112 SIS II developments

EUROPEAN UNION
JOINT SUPERVISORY AUTHORITY
SCHENGEN

Brussels, 3 December 2002
(OR. en)
SCHAC 02

OPINION
Subject: SIS II developments

I.Introduction.

The need to develop a new, second generation Schengen Information System (SIS), as well as the wish to introduce new functions for the SIS have been subject of discussion in the past years.

On the initiative of the Kingdom of Spain, a Council Regulation (OJ C160, 4.7.2002, p.5) and a Council Decision (OJ C, 4.7.2002, p.7) has been drafted concerning the introduction of some new functions for the SIS, in particular in the fight against terrorism.

The Chairman of the SIS Working Group has requested the JSA on 28 June 2002 to give its opinion on these initiatives. During the preparatory activities concerning the development of the SIS II, the Schengen Joint Supervisory Authority (JSA) has on 13 June 2002, already presented an opinion on this subject to the SIS Working Group.

The JSA considers it at its task to give an opinion on the draft Council Decision and the draft Council Regulation.

The JSA is aware of the fact that further discussions in the Schengen Acquis Working Group may lead to amendments of the proposed Council Regulation and Council Decision. Since the present opinion of the JSB only relates to the initiatives of the Kingdom of Spain as published in the Official Journal on 4 July 2002, the JSB stresses the need to be informed on any amendments of these initiatives and given the opportunity to state its opinion.

II. General remarks.

One of the implications of the signing on 19 June 1990 of the Convention implementing the Schengen Agreement of 14 June 1985 was the establishment of a SIS.

In view of the purpose of this Schengen Convention, the SIS was developed to enable the authorities designated by the Member States to have access by an automated search procedure, to alerts on persons and property for the purpose of border checks and other police and customs checks. In case of the alerts referred to in Article 96 - aliens for the purpose of refusing entry - the data may be also be used for the purposes of issuing visas, residence permits and for the administration of legislation on aliens in the context of the application of the provisions relating to the movement of persons. The need to have data available within a very short period of time, lead to the development of a system that may be characterised as a hit-no-hit system. The SIS processes only those data that are necessary for the purposes for which it was created. If a person is subject of a control and a search procedure is started in the SIS, this system only reveals if there is an alert and if so what immediate action should be taken. Any other information needed for a further action is not processed in the SIS but made available for the authorities via the SIRENE bureau's.

The responsibility for the data processing in the SIS and the necessary provisions to safeguard the right of the individual are clearly defined in the Schengen Convention. These provisions are "tailor made" for the categories of data that are processed, for the technical aspects of the SIS and for the use of these data.

The draft Council Decision and the Council Regulation contain changes of the Schengen Convention of a different nature. Some of the proposals contribute to the further elaboration of legal structure of the SIS and the way the rights of the individual are safeguarded. Other proposals fill in a need that exists in practice to have more information on identity documents or other objects.

The draft Council Decision and the Council Regulation also contain specific proposals that are apparently inspired by a more general wish to connect different data files in order to improve the police- and judicial co-operation between the Member States. The experience with the SIS, the work of Europol and the establishment of Eurojust apparently lead to the present proposals concerning the connecting of their data files.
The JSA acknowledges the need to improve co-operation in the field of justice- and home affairs.

The JSA stresses that the Schengen Convention and the SIS are created to support the Member States on certain area's of public order and security, were a resemblance seems to be present with the tasks of Europol and Eurojust. However, this resemblance does not necessarily qualify the SIS as an instrument that may be used to enable Europol and Eurojust to fulfil their tasks. If it is considered that the SIS must be regarded as an important component for this co-operation, a fundamental discussion on the position of the SIS should take place and a clear view on the future of the SIS including the necessary safeguards for the rights of the individual developed.
The JSA offers to participate in that discussion.

The present proposals to develop the SIS II including its new functions shall be assessed on their compliance with the present provisions of the Schengen Convention.

In view of the close relation between the proposals in the draft Council Regulation and the draft Council Decision, the JSA shall in this opinion assess these proposals to change the provisions of the 1990 Schengen Convention as one. The JSA took note of the explanatory memorandum relating to these initiatives.

III. Specific remarks.
(i) Article 94(3) of the Schengen Convention.

Article 1(1) of the draft Council Decision proposes to add two extra categories of data to the list of data that may be processed on persons for whom an alert has been issued. These new categories of data concern the type of offence in cases of alerts under Article 95 and information concerning the absconding from a place of detention in cases of alerts under Article 95 and
Article 99.

According to the explanatory memorandum, these new categories provide for a possibility to add certain information concerning people notably to enhance the security of officers checking the person. The JSA acknowledges the need to provide a certain security level for those authorities who are executing the SIS alerts. For this reason Article 94(3) already foresees the possibility of adding a warning that a person is armed or may be violent. While executing an Article 95 or Article 99 alert, an executing officer shall always act with his professional and appropriate prudence. The fact that a person is reported for an arrest for extradition, a specific check or discreet surveillance, gives every reason to be cautious. The mere mention of the type of offence or the fact that someone has absconded from a place of detention shall not enhance the security of the officer checking the person.

Since no other argument is presented to motivate the necessity of the adding of these two new categories of data, this proposal should not be adopted. *The JSA suggests that for those alerts where the absconding form a place of detention leads to expectation that the person involved is expected to try to escape any arrest, an extra category should be added to Article 94(3) stating that there is a risk of escape.*

(following paragraph deleted)

(ii) Article 99(1 and 3) of the Schengen Convention.

