

ARTICLE 95 INSPECTION

Report of the Schengen Joint Supervisory Authority on an inspection of the use of Article 95 alerts in the Schengen Information System

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Contents

<i>I. Introduction.....</i>	<i>3</i>
<i>II. Data Protection Supervision.....</i>	<i>3</i>
<i>III. Reason for inspection.....</i>	<i>4</i>
<i>IV. Scope and method of inspection.....</i>	<i>4</i>
<i>V. Reactions received</i>	<i>5</i>
<i>VI. Results</i>	<i>5</i>
<i>VII. Considerations and recommendations.....</i>	<i>10</i>
<i>Annex.....</i>	<i>12</i>

Executive Summary

One of the main characteristic features of the Schengen Information System is sharing responsibility for using this system in accordance with the provisions set out in the Schengen Convention and in national laws.

A survey of the Schengen Joint Supervisory Authority to the use of the Article 95 alerts in the Schengen Information System provided much information about the actual use of these alerts.

Although the Schengen Convention does not intend to harmonise national practices in law enforcement, the Schengen Joint Supervisory Authority makes in this report several recommendations concerning the use of Article 95 and to improve compliance with the provisions of the Schengen Convention. This is especially the case when following national procedures do not lead to directly amending or deleting data when this is indicated. The findings of this survey will also be valuable for the introduction of the Second generation of the Schengen Information System.

I. Introduction

In October 2010, the Schengen Joint Supervisory Authority (JSA) asked the national data protection authorities to inspect the Article 95 alerts entered in the Schengen Information System (SIS) by their competent authorities. The survey focused on the procedures leading to Article 95 alerts and does not cover the reasons for issuing a European Arrest Warrant.

This is the final part of a series of surveys the JSA initiated on the use of Schengen alerts. The survey on alerts according to Articles 96-99 were finalised in previous years. Based on past experience, these surveys provide insight into how Schengen States¹ implement and use those articles of the Schengen Convention, and what practical problems may occur. Often the results indicate differences in practice between the Schengen States, enabling the JSA to recommend the necessary measures to improve the implementation of the Schengen Convention and the use of the SIS. Some of the previous recommendations of Articles 96-99 alerts are included in the Schengen Data Protection Catalogue.

This report presents the findings on the use of Article 95 alerts by the Schengen States and was adopted in the meeting of the JSA on 19 March 2013.

II. Data Protection Supervision

Pursuant to the provisions of the Schengen Convention², personal data are processed in the SIS by the Schengen States. The Schengen Convention divides the data protection supervision for the content and the functioning of the SIS between national data protection authorities and the JSA. The Schengen State entering data in the system is responsible for the processing of these data in the SIS, supervised by the national data protection authority. The JSA has the overall task to supervise the technical support function of the SIS, which distributes the SIS data to all Schengen States.

Article 115 of the Schengen Convention describes the tasks of the JSA. Apart from checking the technical support function of the SIS, the JSA is charged with examining any difficulties of application or interpretation that may arise during the operation of the SIS, as well as drawing up harmonised proposals for joint solutions to existing problems. This forms the legal basis for initiating a systematic set of surveys on the implementation of specific articles of the Schengen

¹ Every country participating in the Schengen Information System

² The Convention implementing the Schengen Agreement of 14 June 1985, OJ.L 239, 22/09/2000

Convention. The JSA selects the object of inspection based on the identification of particular problems revealed by the sharing of experiences among delegations in the JSA.

III. Reason for inspection

The JSA has conducted several inspections on the use of alerts in the SIS. All alerts in which personal data are processed, except Article 95 alerts, have been inspected. Previous inspections demonstrated that, from a data protection point of view, changes should be made to further improve compliance with the conditions set out in the Schengen Convention. An inspection of the Article 95 alerts was deemed necessary to achieve a comprehensive overview of the use of alerts in the SIS and any possible data protection complications.

Based on the figures of 1 November 2012, 35592 alerts based on Article 95 were processed.

