

# SNAPSHOT

## INTERNAL SECURITY OF *SCHENGENLAND*: WHAT DO WE NEED SIS II FOR?

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### ABSTRACT

*It took more than ten years to get SIS II on track. Thousands of working hours were devoted to development of the newest, i.e. second generation of the Schengen Information System (SIS II) until it has become operational on 9<sup>th</sup> April, 2013.*

*The abolishment of internal border checks and common procedures at external borders is keep on fostering European decision-makers to establish large-scale IT systems in the area of freedom, security and justice. The decrease of security deficit by control of immigration flow consists of three endeavours: common border control policy, common visa policy and common asylum policy. SIS helps common border control policy of the borderless Europe's home affairs.*

*The aim of the paper is to analyse and evaluate the development of SIS focusing on the latest achievements making SIS II work. The SIS of which basic system is operational since March 1995 is a special large-scale IT system that allows competent authorities to obtain information regarding certain categories of persons, vehicles and objects, i.e. it is a useful tool in relation to law enforcement. Information systems are highly important for the border security strategy, since among others systematic data gathering and data exchange of information concerning (mainly but not exclusively) third country nationals happen through them. The observation of SIS's operation dynamics, difficulties and synergies (with eu-LISA, PNRs and the smart borders initiative) gives a frame of reference to evaluate the phases of SIS's creation.*

*The paper like a case study has a special focus on the additional tasks of the Hungarian public administration, since solely a well-embodied structure could complement national efforts efficiently.*

### KEYWORDS

Schengen, EU home affairs, Schengen Information System, (and) Hungary, information power, security deficit

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The abolishment of the internal border checks is the cornerstone of the Schengen regime facilitating the movement of peoples internally and externally. Persons having the right of free movement can travel freely in the Schengen area (and in non-Schengen EU countries), which makes for economic, regional and cultural dynamism within Europe and especially the border areas. Third country nationals visitor can travel to all Schengen States with a single visa, which means, for example, that economic activity related to tourism is promoted. At the same time, the Schengen cooperation aims to protect people and their property, since it fosters the cooperation among police forces, customs authorities and external border control authorities of the Member States in order to decrease the security deficit formed with the abolition of internal borders. The Schengen *acquis* provides systems of communication for police forces, hot pursuit of criminals and the cross border surveillance of suspects, as well as mutual operational assistance and direct exchanges of information among police authorities. In parallel, strict uniform rules have been adopted to ensure the protection of data and to protect people against any infringements of their fundamental rights.

The decrease of the security deficit by the control of immigration flow consists of three endeavours: the common border control policy, the common visa policy and the common asylum policy.

The European Union realised the opportunity of the exploitation of the information power by the establishment of large-scale IT systems following the analogy of these policies. Thus, the legal instruments of the Schengen Information System (hereinafter: SIS), the Visa Information System (hereinafter: VIS) and the EURODAC were adopted by the European decision-makers. Irregular immigrants found in Member States can be registered in the SIS, but irregular immigration defies this registration itself. Those who enter through asylum procedures are registered in EURODAC and those who enter using a legal channel, i.e. being issued a visa are registered by the VIS. The consideration for the integration of all systems into one “European Information System” is not new. This possibility shall aim the more effective use of information power, which contributes to the fight against terrorism, organised crime, human trafficking and illegal immigration.

Hence the analysis of SIS is carried out evaluating the development of SIS focusing on the latest achievements making SIS II work. The observation of SIS’s operation dynamics, difficulties and synergies (with eu-LISA, PNRs and

the smart borders initiative) gives a frame of reference to evaluate the phases of SIS's creation. The writing has a special focus on the additional tasks of the Hungarian public administration, since solely a well-embodied structure could complement national efforts efficiently.

The paper is based on the presentation of mine entitled "Launching SIS II".<sup>1</sup>

## EVERY END HAS A START: CYCLICAL DYNAMICS OF SIS DEVELOPMENT<sup>1</sup>

Schengen Information System is a large-scale IT system that allows the competent authorities (i.e. national police, customs, and border control authorities when making checks on persons at external borders or within *Schengenland*, and the immigration officers when dealing with third country nationals, in particular when deciding whether to issue visas or residence permits<sup>2</sup>) to obtain information regarding certain categories of persons, vehicles and objects.