Article 1(2)(3) of the draft Council Decision proposes to change Article 99 concerning its content and the procedure when alerts are made at the request of the authorities responsible for national security. The JSA has no comments on the adding of categories of data concerning ships, aircraft and containers to the categories as mentioned in Article 99(1).

The procedure as described in Article 99(3) was dictated by motives of safeguarding the accuracy and liability of data as well by motives of an operational point of view. It prevented that actions may be requested that could harm ongoing investigations from another Member State.

The proposed change of this prior consultation into a system of "keeping each other informed" is motivated in the explanatory memorandum as simplifying the procedure. In its opinion of 13 June 2002, the JSA has already stated that the promotion of a better use of these alerts is in itself no reason to overlook the safeguards for accuracy and liability of the data.

Since no other arguments *are presented* that motivate the amendment of Article 99(3), the JSA underlines the need to hold on to the procedure as described in Article 99(3).

(iii) Article 100(3) of the Schengen Convention.

The JSA has no comments to this proposal.

(iv) Article 101(1)(b) of the Schengen Convention.

Both the draft Council Decision (Article 1(5)) as the draft Council Regulation (Article 1(1)), propose to amend this Article. The amendment opens the possibility to grant access to the SIS-data to authorities that have a judicial supervision on police- and customs checks as well as the judicial supervision on the co-ordination of such checks. The proposed definition seems to allow access for a court of law as well as access for authorities that have a legal responsibility to assess the actions performed by their subordinates. Since the proposed judicial supervision also covers the supervision on the co-ordination of the checks, *and shall be difficult* to implement in those Member States where the co-ordination of the checks in some Member States is done by public prosecutors, this *wide definition need to be clarified further.*

Last paragraph is deleted

(v) Article 101(2) of the Schengen Convention.

The draft Council Regulation proposes in Article 1(2)(3), to add in Article 101(2) the access to data entered under Article 100(3)(d) and (e). The JSA has no principle objections against the proposal to create access to these documents.

The JSA underlines the importance of safeguarding that the use of these data shall not limit the rights of citizens whose identity documents were stolen. *The JSA refers further to its opinion of 13 June 2002 and to its opinion of 15 February 200 on SIS alerts on persons whose identity has been usurped.*

(vi) New Article 101A of the Schengen Convention.

Article 1(6) of the draft Council Decision proposes a new Article 101A that regulates the access to certain SIS alerts for Europol. The explanatory memorandum does not explain the motives to allow Europol access to these data, which makes it difficult to assess this proposal. Since this proposal comprises a fundamental deviation from the basic principles of Article 102 of the Schengen Convention concerning the use of SIS-data, an explanation on the motivation of this deviation should be presented.

As already explained in III (i), the character of the SIS can be described as a hit-no-hit system. Europol shall -if the proposal will be adopted- only be able to see if an alert is issued against a certain individual. The SIS does not contain any data concerning the details of the case leading to the alert. Therefor, the need for Europol to have this information in order to perform its task is not clear. Except for the information as mentioned in Article 100, the data in Article 95 and 99 of the Schengen Convention do not have sufficient comprehensive substance that allows an organisation as Europol to further process these data.

It is a basic data protection principle that the processing of data, including the access and further use, must be lawfully and for a legitimate purpose. *Since no sufficient grounds are presented, the JSA is not able to assess if the proposal is in compliance with that principle.*

Last paragraph is deleted

(vii) New Article 101B of the Schengen Convention.

Article 1(6) of the draft Council Decision proposes a new Article 101B that regulates the access to certain SIS alerts for Eurojust. The explanatory memorandum does not explain the motives to allow Eurojust access to the SIS data, which makes it difficult to assess this proposal. Since this proposal comprises a fundamental deviation from the basic principles of Article 102 of the Schengen Convention concerning the use of SIS-data, an explanation on the motivation of this deviation should be presented. The same remarks as made under point vi of this opinion concerning the content of the SIS apply for Eurojust.

The access to SIS data is exclusively dealt with in the Schengen Convention. According to 101(1) of this Convention, the access to the SIS data is restricted to those persons who are responsible for the co-ordination of the checks as mentioned in that article. If Article 1(5) of the draft Council Decision and Article 1(1) of the draft Council Regulation are adopted, Article 101(1) also regulates the access of the authorities that have the judicial supervision on the checks as mentioned in that article. The national law of the Member States applies and determines which authorities have that specific task.

It is also noticed that Article 9 (4) of the Eurojust Council Decision connects the access to national data files to the applicable national law.

Since the Schengen Convention and the Eurojust Council Decision both connect the access to national files to the national law, it is the Member State that has to determine in what way it shall implement the proposal of the draft Council Decision and -Regulation.

The task of the national members in Eurojust as described in Article 6 of the Eurojust Council Decision is different from the task of national magistrates. When access is created to SIS data, the task for which that access will be granted must be in compliance with those articles of the Schengen Convention that deal with access and use of the SIS data.

Although the Eurojust Council Decision and the Schengen Convention both use the words "co-ordination" as an element of the task, the subject of co-ordination seems to be different. A further explanation is needed to delimit the access and use of SIS-data and show a similarity in the co-ordination for SIS checks and the co-ordination task in Article 6 of the Eurojust Council Decision.

