SIS II Supervision Coordination Group

COMMON POSITION

nr. 1/2016

on the

Deletion of alerts on vehicles sought for seizure or use as evidence in criminal proceedings and the interpretation of Article 38 of the Council Decision 2007/533/JHA

SIS II SCG

14 April 2016

Having regard to:

Article 62 of the Council Decision 2007/533/JHA[1] ("Decision") on the duty of cooperation between the data protection supervisory authorities of the SIS II framework, and in particular the obligations in Article 62(2) to "examine difficulties of interpretation or application of this Decision" and "draw up harmonized proposals for joint solutions to any problems", the SIS II Supervision Cooperation Group hereby adopts the following Common Position on the deletion of alerts on stolen vehicles sought for the purposes of use as evidence in criminal proceedings and the interpretation of article 38.

I. Background

1. The Schengen Information System (SIS) was established as an intergovernmental initiative under the Schengen Convention and implemented by CISA (*Convention Implementing the Schengen Agreement*), now integrated into the EU framework. The Council adopted three instruments to amend the SIS in preparation of the SIS II, amongst others the Council Decision 2007/533/JHA.

2. The SIS holds information on individuals who do not have the right to enter or stay in the Schengen Area, on missing persons or on those who are sought in relation to criminal activities or proceedings. It also contains alerts on certain objects, such as banknotes, vehicles (cars), vans, firearms and identity documents that have been stolen, misappropriated or lost. Data is entered into the SIS by national competent authorities in accordance with the applicable provisions and under their responsibility, being the information then forwarded via the Central System to all Schengen States.

3. On 9 April 2013, the second generation Schengen Information System (SIS II) entered into operation.

[1] Council Decision 2007/533/JHA of 12 June 2007 on the establishment, operation and use of the second generation Schengen Information System (SIS II).

II. Facts of the case

4. Within this context, a specific scenario regarding the storage of data on motor vehicles frequently occurs in some Member States: an individual buys a car in Member State A, however, the registration of the car in Member State A fails due to an alert issued under Article 38 of the Decision by Member State B where the car has been reported stolen. The theft report gives rise to a criminal proceeding and the alert is inserted on behalf of the competent judiciary authority.

5. Member State A informs Member State B about the fact that the car has been located or seized, through exchange of supplementary information via SIRENE Bureaux, in order to give execution to the alert.

6. Member State B does not reply to the communication of the hit or, otherwise, agreement on the measures to be taken is not achieved; cooperation does not proceed; the car is located/seized but no further action is taken and the alert remains valid;

7. The situation reaches an impasse, not overcome for many years, with impact in the rights of the individuals. This causes considerable legal uncertainty and besides the vehicle's owner (in Member State A) has to face multiple problems e.g. when travelling outside Member State A within the Schengen Area.

8. This kind of case raises a twofold question. Should it be considered that upon location/seizure of the car the purpose of the alert was achieved and thus it should be deleted OR should it be considered that the alert is only succeeded when the car is seized to be delivered/delivered to the issuing State to be used as evidence, and therefore until then should not be deleted?

III. Legal Framework

9. According to Article 38 of the Decision – replacing the former Article 100 CISA –, data "*on objects sought for the purpose of seizure or use as evidence in criminal proceedings shall be*

entered into the Schengen Information System". Motor vehicles (cars) fall within the scope of this provision (as per paragraph 2 (a) of the Article).

10. Only the Member State introducing the alert is authorised to modify, add to, correct or delete data which it has been entered (Article 49(2) of the Decision) although the data subject (in this case the car owner) has the right to have his/her personal data corrected if it is inaccurate or deleted if unlawfully stored.

11. Article 39 of the Decision, dealing with "execution of the action based on an alert", states that:

1. *If a search brings to light an alert for a car which has been located, the authority which matched the two items of data* [in this case Member State A] *shall contact the authority which issued the alert* [Member State B] *in order to agree on the measures to be taken* (…).
2. *The information referred to in paragraph 1 shall be communicated through the exchange of supplementary information.*
3. *The Member State that located the object shall take measures in accordance with national law.*

12. The exchange of supplementary information will take place, under Article 8 of the Decision, in accordance with the provisions of the SIRENE Manual[2] (Sections 2.3 and 8.3).

13. According to Article 49(1) of the Decision, the Member State issuing the alert is responsible for ensuring that the data are accurate, up-to-date and entered in SIS II lawfully. Alerts on objects (including cars) entered in SIS II shall be kept only for the time required to achieve the purposes for which they were entered. In particular alerts on objects entered in accordance with Article 38 shall be kept for a maximum of 10 years, although, the retention period may be extended should this prove necessary (Article 45 of the Decision).

14. As a general applicable rule for all the alerts, Section 2.9 of SIRENE Manual sets that *"[a]s soon as the conditions for maintaining the alert are no longer fulfilled, the issuing Member State shall delete the alert without delay*". Regarding the specific alerts on objects,

[2] Commission Implementing Decision (EU) 2015/219 of 29 January 2015 replacing the Annex to Implementing Decision 2013/115/EU on the Sirene Manual and other implementing measures for the second generation Schengen Information System (SIS II), OJ L44/75.