It has become operational with the entry into force of the Schengen Implementing Convention in March 1995. Further rules were laid down by the decisions of the Schengen Executive Committee, such as "the Decision establishing the SIRENE<sup>3</sup> Manual, which governs subsequent exchanges of information following a 'hit' in the SIS."<sup>4</sup> The factual data are stored on the SIS but the SIRENE bureaus make it possible to exchange 'soft' data such as criminal intelligence information. The power of the Executive Committee and its working groups was transferred by the Treaty of Amsterdam to the Council and to its working groups. The SIS consists of two fundamental elements: the central database (called C-SIS) that is located in Strasbourg and the national SIS-bases (called N-SIS) in all of the participating states.

The corresponding authorities can enter certain types of information about or relating to persons. Submitted personal data are certain personal details and an indication of whether he or she is armed or dangerous.<sup>5</sup> There are six broadly defined reasons for which information can be included on the SIS. These are the so-called types of SIS 'alerts'.<sup>6</sup> The SIS is communitarised as a Schengen *acquis* with the entry into effect of the Treaty of Amsterdam. In spite of the protocols on the special status of the United

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<sup>1</sup> Original title "A SIS II beindítása", presentation given in Hungarian at the 11<sup>st</sup> National Conference of the Hungarian National Contact Point of the European Migration Network held at the Ministry of Interior, Hungary, 13.3.2013.

Kingdom and Ireland, they also joined the SIS for criminal law and policing purposes<sup>7</sup>; however they do not apply the Schengen *acquis*.

The original SIS has already been updated to “SIS 1+”. Reasons for change were quite technical; the infrastructure was insufficient to linking the Nordic countries to SIS.<sup>8</sup> Thus the Schengen Implementing Convention SIS rules were amended in 2004 and 2005 giving access for judicial authorities, Europol, Eurojust and with another regulation the vehicle registration authorities to SIS data. Data storage capacity of SIS was planned for a limited number of countries (ideally for eighteen according to the average opinion), so due to the Eastern enlargement the Member States decided to develop and to build up the second generation SIS till March 2007. It became clear at the meeting of the Ministers of Justice and Home Affairs in December 2006 that more time is needed for the development of SIS II. Thus they agreed on that the accession of those new Member States from the ten which are ready to join to the Schengen area shall happen with the accession to the SIS 1+, while the SIS II should have been operational in the enlarged *Schengenland* in 2008. This proposal came from Portugal for the development of a “SIS One4 All” which is basically the extension of the existing SIS 1+, a solution which had previously been understood to be technically impossible.<sup>9</sup>

The operational phase of SIS II has become operational on 9<sup>th</sup> April, 2013 (with a significant delay). New functions were added to the second generation SIS compared to the previous ones including biometric data, new categories of data and the possibility for running searches on the basis of incomplete data.<sup>10</sup> So, the functioning of SIS has been extended to provide for the fight against terrorism<sup>11</sup> and adopted to enable the storage of photographs and fingerprints after 11<sup>th</sup> September 2001. The addition of biometric information to SIS is one of the key aspects of the overhaul, while biometric data can be used both to confirm someone’s identity and to identify somebody.<sup>12</sup> The SIS II legal instruments has a further novelty concerning the access of data, i.e. persons listed on the EU terrorist list based on decisions by the Sanctions Committee of the UN Security Council can be included in the SIS.<sup>13</sup> Its core is to pose entry and stay ban signals on persons listed by the Sanctions Committee and the Council. Previously entry and stay ban signal in this case was applicable solely by national decision. Furthermore, copy of a European Arrest Warrant is enclosed to signals for arrest and surrender persons or persons wanted for extradition. There is no change in relation to the accessing authorities. To sum up, the

stored data on SIS II are surrender persons or persons wanted for extradition on the basis of European or international arrest warrant; persons with entry and stay ban; missing persons; persons to be looked for to participate in judicial proceedings; persons and objects under target or covered control; documents, vehicle and other objects set out in law wanted or seizure in order to use as evidence.