If access is granted it should be clarified what is meant by this access. Does it mean that a check can be made on the existence of an alert on a specific person, or is it also meant as a possibility to process these data according to Article 14 and 15 of the Eurojust Council Decision.

In that case Article 102(2) forbids the duplication or copying of reports in national data files applies. Although Eurojust is not a national data-file, the purpose of Article 102(2) is clear on this point.

Access and further processing of SIS-data by Eurojust shall also cause a problem concerning the data integrity. When a SIS alert is executed and the data is deleted, who will inform Eurojust on the deletion and in what way?

In order to prevent these integrity problems, the JSA holds the opinion that, if the proposal shall be adopted, only a view-access should be allowed if and when all other conditions that are mentioned in this opinion have been fulfilled.

A last question relates to the access to categories of data as mentioned in Article 95 and 98 data. In view of the task of Eurojust, and more specifically the co-ordination task, it should be clarified which specific role Eurojust needs to fulfil that makes it necessary to have access to all the data mentioned in those articles. This is particular the case when it concerns data on convicted persons and witnesses.

In comparison with the proposed new Article 101A, the present proposal for a new Article 101B. contains less limitations for Eurojust then imposed on Europol. Since there is no reason for not having the same limitations and obligations, the JSA proposes -in case a new Article 101B shall be adopted- to have similar limitations and obligations for Europol and Eurojust.

(viii) Article 102(4) of the Schengen Convention.

The JSA has no comments to this proposal.

(ix) Article 103 of the Schengen Convention.

Both the draft Council Decision (Article 1(7)) as the draft Council Regulation (Article 1(4)), propose to amend this article.

The JSA welcomes every contribution to the control and monitoring of the use of the system. The JSA refers to its opinion (SCHAC 97(70))[1] in which the JSA has determined what data should be recorded. The most important elements for appropriate logging include:

a. biographical data transmitted concerning the person on whom the search is run;

b. identification of the terminal or the authority which carried out the search, ensuring that all the necessary measures are taken to enable the user to be identified;

c. place, date and time of search;

d. grounds for consultation, such as the legal basis for an alert.

The JSA has no objections to extend the storage period of these records to one year, but stresses the need to amend Article 103 in order to establish a clear and specific regulation of the recording of searches and where all the elements of the recording are specified.

(x) Article 108 of the Schengen Convention.

Both the draft Council Decision (Article 1(8)) as the draft Council Regulation (Article 1(5)), propose to amend this article. *According to the explanatory memorandum, a new paragraph is proposed to create a common legal basis for the existence and functioning of the SIRENE bureaux.*

The creation of this legal basis in the Convention by introducing a new paragraph added to Article 108 completes the legal structure for the Schengen information circuit, starting at the issuing of alerts and finishing with the concluding of the actions to be taken in connecting with an alert. Since the SIRENE bureaux are designated to exchange information necessary in connection with the entry of alerts and for allowing the appropriate action to be taken in relation with an alert, the new paragraph 5 should also contain rules concerning the use of the SIRENE data, similar to the rules concerning the SIS-data. This use should be limited to the purposes for which the data are processed by the SIRENE bureaux as mentioned in the proposed new paragraph added to Article 108.

(xi) Article 113 of the Schengen Convention.

Both the draft Council Decision (Article 1(9)) as the draft Council Regulation (Article 1(6)), propose to amend this article. A new paragraph is proposed that sets up rules for the archiving of SIRENE files. The JSA welcomes the view that the Convention specifically relates the deletion of SIRENE-data to the deletion of SIS-data. This proposal completes the provisions relating to the existence and work of the SIRENE bureaux.

The provisions in the Schengen Convention concerning the reviewing and deletion of data are divided in two articles. Article 112 contains specific rules concerning the reviewing and deletion of personal data. Article 113 contains specific rules concerning the reviewing and deletion of other non-personal data.

In view of this, the proposed amendment should follow the same distinction as between these articles. In order to prevent any misunderstandings, the deletion of personal data processed by the SIRENE bureaux should be subject of a new paragraph added to Article 112 and not of Article 113.

IV General conclusions

On the various proposals to change the Schengen Convention, the JSA has made its observations and specific remarks . The JSA urges to reconsider the draft Council Decision and Council Regulation in the light of the considerations made in this opinion.

The JSA also envisaged a change in the role and character of the SIS in the future. The JSA stresses the need to have a fundamental discussion on this point and offers to participate in that discussion.

(1) Published in the Second annual report of the JSA

113 Opinion concerning the relation between Article 112 and 113 of the Schengen Convention

JOINT SUPERVISORY AUTHORITY

Brussels, 7 October 2002
(OR. EN)
SCHAC 2510/1/02
REV 1

OPINION

Subject: Opinion concerning the relation between Article 112 and 113 of the Schengen Convention

Opinion nr.SCHAC 2510 r1
concerning the relation between Article 112 and 113 of the Schengen Convention

1. Introduction

The Greek Personal Data Protection Authority has requested the Joint Supervisory Authority of Schengen (JSA) for an opinion concerning the relation between Article 96 and the Articles112 and 113 of the Schengen Convention. The reason for this request was a question of the Aliens Directorate of the Greek Police to the Greek Personal Data Protection Authority concerning the retaining period for alerts based on Article 96 of the Schengen Convention.