The JSA is well aware that the Council Decision on the Establishment, Operation and Use of the Second Generation Schengen Information System (SIS II) will in the near future replace the present legal basis for Article 95 alerts, the Schengen Convention. That Council Decision also defines alerts (as currently in Article 95) on persons for arrests for surrender purposes in a similar way as in the Schengen Convention. In view of this, the results of this inspection will also be valuable when the new legal basis of SIS II enters into force.

IV. Scope and method of inspection

The objective of the inspection was to ensure that Article 95 data are processed in accordance with Article 95 and the data protection principles in the Schengen Convention, the SIRENE Manual and the applicable national legislation. The inspection was also designed to enable the JSA to assess whether there are any interpretation problems with the use of Article 95.

The JSA developed a simple method of inspection to be used by all national data protection authorities. The use of this model would enable the JSA to compare results and evaluate the differences.

A comprehensive questionnaire (see annex) was developed. The questionnaire aimed to get an overview of the relevant national law in the Schengen States and to check all necessary procedures to fulfill the data protection requirements by authorities responsible for the alerts. It also contained specific questions for checking whether the alerts were in accordance with the provisions of

Article 95 and whether they were maintained in the SIS in accordance with the provisions laid down in the Schengen Convention.

V. Reactions received

Twenty two (22) data protection authorities participated in this inspection. These were the authorities from: Austria, Belgium, Czech Republic, Denmark, Estonia, Finland, Germany, Greece, Hungary, Iceland, Italy, Liechtenstein, Lithuania, Luxembourg, Malta, The Netherlands, Poland, Slovakia, Slovenia, Spain, Sweden and Switzerland.

VI. Results

The results of the national inspections are referenced in this report, along with an assessment of those results. In the presentation of its assessment, the JSA emphasises some guiding principles for the use of Article 95 alerts. It must be stressed that although the national data protection authorities used the same model of inspection, in some cases there were differences in the way the results were reported.

A. Article 95 Alert

1. Which judicial authority may decide on an Article 95 alert?

All answers received showed that a public prosecutor or a court/magistrate is the authority competent to issue an Article 95 alert. In one State such an alert is also possible by a decision of the National Police Board (limited to EAW for enforcement of a custodial sentence or other form of detention). The answers to this question reveal that in all Schengen States the requesting authority for an alert is a judicial authority.

2. Is this authority reported to the General Secretariat of the Council of the European Union as required by Article 6(3) of the EAW Framework Decision?

All Schengen States that are also subject to the EAW Framework Decision confirmed that this condition has been met.

3. Is there a specific procedure established for the Article 95 alerts?

From the 20 answers received on this question, two mentioned that no specific procedures are in place. Most answers refer to the procedures for SIRENE bureaux. In some States an extra procedure is in place, e.g. notifying the alert to a specific office of the Ministry of Justice in order to

coordinate search activities. One answer mentioned a special check for alerts for considering flagging when the alert concerns a person not being a national of that State, not concretely staying there, and where the double incrimination might lead to doubts.

One reaction mentioned that although the EAW is ordered by a judge, the State Prosecutor and the Ministry of Justice have to approve the warrant.

4. For which criminal acts is Article 95 used?

All Schengen States being party to the EAW Framework Decision reported that Article 95 is used for the acts referred to under Article 2(2) and Article 2(4) of the EAW Framework Decision.

5. Special procedures Article 2(4) EAW Framework Decision

Article 95(2), second sentence of the Schengen Convention obliges the alerting State before issuing the alert to check whether the arrest is authorised under the national law of the requested Contracting Parties. According to Article 2(4) EAW Framework Decision, surrender may be subject to the condition that the acts for which the EAW has been issued constitutes an offence under the law of the executing Member State.

These conditions are dealing with two different issues: arrest and surrender, and do not affect the obligation of an alerting State as referred to in Article 95(2), second sentence of the Schengen Convention.