Section 8.4 provides for the deletion of Article 38 alerts upon: *"(a) the seizure of the object or equivalent measure once the necessary follow-up exchange of supplementary information has taken place between Sirene Bureaux or the object becomes subject of another judicial or administrative procedure (e.g. judicial procedure on good faith purchase, disputed ownership or judicial cooperation on evidence); (b) the expiry of the alert; or (c) the decision to delete by the competent authority of the issuing Member State"*.

IV. Assessment

15. Article 38 of the Decision sets two purposes for the alert: sought for seizure or sought for use as evidence in criminal proceedings. Actually, a car could be sought for seizure for other reasons than a criminal proceeding. On the other hand, to use a car as evidence requires that it is seized. Nevertheless, in one case seizure is an end in itself; in the other case, seizure is just a mean to reach another objective.

16. To locate the object is not a purpose foreseen in Article 38, unlike Article 34 on persons sought to assist with a judicial procedure, which expressly disposes that the alert is *"for purposes of communicating their place of residence or domicile*". Moreover, the only action to be executed is to communicate the requested information. Also in Article 33 about the execution of action based on the alert on missing persons it is mentioned that *"competent authorities may communicate the fact that the alert has been erased because the person has been located to the person who reported the person missing"*.

17. It is clear in the logic of the Decision that when the purpose is to find the location, the alert is deleted after the person has been located. Therefore, once that is not the case of Article 38, one may argue that the communication of the location of the object to the issuing Member State does not entail the deletion of the alert, once locating the car is just a step to get to the objective. Meanwhile, after the hit, there are some procedures to be followed between the Sirene Bureaux, in particular exchange of relevant information, to enable the purpose of the alert be fully achieved.

18. Taking into account that the Member States locating the object have to take measures according to its national law (Article 39 (3)) and that the issuing Member State has to observe its national law as well – especially within a criminal proceeding where stricter rules apply –, there has to be found an agreement that indeed serves the legal regime of both

parts on what measures are to be taken. This is indispensable for the conclusion of the case. That is how the system works.

19. Individuals who are somehow affected by this problem turn to the national Data Protection Authorities, but their role could be limited in this regard to checking the lawfulness of the alert.

20. Cooperation at this phase should run as smoothly as possible; authorities should be highly committed to “execute the alert”. SIRENE Manual clarifies that the alert should be deleted upon seizure or equivalent measure, only after the necessary follow-up of exchange of information has taken place. Therefore, if the cooperation ceases for any reason, everything is suspended and the alert is not deleted.21. There could be multiple causes for this kind of disengagement. On the one hand, the variety of Schengen stakeholders at national level (SIRENE Bureau and/or data controller; several authorities inputting data directly or deciding on the data to be inserted; several authorities with access to the SIS) may generate different perception on the responsibilities, the requirements and the adequate procedures. On the other hand, despite the guidance provided by the SIRENE Manual there is some lack of density in Article 39 and there are no tools to check the effectiveness of the cooperation at this level.

22. The data retention period for this kind of alerts is very long and having the object been located – which would seem to be the most difficult obstacle to surpass – it is hardly admissible that the next stage to complete the purpose of the alert is not met. Data processing that does not accomplish the intended purpose is considered not adequate. If the alert is never executed because cooperation does not happen in practice, ultimately the necessity of the alert can be disputed.

V. Conclusion

23. The deficiencies detected in the course of the execution of action by Member States after a hit on a car under Article 38 of the Decision need to be properly addressed. The fulfilment of the purpose of the alert depends on the conclusion of the procedures provided by Article 39, so cooperation must not cease in any way.

24. The alert shall be deleted as soon as its purpose is achieved. According to Article 38, objects (including motor vehicles) are subject to be alerted when sought for seizure or use as evidence in criminal proceedings. The location of the car is not a purpose of this alert, but instead the first step giving rise to the exchange of supplementary information, in view of agreeing on measures to be taken to accomplish the objective of the alert.

25. If agreement is not reached, regardless of the reasons, the purpose of the alert is not fulfilled; hence the alert is not deleted, with clear impact on the rights of the individuals.

26. Accordingly, it is of the utmost importance to set a clear procedural framework for this kind of cooperation, improving the rules, including setting timeframes for communication between Member States, and providing further guidance, in particular in the SIRENE Manual, on how to better implement the procedures laid down in Article 39 and how to check its effectiveness.

27. In view of the different kind of competent authorities dealing with the SIS, such as authority responsible for running the SIS or judicial authority, it is also imperative to ensure that, at national level, they receive adequate training and they are well aware of the cooperation mechanisms within the SIS framework, including clear procedures to interact with each other.

28. To this end it is necessary for each and every Schengen Member State to establish clear responsibilities regarding the legal obligations laid down in the Decision. These responsibilities should be explicitly allocated, at national level, in order to assure that the appropriate exchange of supplementary information takes place so that the Member States involved can “agree on the measures to be taken” and properly deal with the alert (Article 39). In this regard, there should be a binding catalogue of measures to facilitate cooperation between national competent authorities, such as the SIRENE Manual.

29. Cooperation is key to the functioning of the SIS II. It is then essential to examine at national level whether all necessary procedures are in place and properly working in order to foster mutual trust between the Member States.

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