The Greek Personal Data Protection Authority decided to ask the opinion of the JSA on this subject in view of its task according to Article 115(3) of the Schengen Convention.

The JSA defines the question as: does Article 112 of the Schengen Convention, that provides for a retaining period period of three years or Article 113 that provides for a retaining period of ten years, apply in relation to the alerts as described in Article 96 of the Schengen Convention.

2 Relevant Law.

Article 92 of the Schengen Convention

1. ...The Schengen Information system shall enable the authorities designated by the Contracting Parties, by means of automated search procedure, to have access to alerts on persons and property for the purposes of border checks and other police and customs checks carried out within the country in accordance with national law and, in the case of the specific category of alerts referred to in Article 96, for the purposes of issuing visa, residence permits and the administration of legislation on aliens in the context of the application of the provisions in this Convention relating to the movement of persons.
2. ...
3. ...

Article 93 of the Schengen Convention

The Purpose of the Schengen Information System shall be in accordance with this Convention to

maintain public policy and public security, including national security, in the territories of the Contracting Parties and to apply the provisions of this Convention relating to the movement of persons in those territories, using information communicated via this system.

Article 96 of the Schengen Convention.

1. Data on aliens for whom a alert has been issued for the purposes of refusing entry shall be entered on the basis of a national alert resulting from the decisions taken by the competent administrative authorities or courts in accordance with the rules of procedure laid down by national law.

Article 112 of the Schengen Convention.

1. Personal data entered into the Schengen Information System for the purposes of tracing persons shall be kept only for the time required to meet the purposes for which they were supplied. The Contracting Party which issued the alert must review the need for continued storage of such data not later than three years after they were entered. The period shall be one year in the case of the alerts referred to in Article 99.

2. ...

3. ...

4. The Contracting Party issuing the alert may, within the review period, decide to keep the alert should this prove necessary for the purposes for which the alert was issued. Any extension of the alert must be communicated to the technical support function. The provisions of paragraph 1 shall apply to the extended alert.

Article 113 of the Schengen Convention.

1. Data other than that referred to in Article 112 shall be kept for a maximum of 10 years, data on issued identity papers and suspect banknotes for a maximum of five years and data on motor vehicles, trailers and caravans for a maximum of three years.

2. ...

3. The request.

In its Decision No. 54/2002, the Greek Personal Data Protection Authority has decided to submit the question concerning the retaining period of personal data processed according to Article 96 of the Schengen Convention to the JSA. The JSA is asked for its interpretation of the applicability of Article 112 or of Article 113 of the Schengen Convention in relation with the personal data as mentioned in Article 96.

In that decision the Greek Personal Data Protection Authority also concluded the following:

Article 112 of the Schengen Convention, which provides that the need to retain entries should be reviewed every three years, refers to data entered for the purpose of tracing persons.

These are mainly persons wanted for arrest under a warrant or other document having the same force or pursuant to a judgement for the purpose of their extradition, i.e. the persons referred to in Article 95 of the Schengen Convention.

Conversely, the data referred to in Article 96 of the Schengen Convention are not entered for the purpose of tracing persons but with the aim of preventing entry into the Schengen area of aliens believed to represent a danger to public order and security or against whom removal measures have been applied. Accordingly, the length of time such data may be retained should be governed by Article 113 of the Schengen Convention, which provides that such data may be retained for a maximum of ten years, and not Article 112.

4. Findings

The Decision No. 54/2002 of the Greek Personal Data Protection Authority links categories of alerts to different provisions for the reviewing and deletion of data. The requested kind of action to be taken

in connection with an alert determines if Article 112 or Article 113 of the Schengen Convention is applicable.

According to Article 92 and 93, the SIS contains data on persons that enables the authorities on the occasion of a check on a person (normal border - or police control), to see if there is an alert concerning that person and subsequently inform the controlling authority what specific action (according to Article 95-99 of the Schengen Convention) must be taken. Although the purposes of the alerts may be different, the function of the SIS is for all those alerts the same: alerting the authorities that a certain action is required. No data are processed in the SIS that could be used for other police investigations then a simple checking if an alert exists.

The Schengen Convention and the SIS do not make a distinction between different kind of police actions.

Article 112 of the Schengen Convention contains provisions for the reviewing and the deletion of personal data entered into the SIS for the purposes of tracing persons.

Article 113 of the Schengen Convention contains similar provisions concerning other data than that referred to in Article 112. Since a clear distinction is made between personal data in Article 112 and other data in Article 113, it can be concluded that Article 112 of the Schengen Convention exclusively covers the reviewing and deletion of personal data.

According to Article 112(4), personal data may only be processed in the SIS after the reviewing period when this is proved to be necessary for the purposes for which the alert was issued. This paragraph creates the possibility to retain data in the SIS if an assessment of the facts justifies this explicitly.

Since the Schengen Convention does not distinguishes different kind of police actions in relation with the SIS, no argument can be found that links Article 112 to those personal data that are used for tracing people and that personal data that are not used for tracing people will fall within the scope of Article 113.

The meaning of the word" tracing" in Article 112 (1) of the Schengen Convention has in itself and in relation with Article 92 and 93 of the Schengen Convention no sufficient comprehensive substance that justifies a conclusion that Article 113 is applicable on personal data that is not used for tracing but for other forms of police action.