The answers received demonstrate that the practical implementation of this obligation is done in various ways, sometimes not in compliance with Article 95(2). Most answers indicate an important role for the SIRENE Bureaux to ensure compliance; however, without specifying what is actually checked. Other answers indicate that such a role is for the courts/prosecutors or the Ministry of Justice. One answer mentions that Eurojust is consulted when there might be doubts. It is important to note that when an EAW is used in SIS it automatically addresses all Schengen States and it is difficult to have a check as referred to in Article 95(2) second sentence for all these States. This might be possible if the whereabouts of the alerted person is known, but if not, the check is considered practically impossible.

The JSA also notes that the obligation of Article 95(2) of the Schengen Convention is not introduced in the legal basis for SIS II.

6. Do any additional national laws apply to issuing an EAW?

Apart from the national laws covering cooperation in criminal matters and criminal procedures no specific other laws apply.

7. Which data are communicated when an arrest cannot be made (Article 95(5))?

All respondents mention that the address or place of residence are reported. Some communicate more information such as date of birth, place of origin, nationality, place of interception and reason for interception, circumstances. Some mention sending "full details" without specifying what is meant by that. One state also mentions communicating information on accompanying persons, and means of transportation. Two contributions mention that when there are objections, data will not be communicated.

8. When data appear to be inaccurate are they immediately changed? If yes, what is the responsible authority and are there procedures/guidelines ensuring the alert is changed?

All answers indicate that inaccurate data will be changed but not all indicate that it is done immediately. One contribution mentioned that the alert - even when the data are inconsistent with the EAW - remains unchanged until the EAW is corrected. Most answers indicate that the authority responsible for the EAW is also responsible for changing inaccurate data. Some place this responsibility in the hands of the SIRENE bureaux.

In those situations where changing inaccurate data is dependant on the authority responsible for the EAW, the necessary change may take some time.

B. SIRENE

1. Is the alert only inputted after the SIRENE bureau is in the possession of the A and M form?

According to Art. 3.4.2, first sentence, of the SIRENE Manual ³, the file with regard to the persons wanted for arrest for extradition purposes shall be prepared before the alert is entered. This also includes the A and M form.

Twelve answers indicated that the SIRENE bureau needs to have the information referred to in the SIRENE Manual before the alert is entered in the SIS. Nine answers indicated that the alert is inputted before the necessary information is received by SIRENE. The procedures in these eight States foresee that the supplementary information is been made available shortly after entering the alert. One State reported that it would be impossible to create an A and M form before entering the alert.

2. Do the SIRENE bureaux delete alerts where the arrest warrant is withdrawn?

The withdrawal has in all responding Schengen States the same result: the alert will be deleted. The answers received show some difference in actors involved in the deletion depending on the procedure for issuing the same alert.

³ OJ.L. 186, 15.7.2011

C. Deletion of alerts

1. Are alerts deleted directly after arrest and surrender?

A large majority of answers received mention that the alert is directly deleted after arrest and surrender. This is done by the SIRENE bureaux after consultation or by order of the responsible authorities. Three respondents reported that it might take some time to have the alert deleted. Deletion is done when the alerted person is actually surrendered and the court/prosecutor in charge of the case is informed. A reason why it may take some time is that even after surrender the person has not been put at the disposal of the issuing authority, the lack of a withdrawal order or simply forgetfulness.

2. If a requested Member State refuses to arrest and surrender or to surrender, is the alert maintained?

All answers indicate that the alert is maintained. Apart from placing a flag on the alert there are no specific procedures for these situations.

3. Are there alerts inputted before 1 January 2004?

Ten respondents indicated that Article 95 alerts were inputted before 1 January 2004. In eight States these alerts were reviewed at least twice (based on the three-year review period of Article 112 of the Schengen Convention).

4. Which authority is responsible for the review decision?

The answers indicate that the authorities responsible for the review decision are the same as the ones responsible for the decision to alert.