## SIS II AND HUNGARY

The Hungarian state administration incorporates, translates the SIS II structure which is transposed to the matrix of turf-war-like-competencies of the single entities of state administration. Two pieces of legislation govern SIS II in the Hungarian legal system: Act No. CLXXXI of 2012 on the Information Exchange in the framework of the Second Generation of the Schengen Information System and other Law Enforcement Acts relating this Topic on the modification of the Magyary Simplification Program (hereinafter: SIS II Act) and Government Decree No. 15/2013 (I. 28.) on the Detailed Rules of the Information Exchange in the framework of the Second Generation of the Schengen Information System and on the Amendment of Certain Related Government Decrees. The SIS II Act is the depository of competence division which is hence observed.

In Hungary, N-SIS II office is the Central Office for Administrative and Electronic Public Services being responsible for cooperation and information exchange in the frame of Schengen Implementing Convention. Supplementary exchange of information is done via SIRENE Bureau of the Hungarian National Police Headquarters. In accordance with the above explained *acquis*, SIS II data is accessible by the National Police, by the National Tax and Customs Administration of Hungary, by the Office of Immigration and Nationality, by the Hungarian foreign representations, by the Central Office for Administrative and Electronic Public Services and its district offices, by the courts and by the public prosecutors' offices.

High level data protection standards are transposed to the current Hungarian national SIS II governance structure. All persons have the right on his/her request to access all data stored about him/her on SIS II. Request shall be submitted at government offices, police headquarters or foreign representations. Correction or deletion of inadequate personal data can be requested. Perceiving any ill-treatment, proceedings can be filed before courts to enforce rights of the applicant. In Hungary, the National

Authority for Data Protection and Freedom of Information is responsible for the control of due process data handling. The Authority shall cooperate with European Data Protection Supervisor (also) in SIS II relevant cases.

## SIS II AND EU-LISA: EVOLUTION OR PATH DEPENDENCY?

The EU-wide integration of the operational management of (existing) large-scale IT systems was legally predetermined.<sup>14</sup> EU Agency for large-scale IT systems (hereinafter: eu-LISA) is a regulatory agency being responsible for the 24/7 operation of SIS II, VIS and EURODAC. Technically, eu-LISA runs the operational management of SIS II after a 30-day-start-up of the second generation, i.e. since 9<sup>th</sup> May, 2013.

The Lisbon-born non-pillar Europe fosters the unified management of large-scale IT systems being operational in the area of freedom, security and justice. The Constitutional Treaty would have significantly changed the structure of justice and home affairs if it had come into force. The Treaty of Lisbon<sup>15</sup> inherited the substantive changes proposed in the Constitutional Treaty. As a result of the disappearance of the Pillars, the decision-making procedure of measures in relation to the area of freedom, security and justice is basically the ordinary decision legislative procedure. The European Union *“[...] shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between Members States [...]”*<sup>16</sup>.

The Treaty confirmed the tendency towards the integration of external border controls, since it investigates the establishment of a Union policy on border checks.<sup>17</sup> The protocols on the special status of the United Kingdom, Ireland and Denmark are included in the Treaty with some minor amendments<sup>18</sup>. In connection with common asylum policy the Treaty of Lisbon states that *“[...] [t]he Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement.”*<sup>19</sup>

The Lisbon Treaty closed the process started by the 1997 Amsterdam Treaty, since the Third Pillar abolished and the decision-making procedure concerning the area of freedom, security and justice was reviewed.