The JSA has found no other argument in the Schengen Convention that would direct to another interpretation of the Schengen Convention. It should further be noted that the SIS information functionality as mentioned in Article 112(3) covers all the personal data processed according to the Articles 95-99

5. Opinion

Based on the text of the Schengen Convention, its objective, the implementation of the SIS and its technical structure, the JSA comes to the opinion that the reviewing and the deletion period of personal data in the SIS, is exclusively dealt with in Article 112 of the Schengen Convention.

Done at Brussels , 7 October 2002

Mr. Giovanni Buttarelli , Chairman

114 SIS II developments

EUROPEAN UNION
JOINT SUPERVISORY AUTHORITY SCHENGEN

Brussels, 3 December 2002
(OR. en)
SCHAC 2513/02

OPINION

Subject: SIS II developments

I. Introduction.

The Chairman of the SIS Working Group requested the JSA on 26 November 2002 to give its opinion on the initiatives of the Kingdom of Spain for a Council Regulation and a Council Decision concerning the introduction of some new functions for the SIS, in particular in the fight against terrorism.

During the preparatory activities concerning the development of the SIS II, the Schengen Joint Supervisory Authority (JSA) has on 13 June 2002, and on 1 October 2002 (SCHAC 2509/2/02 Rev2) already presented an opinion on this subject to the SIS Working Group.

The JSA brings to mind the guidelines for the cooperation with the JSA concerning the requirements for SIS II. These guidelines that were adopted by both the JSA as the Article 36 Committee provide for a reasonable period (i.e. one to two months) for the JSA to state its opinions.

The time made available for the JSA to study the new draft and to adopt an opinion - no more then three working days - only allows the JSA to present a preliminary opinion on the draft Council Decision and Council Regulation.

In view of the close relation between the proposals in the draft Council Regulation and the draft Council Decision, the JSA shall in this preliminary opinion assess these proposals to change the provisions of the 1990 Schengen Convention as one. The JSA took note of the documents 5970/02 SIS 8, Europol l9,Comix 80 and 9323/02 SIS 35, Europol 42, Comix 363.concerning the access to SIS for Europol, and the documents 11653/02, SIS 58, Schengen 7, Comix 492 and 13389/02 SIS 76, Schengen 15, Comix 594 concerning the access to SIS for Eurojust.

II. Specific remarks.

(i) Article 92(4).of the Schengen Convention

The JSA supports the creation of a legal basis in the Convention for the existence and functioning of the SIRENE bureaux. The JSA repeats its comments in its opinion of 1 October that since the SIRENE bureaux are designated to exchange information necessary in connection with the entry of alerts and for allowing the appropriate action to be taken in relation with an alert, the new paragraph 4 should also contain rules concerning the use of the SIRENE data, similar to the rules concerning the SIS-data. This use should be limited to the purposes for which the data are processed by the SIRENE bureaux as mentioned in the proposed new paragraph added to Article 92.

(ii) Article 94(2)(b) of the Schengen Convention
The JSA has no comments.

(iii) Article 94(3) of the Schengen Convention.
In its opinion of 1 October the JSA stated that the introduction of the fact that someone has absconded from a place of detention might be considered if better proof could be provided that this would enhance the security of the officer checking the person. The JSA suggested to consider alternative approaches. It could for instance be evaluated whether for those alerts where absconding from a place of detention means that the person absconding can be expected to try to escape arrest, an extra category should be added to Article 94(3) stating that there is a risk of escape.

The draft Council Decision that was published (OJ C 160,4.7.2002, p.7) and that was subject of the opinion of 1 October, linked this extra category of data to cases of alerts under Article 95 and 99. In view of the special character of these alerts, it seemed logical to attach any specific warning regarding the behaviour of the persons involved to these alerts. The present draft makes it possible to add these data to every alert. The JSA would like to see an explanation why these data have added value in case of alerts under Article 97 and 98. Since this extra category of data does not provide for a legal ground to arrest the person involved, the combination of the warning with Article 97 and 98 seems to be useless.

The JSA suggests considering the alternative approach as mentioned above.

(iv) Article 99(1) of the Schengen Convention.
The JSA has no comments.

(v) Article 99(3) of the Schengen Convention.
The JSA refers to its comments made in its opinion of 1 October.

(vi) Article 99(5) of the Schengen Convention.
The JSA has no comments.

(vii) Article 100(3) of the Schengen Convention
The JSA has no comments.

(viii) Article 101(1) of the Schengen Convention
The draft opens the possibility for access to SIS data and the right to search by national judicial authorities in the performance of their tasks as set out in national legislation.

The purpose of the SIS and the use of the SIS data are regulated in Article 92(1) and 102(1). Basic principle is that these data may only be used for the purposes provided for in the Articles 95 to 100. The tasks of judicial authorities for which they should be granted access must thus be limited to the purposes of the alerts in the SIS and not be extended to (any) task as set out in national legislation. In order to avoid any misunderstanding, the JSA suggests to amend the proposal in the following way:" ...may also be exercised by national judicial authorities in the performance of their tasks related to the SIS alerts as set out in national legislation."

(ix) Article 101(2) of the Schengen Convention
The JSA repeats the importance of safeguarding that the use of these data shall not limit the rights of citizens whose identity documents were stolen. The JSA refers further to its opinion of 13 June 2002 and to its opinion of 15 February 2000 on SIS alerts on persons whose identity has been usurped.