5. Are there guidelines for maintaining or deleting alerts after a certain period of inactivity?

Ten States mentioned that no specific guidelines are in place. Some refer to the review period of three years. The 10 other respondents mention the existence of guidelines. One State deletes the alerts after a period of six months of inactivity.

The guidelines do not distinguish between an alert for conducting a criminal prosecution or the execution of a custodial sentence or detention order. One State mentioned that alerts for the execution of a custodial sentence will be valid as long as the sentences are not expired.

One State mentioned that, in practice, in the absence of a notification of the responsible authority, the alert will automatically be maintained for a further three years.

Assessment is done by the authority responsible for the alert according to 10 answers received. Other answers mention a more important role for police and SIRENE bureaux whether there is still a valid need for the alert

D. Results of checks on post-2004 alerts

In total some 1300 alerts were checked by the national data protection authorities. In these checks the content of the EAW (accurate, up to date and lawfully processed), the time limits and the recording of transmission was checked.

The results show that, in general, the alerts comply with Article 95 of the Schengen Convention. However, the checks also highlighted specific problems:

- In one case it appeared from the data in the SIS that the alerted person had already been surrendered and the transport had taken place in September 2011. This information was confirmed by the public prosecutor's office. The alert should have been deleted.
- In one case, after a missing page of the corresponding EAW had been retrieved from the public prosecutor's office, it appeared that the alerted person had already been convicted by a District Court in July 2011. The alert should have been deleted.
- In two cases the nationality stated in the SIS did not match the nationality stated in the corresponding EAW. In one case the date of birth of the alerted person in the SIS did not match the date of birth in the corresponding EAW (with a difference of three years).
- Regarding the revision of the alert on a three-yearly basis, there is no uniform procedure. Analysis of files showed that the revision occurs either after a simple telephone conversation, or after a written confirmation by the police / by the police on behalf of the judicial authority / by the judicial authority directly: this makes it rather difficult in some files to check whether or not the maintaining of a revision is endorsed by the judicial authority having issued the warrant. Otherwise, it was taken into account of the statutory limitation of criminal proceedings or of sentences. The procedure of revision has to be formalised to guarantee the rights of the alerted persons.
- There is a communication problem between the judicial authority and the SIRENE bureau regarding the deletion of the alert when a person had been surrendered and imprisoned. The procedure of deletion after surrender has to be improved.
- In a particular file, the warrant was issued regarding an internment, which is not a penalty. Furthermore, the measure was statute-barred. The alert was flagged by some countries and a court denied the surrender of the person.
- In several alerts to SIS the second surname of the wanted person was not entered, even though the EAW states that these persons have two surnames.
- In one case characteristic features were entered, even though there was no such information in the EAW, whereas in other cases there were no characteristic features.
- One alert lacked information on the citizenship of the wanted person.
- There was a discrepancy in one alert as regards date of birth with relation to day and in other one with relation to year.
- Due to the lack of written internal procedures of the SIRENE bureau, the deletion of some cancelled alerts is not fulfilled within the statutory period. The deletion is done manually and takes place every one or two months. This was explained by a lack of staff, but willingness was shown to shorten the review periods severely.

- No retention periods are currently applied to physical files containing SIS data. Based on previous meetings and a general recommendation of our DPA, the Police are currently working on a retention schedule in order to establish retention periods for national police files, by taking into account the different legal requirements or impediments arising from other laws or judicial procedures such as the applicable time frames for legal prescription. Schengen files are first in order of priority.

-Although alerts may be deleted from the SIS, the SIRENE Bureau keeps the physical files relating to these alerts that contain the EAWs and any other relevant background documents, past their deletion date. These files are maintained for 10 years

VII. Considerations and recommendations

One of the characteristic features of the SIS is the shared responsibility for using such a system in accordance with the provisions set out in the Schengen Convention and national laws. This Convention is also the first common legal instrument establishing a joint system with specific data protection provisions on the use of the SIS.

