introduced several major new features: first, SIS II alerts on irregular migrants who were subject to return decisions; second, the use of facial images for biometric identification, in addition to fingerprints as, in the future, AFIS is expected to be replaced by

the Automated Biometric Identification System (ABIS); third, the automatic transmission of information regarding a hit resulting from a check; fourth, the storing of hit information on the discreet, inquiry, and specific check alerts, and the creation of a new alert category of “wanted unknown persons” for which forensic data may exist in national databases.

4.1 The revised SIS alert on the refusal of entry

Regulation 2018/1861 is underpinned by Articles 77(2)(b) and (d) and 79(2)(c) of the [TFEU](#) and for the first time it imposes to issue a refusal of entry alert in case a third-country national is found to be irregularly staying in the territory of a Member States according to the Return Directive. Specifically, in light of the [recast proposal for a Return Directive](#), entry ban alerts would be issued together with the return decision when the person leaves the territory of a Member State, as well as when the third-country national is found to be irregularly staying in the Member States’ territories. Moreover, Regulation 2018/1861 introduces a system of mandatory queries among Member States to prevent a person registered in the SIS II from being able to legally enter and stay in another Member State, when: first, a Member State wants to grant or extend a residence permit or long-stay visa to a third-country national who is subject of an alert in the SIS II of another Member States; second, a Member State wants to issue an SIS II alert prohibiting the entry and residence of a third-country national holding a valid residence permit or long-stay visa of another Member State.

4.2 The new SIS alert on the return of irregular migrants

Regulation 2018/1860 was adopted based on the EU policy on the prevention of, and fight against, irregular migration, namely Article 79(2)(c) of the [TFEU](#). Regulation 2018/1860 obliges Member States to enter a new type of SIS II alert when issuing a return decision and to verify compliance with the return procedure established in the Return Directive. In this sense, refusal of entry alerts and return alerts are incompatible but complementary: the return alert shall be issued together with the return decision and, if an entry ban decision is issued, once the return has been executed the SIS II alert on return shall be turned into a SIS II alert on refusal of entry. To achieve its goals, Regulation 2018/1860 establishes a cooperation mechanism among competent authorities to identify third-country nationals subject to a return decision, who have absconded and have been apprehended in other Member States, for which supplementary information can be exchanged via the SIRENE Bureaux.

The authorities that have access to the SIS II to enter, update, delete, and search return alerts are those competent to issue and enforce a return decision following the Return Directive. In addition, return alerts can be accessed by the following national authorities: those competent for the identification of third-country nationals according to Regulation 2018/1861; those competent for naturalisation; national judicial authorities, including those responsible for the initiation of public prosecutions in criminal proceedings and for judicial inquiries before

charging an individual; Europol for the prevention and combating of migrant smuggling and irregular migration, and the European Border and Coast Guard Agency's teams to carry out border checks, border surveillance, and return operations.

4.3 The new SIS alerts for police and judicial cooperation in criminal matters

Regulation 2018/1862 is based on Articles 82(1)(d), second subparagraph, 85(1), 87(2)(a), and 88(2)(a) of the [TFEU](#). Regulation 2018/1862 inserts new categories of alerts to prevent missing persons, children at risk, and vulnerable persons from travelling; on "unknown wanted persons" regarding terrorism-related activities, and for inquiry checks to contrast terrorism and serious crimes. In the case of missing persons, which is especially relevant for children at risk of parental abduction, becoming victims of trafficking, or being enlisted in armed groups, Article 42(3) of Regulation 2018/1862 includes the possibility to collect DNA profiles after the execution of a data quality check. Moreover, it is expected that so-called "preventive alerts" regulated under Article 32 Regulation 2018/1862 will facilitate the detection of unauthorised secondary movements of unaccompanied foreign minors within the free-movement area. Conversely, the possibility of inserting new alerts for the European investigation order was rejected during the negotiations of Regulation 2018/1862, and Europol has not been allowed to enter SIS alerts directly as it was [proposed](#) by the European Commission in December 2020. SIS alerts will only be entered by the Member States or, in very strict circumstances, following a request made by Europol after assessing the reliability of the source of the information and the absence of any previous SIS alert on the individual.