(x) Article 101A of the Schengen Convention
In its opinion of 1 October the JSA stated that the JSA was not able to assess the reasons and the legal basis for access and use of SIS data by Europol. No information on that subject was made available.

The JSA took good notice of the arguments to justify access to the SIS by Europol presented in the document 9323/02 of 28 May 2002.

The JSA acknowledges that the access and use as described in that document may have an added value for maintaining public security in the Schengen area as well as a contribution to the objective of Europol.

The new Article 101A appears to be a good elaboration of the access and use of SIS data for Europol. However, the JSA stresses that this proposal involves a fundamental departure from the basic principles of Article 102 of the Schengen Convention concerning the use of SIS data.

The introduction of the new Article 101A should lead to the amendment of Article 102 of the Schengen Convention. This amendment should be similar as Article 102(4), that provides for a derogation from the basic principle in view of issuing visas and residence permits.

The JSA underlines that a same situation shall be present with the proposal to grant access for Eurojust (see xi).

(xi) Article 101B of the Schengen Convention

In its opinion of 1 October the JSA stated that the JSA was not able to assess the reasons and the legal basis for access and use of SIS data by Eurojust. No information on that subject was made available. The JSA took good notice of the arguments to justify access to the SIS by Eurojust presented in the document 13389/02 of 22 October 2002.

The JSA acknowledges that the access and use as described in that document may have an added value for the work of Eurojust. However, the JSA stresses that this proposal involves a fundamental departure from the basis principles of Article 102 of the Schengen Convention concerning the use of SIS data. The introduction of the new Article 101A should lead to the amendment of Article 102 of the Schengen Convention.

In the light of the consequences of the proposals to grant access to Europol and Eurojust, the JSA stresses the need to maintain a careful balance between the need for those institutions to have that access and the data protection consequences of these proposals.

(xii) Article 102(4) of the Schengen Convention

The JSA has no comments.

(xiii) Article 103 of the Schengen Convention

The JSA repeats its comments made in the opinion of 1 October. The JSA could agree with extending the retention period from six months to one year. It appears now that in the new proposal the one year deadline is a minimum period for retention. Data should be deleted after one year but not later ten three years. In view of the purpose of processing these data, to check whether the search was admissible or not, the proposed period is not proportional for the purpose for which data are processed.

(xiv) Article 112A of the Schengen Convention

The JSA has no comments.

(xv) Article 113(1) of the Schengen Convention

The JSA has no comments.

(xvi) Article 113A of the Schengen Convention

The JSA has no comments.

III General conclusions

On the various proposals to change the Schengen Convention, the JSA has made its observations and specific remarks . The JSA underlines the advisability to reconsider the draft Council Decision and Council Regulation in the light of the considerations made in this opinion.

The JSA reaffirms that it is ready to contribute to the relevant discussion in a constructive manner.

Mr. Giovanni Buttarelli , Chairman

115 Quinta relazione di attività dell'Autorità di controllo comune: marzo 2000 - dicembre 2001 (*)

SOMMARIO

(*) Pubblicata integralmente nella Relazione 2001, p. 286

QUARTA PARTE: REAZIONI DELLE AUTORITÀ SCHENGEN ALLA RELAZIONE ANNUALE DELL'ACC

QUINTA PARTE: IL FUTURO DELL'ACC NEL NUOVO QUADRO ISTITUZIONALE

ALLEGATI

1. Elenco dei membri dell'autorità di controllo comune
2. Quadro dei pareri dell'ACC e reazioni degli organi esecutivi e tecnici
3. Elenco delle decisioni, delle raccomandazioni, dei pareri e delle relazioni dell'autorità di controllo comune Schengen che costituiranno l'acquis Schengen in conformità del protocollo relativo all'incorporazione dell'acquis Schengen nell'ambito dell'Unione europea allegato al trattato di Amsterdam
4. Dati inseriti nel SIS

NOTA DI SINTESI

Fedele alla sua tradizione di trasparenza e di apertura democratica, l'autorità di controllo comune Schengen (ACC) ha voluto presentare, per la quinta volta, una relazione sulla sua attività. La difesa degli interessi dell'individuo nella tutela della vita privata è stata, anche nel periodo compreso tra il marzo 2000 e il dicembre 2001, al centro delle attività dell'ACC, di cui ha così confermato la specificità nell'ambito della struttura Schengen.

L'ACC, basandosi su relazioni, raccomandazioni o pareri, ha formulato varie proposte e suggerimenti riguardanti sia il controllo della sicurezza del Sistema d'informazione Schengen (SIS) sia la tutela degli interessi dei singoli di cui sopra sia ancora l'adempimento dell'obbligo d'informazione nei confronti del cittadino e la verifica dell'esistenza dei presupposti per l'attuazione dell'acquis di Schengen nei nuovi paesi.

Negli ultimi tempi, dalle discussioni sull'evoluzione di un nuovo SIS è emersa forte la volontà di ampliare il contenuto e l'utilizzo del SIS. Per poter contribuire attivamente a tale evoluzione, è assolutamente indispensabile che quanti sono coinvolti nello sviluppo del SIS riconoscano l'importanza di coinvolgere l'ACC fin dall'inizio. Si tratta di una condizione essenziale per lo sviluppo di un nuovo SIS con un corretto equilibrio tra contenuto e uso del SIS e protezione dei dati.