Examining the smart borders initiative of the European Commission (hereinafter: smart borders initiative)<sup>20</sup>, it endeavours for the establishment of the European level entry/exit system (hereinafter: EES) and of the registered traveller programme (hereinafter: RTP) which are the results of a typically spill-over process. It is practicable legally and technically that eu-LISA may develop and operate the newly envisioned RTP and/or the EES. Moreover, it would be desirable, since experience and practice of the existing large-scale IT systems' development and operation could be directly implemented into the new systems without any special authorisation. Article 77 (2)d of the Treaty on the Functioning of the European Union, stipulates one, unified management system for the external borders. Therefore, the operational management of RTP and EES have to be merged into eu-LISA. The envisioned systems are defined as large-scale IT systems. Therefore, eu-LISA shall host, manage and develop their (at least EU level) operations.<sup>21</sup>

Programmes, action plans and communications are compasses of future legislation. Focusing on the core legislation of SIS II, its delineated development is more likely to be seen path dependent. However, bearing in mind the cyclic development of SIS and having an outlook to further plans in the field of large-scale IT systems, the evolution is clear, i.e. information gatherings securitise more facilitated migration flows.

## NEVER ENOUGH? NEW SYSTEMS ON THE HORIZON

The smart borders initiative presents the newest endeavours for the development of new (and related) large-scale IT systems in the area of freedom, security and justice. The smart borders initiative prepared by the European Commission is a short summary of the main options, implications and of the possible way forward. The full package<sup>22</sup> has been released on 28<sup>th</sup> February, 2013. Analysing the documents, a quick assessment of the planned directions towards the achievement of smarter European borders is made. The basic role of the RTP would be to ensure fast and simple border crossing for third country nationals at the external borders. The EES would take the challenge of establishing a more effective monitoring tool for travel flows and for the movements of third country nationals across the external borders.

The smart borders imitative highlights that the main sources of illegal migration are the so-called overstayers, i.e. persons who stay longer in a

Member State as it is allowed. Concerning the problem of law enforcement entry and exit dates are not centrally recorded.<sup>23</sup> The EES would allow the calculation of authorised stay basically for third country nationals in the Schengen area. Individual travel history of third country nationals obliged to obtain visa to enter *Schengenland* is crucial for frequent travel. Moreover, it is an essential part of first line risk assessment concerning visa exempted travellers, too.<sup>24</sup> The issue of the verified individual travel history links the EES with the RTP, since these records may help to estimate travellers' risks during the process of granting them registered traveller status. The EES is envisioned to replace the current system of stamping passports with an electronic registry of the dates and places of third country national admitted for short stays. Its main purpose would be to monitor authorised stay of third country nationals; it would enhance security at the moment of the crossing the external borders.<sup>25</sup> As it is planned in relation to RTP, EES shall use biometric identifier which is likely to be fingerprints and the digital facial image as it has been chosen for the EURODAC, VIS and SIS II, too.<sup>26</sup>

A fully operational VIS is a prerequisite for the smart European borders. Concerning mainly the EES (and the RTP to some extent), a reliably functioning VIS is needed in order to make maximum usage of the existing systems and tools.<sup>27</sup> VIS goes and EES could go hand in hand with Decision No 1105/2011/EU<sup>28</sup>. On the basis of the Decision, synergies with FADO<sup>29</sup> could be obtained in the long run.

The cornerstone of EES and RTP is speed. If the estimations are valid, using the current procedures, the rising number of border crossings at the external borders will need an extreme accrual of human resources. Therefore, it is logical to foster a technological shift. The smart borders initiative aims to reinforce checks while speeding up border crossings for regular travellers. EES combating overstayers helps law enforcement. Their interaction handles the problem of the increasing travel flow without compromising security.<sup>30</sup> VIS is the prerequisite for the EES, since VIS could be used in conjunction with identity checks within the Schengen area. Furthermore, using VIS, it would be possible for the EES to identify undocumented persons.<sup>31</sup> Obviously, before the establishment of the EES and RTP, there is a need for some changings in the Schengen Border Code, too.<sup>32</sup> Moreover, the smart borders package flashes the vision of Automated Border Control<sup>33</sup> for which more Member State commitments would be needed. The EES would have similar aims as the so-called US VISIT system

of the United States of America, which was seemingly not feasible.<sup>34</sup> Therefore, its lessons shall be taken into account at the time of the planning and of the operation of EES.