This report was finalised just before the new legal basis for SIS II becomes applicable. As Article 26 of Council Decision 2007/533/JHA covers the same type of alerts, this report, its conclusions and recommendations will also be valuable for these alerts in SIS II.

The results of this questionnaire demonstrate that while, in general, the implementation of Article 95 alerts and EAWs may be in compliance with the legal basis, there are too many examples where the process of alerting, maintaining the alert, having data up to date and correct and the communication of information are not in line with the legal basis and must be improved.

The results show that not all Schengen States act in compliance with Article 95(2). Since the obligation of that paragraph does not appear in the new legal basis for SIS II, the JSA has not formulated a recommendation in this respect. Another important conclusion that may be drawn is that all authorities involved with issuing and distributing an EAW should act in compliance with their responsibilities. This survey demonstrated that not all parties in the chain of responsibilities for using an Article 95 alert always act in accordance with their responsibilities.

Recommendations

In view of the findings of the Article 95 survey, the JSA would make the following recommendations:

- Harmonise the data to be transferred when an arrest cannot be made and the person is found.
- Centralise the responsibility for changing inaccurate data, for example with the SIRENE bureaux to prevent lengthy procedures for changing the data.

- Better implement the obligation for having the documentation available in accordance with the SIRENE Manual before issuing the alert.
- Better implement the obligation to delete the alert directly after arrest and surrender.
- Develop harmonised guidelines for the deletion of an alert after a certain period of inactivity. These guidelines should differentiate between the reasons for inactivity.
- A definite decision to maintain or delete an alert must be made during the three-year review.

<p style="text-align: center;">ARTICLE 95 OF THE SCHENGEN CONVENTION: USEFUL INFORMATION AND INSPECTION QUESTIONS</p>
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Judicial authorities may alert a person wanted for arrest for extradition purposes in the SIS. Before such an alert can be inputted, many conditions have to be fulfilled; these are defined in Article 95(2-5).

On 13 June 2002, the Council Framework Decision on the European arrest warrant and the surrender procedures between Member States was adopted⁴ (further: EAW Framework Decision) According to Article 9(3) of the framework decision, '*an alert in the Schengen Information System shall be equivalent to a European arrest warrant...*' Furthermore, Article 32, containing a transitional provision, provides that extradition requests received before 1 January 2004 will continue to be governed by existing instruments relating to extradition. Information on the European arrest warrant (EAW) and how it should be used is available [here](#).

Conditions for Article 95 alerts

Before an Article 95 alert may be processed in the SIS, certain conditions should be complied with:

1. The specific alert of an EAW is issued with a view to the arrest and surrender of a person for the purpose of conducting a criminal prosecution or executing a custodial sentence or detention order.
2. A judicial authority should issue the alert.
3. The judicial authority should be reported to the General Secretariat of the Council.
4. The EAW should be issued for the acts defined in Article 2(2) of the EAW Framework Decision.
5. According to Article 105 it should be ensured that these data are accurate up-to-date and lawful.
6. The storage of Article 95 alerts concerning persons should be reviewed no later than three years (Article 112).
7. The alert should be deleted when the arrest and surrender is effected (Article 112).

It is suggested to focus the inspection on the alerts inputted after 1 January 2004. Separate questions in section C - deletion of alerts - focus on how the review of alerts inputted before 1 January 2004 takes place.

Sections A-E provide guidelines for checking whether the conditions for alerting and the content of Article 95 alerts are in compliance with the Schengen Convention and the framework decision. The sections have been developed to distinguish between the various steps in checking compliance.

NB: Questions referring to procedures - apart from questions relating to the SIRENE Bureaux - do **not** refer to the SIRENE Manual but to internal procedures of the judicial authorities.

⁴ OJ.L 190, 18.07.2002, p.5

A. DECISIONS MADE ON ARTICLE 95 ALERTS

1. Which judicial authority may decide on an Article 95 alert?

1.a. Is this authority reported to the General Secretariat of the Council, as required by Article 6(3) of the EAW Framework Decision?