L'ACC nota con soddisfazione che sta delineandosi in modo costruttivo una tendenza a coinvolgere l'ACC.

L'anno appena trascorso ha permesso all'ACC di migliorare notevolmente la visibilità grazie ai contatti con la Commissione per le libertà pubbliche del Parlamento europeo. Anche l'ingresso dei paesi nordici come membri effettivi dell'ACC, il 25 marzo 2001, è stato occasione di numerosi contatti con la stampa che hanno permesso all'Autorità di sottolineare l'importanza del suo ruolo.

La decisione del Consiglio di istituire un segretariato comune di tutte le autorità di controllo nel settore di polizia europeo (Schengen, Europol, Sistema d'informazione doganale, ecc.) rappresenta indubbiamente un passo nella buona direzione e l'ACC non può che compiacersene. Tale soluzione permetterà infatti alle autorità di controllo interessate, tra cui l'ACC, di contare su un maggiore supporto di segreteria, che l'ACC ha chiesto fin dal 1995. Sebbene a tale decisione non si associno risorse di bilancio separate, l'ACC è certa di poter godere, grazie ad essa, di una maggiore autonomia a beneficio della tutela dei diritti dei cittadini alla vita privata.

Bruxelles, gennaio 2002

Il Presidente
Giovanni Buttarelli

Gruppo per la tutela delle persone con riguardo al trattamento dei dati personali (art.29 direttiva 95/46/CE)

116 Documento di lavoro riguardante la vigilanza sulle comunicazioni elettroniche sul posto di lavoro (*)

Gruppo per la tutela delle persone con riguardo al trattamento dei dati personali
(art.29 direttiva 95/46/CE)

5401/01/IT/def.
WP 55

Documento di lavoro riguardante
la vigilanza sulle comunicazioni elettroniche sul posto di lavoro

Adottato il 29 maggio 2002

(*) http://www.europa.eu.int/comm/internal_market/privacy/docs/wpdocs/2002/wp55_it.pdf

117 Documento di lavoro sulla determinazione dell'applicazione internazionale della normativa comunitaria in materia di tutela dei dati al trattamento dei dati personali su Internet da parte di siti web non stabiliti nell'UE (*)

Gruppo per la tutela delle persone con riguardo al trattamento dei dati personali
(art.29 direttiva 95/46/CE)

5035/01/IT/def.
WP 56

IL GRUPPO PER LA TUTELA DELLE PERSONE CON RIGUARDO AL TRATTAMENTO DEI DATI PERSONALI

costituito in virtù della direttiva 95/46/CE del Parlamento europeo e del Consiglio, del 24 ottobre 1995 [1],
visti l'articolo 29 e l'articolo 30, paragrafo 1, lettera a), e paragrafo 3, di tale direttiva,
visto il proprio regolamento interno, in particolare gli articoli 12 e 14,
ha adottato il presente documento di lavoro:

1. Introduzione

Il presente documento si propone di analizzare la questione dell'applicazione internazionale della normativa comunitaria in materia di tutela dei dati al trattamento, in particolare alla rilevazione, dei dati personali da parte dei siti Web stabiliti al di fuori dell'Unione europea [2]. Il presente documento di lavoro è inteso a costituire un utile strumento e un punto di riferimento per i responsabili del trattamento e per quanti forniscono loro consulenza in sede di valutazione di casi di trattamento di dati personali su Internet da parte di siti Web non stabiliti nell'UE. In considerazione della complessità dell'argomento e dell'estrema dinamicità che caratterizza Internet, il presente documento non fornirà soluzioni definitive riguardo a tutti i possibili aspetti di tale problematica.

Nel suo documento di lavoro "Tutela della vita privata su Internet" [3], il gruppo per la tutela dei dati personali ("articolo 29") ha individuato una chiara necessità di precisare l'applicazione concreta della norma concernente il diritto applicabile, contenuta nella direttiva relativa alla tutela dei dati (articolo 4,

(*) Gruppo di lavoro sulla protezione dei dati - Articolo 29
Il Gruppo, istituito in virtù dell'articolo 29 della direttiva 95/46/CE, è l'organo consultivo indipendente dell'UE per la tutela dei dati personali e del diritto alla riservatezza. I suoi compiti sono fissati all'articolo 30 della direttiva 95/46/CE e all'articolo 14 della direttiva 97/66/CE.
Segretariato: Commissione europea, DG Mercato interno, Funzionamento ed impatto del mercato interno - Coordinamento - Protezione dei dati
B-1049 Bruxelles - Belgio - Ufficio: C100-6/136
Indirizzo Internet: http://europa.eu.int/comm/privacy
(1) GU L 281 del 23/11/1995, pag. 31, disponibile al sito:
http://europa.eu.int/comm/internal_market/en/dataprot/index.htm
(2) La direttiva 95/46/CE relativa alla tutela dei dati è stata applicata anche all'interno dello Spazio economico europeo (SEE). Il riferimento all'Unione europea nel presente documento va inteso come riferimento al SEE.
(3) "Tutela della vita privata su Internet - Un approccio integrato dell'UE alla protezione dei dati on-line", WP 37, 21 novembre 2000.

paragrafo 1, lettera c)[4]), in particolare al trattamento on-line dei dati personali da parte di un responsabile non stabilito nel territorio della Comunità. Le autorità nazionali preposte al controllo in materia di tutela dei dati sono continuamente sollecitate a fornire consulenza alle imprese e ai privati a questo riguardo.