Other European policies foster the realisation of the examined smart borders initiative's aims. The envisioned systems could help the common visa policy. The Member States do not have enough capacity to manage the increasing travel flows which are the results of the common visa policy efforts. Having no EU-wide passenger name record (PNR), the EES (and to some extent the RTP) is needed to gather more information on travel flows into and out of *Schengenland*.<sup>35</sup> This information may help further policy formation with reliable data. In conclusion, the smart borders initiative is in favour of facilitating travel into and out of the Schengen area focusing on long-term goals and efficiency without compromising security. It merges the triple prerequisite of intelligent border control which is technology, automation and security.

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The second generation of the Schengen Information System is an enormous step in the internal security of the Schengen area. Its augmented capacity may combat future challenges. New categories and signals are incorporated into SIS II, which can be interlinked as well helping investigation and law enforcement. Eu-LISA is a common platform for all existing large-scale IT systems (SIS, VIS and EURODAC) being operational in the area of freedom, security and justice. Taking into account human rights concerns, the interoperability is not allowed within the central systems.

SIS II is clearly a milestone. However, it is a single internal security segment of *Schengenland*, since, for example, SIS, being not a border registration system, has never contained travellers' information. Therefore, new systems (EES and RTP) have appeared on the horizon to supplement and extend the scope of not only the operation of SIS but also the operation of all large-scale IT systems working in the area of freedom, security and justice.

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<sup>1</sup> Read more on large-scale IT systems: DÓCZI, Zoltán (2013), "The Development, the Integration and the Assessment of the Existing Large-Scale IT Systems in the Area of Freedom, Security and Justice." *Acta Juridica Hungarica*, Vol. 54. No. 2: 164–183.

<sup>2</sup> Schengen Implementing Convention, OJ L 239, 22.9.2000, Art. 92(1), p. 42.

- <sup>3</sup> It stands for Supplément d'Information Requis à l'Entrée Nationale.
- <sup>4</sup> PEERS, Steve (2008), "Key Legislative Developments on Migration in the European Union: SIS II." *European Journal of Migration and Law*, Vol. 10. No. 1: 79.
- <sup>5</sup> Schengen Implementing Convention, *op. cit.*, Art. 94(3), 43.
- <sup>6</sup> See: Schengen Implementing Convention, *op. cit.*, Art. 95-100., pp. 43–45.
- <sup>7</sup> Peers, Steve (2008), 80.
- <sup>8</sup> See the incorporation of the Nordic Passport Union into the Schengen area.
- <sup>9</sup> Peers, Steve (2008), 81–82.
- <sup>10</sup> Council Regulation (EU) No 541/2010 of 3 June 2010 amending Regulation (EC) No 1104/2008 on migration from the Schengen Information System (SIS 1+) to the second generation Schengen Information System (SIS II), OJ L 155, 22.6.2010, Art. 1(6), 22.
- <sup>11</sup> See: Council Regulation (EC) No. 871/2004 of 29 April 2004 concerning the introduction of some new functions for the Schengen Information System, including in the fight against terrorism, OJ L 162, 30.4.2004, 29-31; and Council Decision 2005/211/JHA of 24 February 2005 concerning the introduction of some new functions for the Schengen Information System, including in the fight against terrorism, OJ L 68, 15.3.2005, 44–48.
- <sup>12</sup> BALDACCINI, Anneliese (2008), "Counter-Terrorism and the EU Strategy for Border Security: Framing Suspects with Biometric Documents and Databases." *European Journal of Migration and Law*, Vol. 10. No. 1: 37–38.
- <sup>13</sup> BOELES, Pieter — DEN HEIJER, Maarten — LODDER, Gerrie — WOUTERS, Kees (2009), *European Migration Law*, Antwerpen and Oxford and Portland: Intersentia, 423. See also: Regulation (EC) No 1987/2006 of the European Parliament and of the Council of 20 December on the establishment, operation and use of the second generation Schengen Information System (SIS II), OJ L 381, 28.12.2006, Art. 26, 15.
- <sup>14</sup> DÓCZI, Zoltán (2013), "The Development, the Integration and the Assessment of the Existing Large-Scale IT Systems in the Area of Freedom, Security and Justice." *Acta Juridica Hungarica*, Vol. 54. No. 2: 172–174.
- <sup>15</sup> Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, OJ C 115, 9.5.2008, 1–388.
- <sup>16</sup> Treaty on the Functioning of the European Union, OJ C 83, 3.30.2010, Art. 67(2), 73.
- <sup>17</sup> *Ibid.*, Art. 77, 75–76.
- <sup>18</sup> Protocol (No 20) on the application of certain aspects of article 26 of the Treaty on the Functioning of the European Union to the United Kingdom and to Ireland, OJ C 115, 9.5.2008, 293–294. Protocol (No 21) on the position of the United Kingdom and to Ireland in respect of the area of freedom, security and justice, OJ C 115, 9.5.2008, 295–298. Protocol (No 22) on the position of Denmark, OJ C 115, 9.5.2008, 299–303.
- <sup>19</sup> Treaty on the Functioning of the European Union, *op. cit.*, Art. 78, 76.
- <sup>20</sup> COM (2011) 680 final Communication from the Commission to the European Parliament and the Council Smart borders – options and the way ahead, Brussels, 25.10.2011.
- <sup>21</sup> See: COM (2013) 95 final Proposal for a Regulation of the European Parliament and of the Council establishing an Entry/Exit System (EES) to register entry and exit data of third country nationals crossing the external borders of the Member States of the European Union, Brussels, 28.2.2013; and COM (2013) 97 final Proposal for a Regulation of the