5. Conclusions

The first generation of the SIS, that was firstly implemented in 1998, has been amended twice following its integration into the EU's founding Treaties. Although the SIS was originally executed to supply the security gaps caused by the suppression of checks at the States' borders, it has progressively expanded its purpose to support the EU's policies related to the management of migration flows. The insertion of return alerts into the SIS II is a rather significant change in the light of the nature of the system as it shifts from the criminal area to the prevention of and fight against irregular migration. All in all, the 2018 reform significantly expands the alerts that will be stored in the SIS II for administrative purposes by covering all cases of return, with or without an entry ban alert, including those where the migrant is leaving through the EU's external borders. As a way of conclusion, we cannot avoid mentioning how this shift ultimately facilitates the implementation of the framework on the interoperability between large-scale IT systems, as we have analysed elsewhere in [this blog](#).

SUGGESTED READINGS

Doctrine:

- A. FIORDOVA, *Information Exchange and EU Law Enforcement*, London, 2018.
- E. BROUWER, *Digital borders and real rights: effective remedies for third-country nationals in the Schengen Information System*, Leiden, 2008.
- E. BROUWER, *Large-Scale Databases and Interoperability in Migration and Border Policies: The Non-Discriminatory Approach of Data Protection*, in *European Public Law*, n. 1/2020, pp. 71-92.
- F. TASSINARI, *The identification of unaccompanied foreign minors and the voluntary guardian in Italy: an example to be followed by the EU?*, in *Cuadernos de Derecho Transnacional*, n. 1/2019, pp. 545-570.
- F. TASSINARI, [*The Management of Migrants' Identities at the EU External Borders: Quo vadis Interoperability?*](#), in *ADiM Blog, Analyses & Opinions*, November 2021.
- M. COLVIN, *The Schengen information System: a human rights audit*, in *European Human Rights Law Review*, n. 3/2001, pp. 271-279.
- N. VAVOULA, *Interoperability of EU Information Systems: The Deathblow to the Right to Privacy and Personal Data Protection of Third Country Nationals?*, in *European Public Law*, n. 1/2020, pp. 131-156.
- P. BOELES, M. DEN HEIJER, G. LODDER and K. WOUTERS, *European Migration Law*, Cambridge, 2014.
- P. HANKE and D. VITIELLO, *High-Tech Migration Control in the EU and Beyond: The Legal Challenges of "Enhanced Interoperability"*, in E. CARPANELLI and N. LAZZERINI (eds.), *Use and Misuse of New Technologies. Contemporary Challenges in International and European Law*, Switzerland, 2019.
- S. FORLATI, *L'ingresso dei migranti irregolari nell'Unione europea – Fra controllo dell'immigrazione clandestina ed esigenze di protezione*, in V. MILITELLO and A. SPENA (eds.), *Il traffico di migranti – Diritti, tutele, criminalizzazione*, Turin, 2015, pp. 37-59.
- S. KABERA KARANJA, *Transparency and proportionality in the Schengen Information System and border control co-operation*, Leiden, 2008.
- S. PEERS, *EU Justice and Home Affairs Law. Volume II: EU Criminal Law*, Oxford, 2016.
- T. FAJARDO DEL CASTILLO, *La directiva sobre el retorno de los inmigrantes en situación irregular*, in *Revista de Derecho Comunitario Europeo*, n. 33/2009, pp. 453-499.

Case-law:

- CJEU, Judgment of 20 May 2008, n. C-170/96, EU:C:2008:288.
- CJEU, Opinion of Advocate General Fennelly of 12 May 1998, n. C-170/96, EU:C:1998:219.

Other material:

A. ANGERS, D. MARIA KAGKLI, L. OLIVA, M. PETRILLO, and B. RAFFAEL, [Study on DNA Profiling Technology for its Implementation in the Central Schengen Information System](#), Publications Luxembourg, 2019.

EU-LISA, [Report on the technical functioning of Central SIS II and the Communication Infrastructure, including the security thereof and the bilateral and multilateral exchange of supplementary information between Member States](#), Tallin, 2015.

EUROPEAN COURT OF AUDITORS, [Lessons from the European Commission's development of the second generation Schengen Information System \(SIS II\)](#), Luxembourg, 2014.

J. GALBALLY HERRERO, P. FERRARA, R. HARAKSIM, A. PSYLLOS, and L. BESLAY, [Study on Face Identification Technology for its Implementation in the Schengen Information System](#), Luxembourg, 2019.

L. BESLAY and J. GALBALLY, [Fingerprint identification technology for its implementation in the Schengen Information System II \(SIS-II\)](#), Luxembourg, 2015.

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