La necessità di determinare l'applicabilità o meno del diritto nazionale in situazioni interessanti più paesi non è circoscritta alla tutela dei dati, a Internet o all'Unione europea: si tratta di una questione generale di diritto internazionale che si pone nelle situazioni on-line e off-line laddove sono presenti uno o più elementi che riguardano più di un paese. Prima che possa essere sviluppata una soluzione nella sostanza è necessario decidere quale diritto nazionale sia applicabile.

Tali decisioni implicano la considerazione di numerosi fattori. Innanzitutto, ogni paese si preoccupa di tutelare i diritti e gli interessi dei propri cittadini, dei residenti, dell'industria e delle altre istanze riconosciute dall'ordinamento nazionale. In molti paesi il diritto penale (che costituisce l'altra faccia delle leggi che riconoscono diritti e libertà) sollecita l'applicazione più ampia con effetti internazionali. Casi eclatanti quali Yahoo![5] o CompuServe [6] illustrano come i tribunali applichino il diritto penale nazionale per proibire l'accesso a contenuti pornografici o razzisti su server di Internet stranieri. Recentemente la suprema corte tedesca in materia penale ha condannato un editore della "Auschwitz Lüge" (negazione dell'esistenza di Auschwitz) in un sito Web australiano anche in mancanza della prova di un effettivo accesso a tale sito dalla Germania [7]. Secondo la corte, nel contesto di questo particolare reato, è sufficiente che il contenuto di Internet "sia suscettibile" di influenzare negativamente l'ordine pubblico in Germania, senza che sia necessario che ciò sia accaduto effettivamente.

Tali effetti internazionali di norme protettive riflettono generalmente la preoccupazione del legislatore o del magistrato di tutelare i cittadini, se necessario, nonostante le difficoltà intrinseche di attuazione connesse alla situazione di internazionalità e di applicarle nella pratica onde garantire che l'intento perseguito sia raggiunto.

A livello del diritto comunitario, numerosi esempi illustrano tale ricerca di coerenza.

Nel campo della concorrenza la Commissione europea può prendere decisioni riguardanti società stabilite al di fuori dell'UE allorché operano all'interno dell'UE. Un buon esempio è costituito dalla recente decisione della Commissione [8] di bloccare il progetto di fusione [9] tra General Electric e Honeywell, due società statunitensi. Tale decisione, presa nel luglio 2001, dichiarava all'articolo 1 che una fusione tra le due società avrebbe creato una "concentrazione incompatibile con il mercato comune". La Commissione ha stabilito che il fatturato totale a livello comunitario delle due società ammontava a più di 250 milioni di euro e ha pertanto concluso che l'operazione notificata presentava una "dimensione comunitaria".

La dimensione extraterritoriale del diritto comunitario è osservabile anche con riguardo alla protezione dei consumatori. L'articolo 12 della direttiva [10] riguardante le vendite a distanza stabilisce che un consumatore non è privato della tutela assicurata dalla direttiva a motivo della scelta della clausola giuridica in un contratto, se il diritto del paese non membro prescelto fornisce una tutela inferiore di quella del diritto comunitario. Ciò avviene allorché il contratto presenti un "legame stretto" con il territorio di uno o più Stati membri [11]. L'espressione "legame stretto" è tratta dall'articolo 7 della convenzione di Roma del 1980. Tale articolo stabilisce che le "norme imperative" di un paese debbano essere applicate a situazioni disciplinate dal diritto di un altro Stato laddove tale situazione presenti uno "stretto legame" con il paese.

(4) Direttiva 95/46/CE del Parlamento europeo e del Consiglio, del 24 ottobre 1995, relativa alla tutela delle persone fisiche con riguardo al trattamento dei dati personali, nonché alla libera circolazione di tali dati (GU L 281 del 23.11.1995, pag. 31), disponibile al sito: http://europa.eu.int/eur-lex/en/lif/dat/1995/en_395L0046.html.

(5) TGI di Parigi, ordonnance du référé del 20 novembre 2000 http://legal.edhec.com/DTIC/Decisions/Dec_responsabilite_o.htm

(6) AG di Monaco, sentenza del 28.5.1998 – 8340 Ds 465 Js 173158/95.

(7) BGH, sentenza del 12.12.2000, Az: 1 StR 184/00.

(8) Decisione del 3.7.2001 (COMP/M.2220) in virtù dell'articolo 8, paragrafo 3, del regolamento (CEE) n. 4064/89 del Consiglio relativo al controllo delle operazioni di concentrazione tra imprese.

(9) In base all'accordo notificato Honeywell era destinata a diventare una controllata al cento per cento della General Electric.

(10) Direttiva 97/7/CE..4

(11) L'articolo 6, paragrafo 2, della direttiva 93/13/CEE concernente le clausole abusive nei contratti stipulati con i consumatori e l'articolo 7, paragrafo 2, della direttiva 1999/44/CE su taluni aspetti della vendita e delle garanzie dei beni di consumo sono molto simili all'articolo 12, paragrafo 2. Entrambi insistono sull'applicazione del diritto comunitario e utilizzano espressioni analoghe a "legame stretto".