See also

http://www.consilium.europa.eu/cms3_Applications/applications/PolJu/details.asp?id=66&lang=EN&cmsid=720

Yes No

2. Is there a specific procedure established for this category of alerts?

Yes No

2.a. If the answer is yes, please describe the procedure:

3. Are EAWs only used for acts referred to under Article 2(2) of the EAW Framework Decision?

Yes No

3.a. If the answer is no, are EAWs used for acts referred to under Article 2(4) of the EAW Framework Decision?

Yes No

3.b. If the answer to 3.a. is yes:

- describe the procedure for checking whether the offence for which an EAW is issued constitutes an offence under the law of the executing Member State (including the situation referred to in Article 95(2) second sentence)
- which authority or service is responsible for this check?

4. Do any additional national laws apply to issuing an EAW?

Yes No

4.a. If the answer is yes, please explain:

5. If Article 95(5) applies (arrest cannot be made) is information communicated of the place of residence of the person concerned?

Yes No

5.a. If the answer is yes, which specific data are communicated?

6. When data appear to be inaccurate are they immediately changed?

Yes No

6.a. If the answer is yes, what is the responsible authority?

6.b. If the answer is yes, are there procedures/guidelines ensuring changing the alert?

Please describe

B. SIRENE

1. Is the alert only inputted after the SIRENE Bureau is in the possession of the A-and M-form?
(See Article 3.4.2, first sentence SIRENE Manual)

Yes No

1.a. If the answer is no, what information is kept at the SIRENE Bureau before inputting the alert?
Please describe.

1.b. Does the SIRENE Bureau delete alerts where the arrest warrant is retracted?

Yes No

C. DELETION OF ALERTS

1. Are alerts always deleted directly after arrest and surrender?

Yes No

1.a. If the answer is yes, who is responsible for the decision to delete?

1.b. If the answer is no, who is responsible for the decision to maintain the alert?

1.c. If the answer is no, what is the motivation for maintaining the alert?

2. If a requested Member State refuses to arrest and surrender or to surrender, is the alert maintained?

Yes No

2.a. If the answer is yes, who is responsible for the decision to maintain the alert?

2.b. If the answer is yes, are there national guidelines applicable for deciding whether the alert will be maintained? Please describe.

3. Are there Article 95 alerts inputted before 1 January 2004?

Yes No

3.a. If the answer is yes, were they reviewed at least twice?

Yes No

3.b. If the answer is yes, which authority is responsible for the review decision?

4. Are there guidelines for maintaining or deleting alerts after a certain period of inactivity?

Yes No

4.a. If yes, do these guidelines differentiate between alerts for conducting a criminal prosecution and the execution of a custodial sentence or detention order?
Please describe.

4.b. Is the authority mentioned under 3.b. the same as the judicial authority deciding on inputting the alert?

Yes No

4.c. If the answer is no, which procedures are applicable ensuring that the reasons for alerting are still applicable? (Please describe)

D. CONTENT OF THE ALERTS

Please carry out a check of post-2004 alerts. Select a reasonable number of files to check, bearing in mind that the results of your checks may make it necessary to enlarge your chosen sample size. You may wish to use the following numbers as a guide.

<u>Number of alerts</u>	<u>Suggested number of files to check</u>
20<	20
100<	30
500<	40
1000<	50
1000>	5%

E. RESULTS

1. Is the content in conformity with article 95?

Yes No Not all

1.a. If the answer is no or not all please give a description of problems discovered.

2. The results of the checks carried out under A-D demonstrate that compliance with articles 95, 105, and 112 is sufficient/insufficient as:

a. The data are accurate

Yes No

b. The data are up to date

Yes No

c. The data are lawfully processed

Yes No

d. The data are retained within the applicable time limits

Yes No

e. The transmission of data is recorded

Yes No

f. The alert is still necessary

Yes No