European Parliament and of the Council establishing a Registered Traveller Programme, Brussels, 28.2.2013.

- <sup>22</sup> Smart Borders Package, Accessed October 27, 2013. [http://ec.europa.eu/dgs/home-affairs/what-is-new/news/news/2013/20130228\\_01\\_en.htm#/c](http://ec.europa.eu/dgs/home-affairs/what-is-new/news/news/2013/20130228_01_en.htm#/c).
- <sup>23</sup> COM (2011) 680 final, *op. cit.*, 3–4.
- <sup>24</sup> *Ibid*, 4.
- <sup>25</sup> *Ibid*.
- <sup>26</sup> *Ibid*, 12.
- <sup>27</sup> *Ibid*, 7–8.
- <sup>28</sup> Decision No 1105/2011/EU of the European Parliament and of the Council of 25 October 2011 on the list of travel documents which entitle the holder to cross the external borders and which may be endorsed with a visa and on setting up a mechanism for establishing this list, OJ L 287, 4.11.2011, 9–12.
- <sup>29</sup> FADO is an online system for exchanging information on false and authentic documents accessed solely by border control officers.
- <sup>30</sup> See: COM (2011) 680 final, *op. cit.*, 4.
- <sup>31</sup> See: COM (2011) 680 final, *op. cit.*, 11.
- <sup>32</sup> See also: COM (2013) 96 final Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 562/2006 as regards the use of the Entry/Exit System (EES) and the Registered Traveller Programme (RTP), Brussels, 28.2.2013.
- <sup>33</sup> Read more: Best Practice Operational Guidelines for Automated Border Control (ABC) Systems, FRONTEX Research and Development Unit, 31.8.2012, Accessed October 27, 2013. [http://www.frontex.europa.eu/assets/Publications/Research/Best\\_Practice\\_Operational\\_Guidelines\\_for\\_Automated\\_Border\\_Control.pdf](http://www.frontex.europa.eu/assets/Publications/Research/Best_Practice_Operational_Guidelines_for_Automated_Border_Control.pdf)
- <sup>34</sup> HAYES, Ben, Dr. and VERMEULEN, Mathias, Borderline: The EU's New Border Surveillance Initiatives, "Assessing the Costs and Fundamental Rights Implications of EUROSUR and the 'Smart Borders' Proposal", Heinrich Böll Foundation, 2012, Accessed October 27, 2013. <http://www.statewatch.org/news/2012/jun/borderline.pdf>, 70–71.
- <sup>35</sup> See: COM (2011) 680 final, *op. cit.*, 3.