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Investigation of the registration of foreign nationals in the Schengen Information System and the provision of information in this connection
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Report no. 2010/115
17 June 2010
GENERAL OBSERVATIONS
The Schengen Agreement allows people to travel between 25 European countries without undergoing border controls.1 Nevertheless, we must still ensure that people who should not be permitted to enter the Schengen Area are stopped at its border. The Schengen Information System was introduced to this end. An alert issued for a third-country national in this system means that he or she will be denied entry to Schengen countries for several years. In this sense, the system is a blacklist that has major implications. Partly in response to the questions and criticisms raised by the Meijers Committee, the National Ombudsman conducted an investigation into the practical implementation of the Schengen Information System.2

ORGANISATIONS INVOLVED
One notable aspect of the implementation of the Schengen Information System in the Netherlands is the involvement of several organisations. The Royal Military Constabulary makes a recommendation that an alert be issued in the system, and the Immigration and Naturalisation Service decides whether to proceed with the matter. The Royal Military Constabulary is then responsible for refusing entry at the border. The implications of an alert in the Schengen Information System can also, however, become apparent when a decision is taken on a visa application. This chain of implementation bodies with their own tasks and responsibilities, which come into play at different points, makes for a fragmented system, and assessment of whether an individual should be registered in the Schengen Information System is not clearly structured. It is, for example, unclear who decides if registration in the system is justified, and when.

FAR-REACHING IMPLICATIONS
Registration in the Schengen Information System has far-reaching implications. On arrival, visitors can be unpleasantly surprised by the fact that an alert has been issued for them in the Schengen Information System, meaning that they have to leave immediately or be placed in detention. This happened, for example, to a daughter from the United States who came to celebrate Christmas with her parents. A researcher at Radboud University in Nijmegen also faced problems as a result of an alert in the Schengen Information System when he wanted to return to the Netherlands to defend his PhD thesis. The most common reason for registration in the system is that the individual in question has overstayed their visa (often unintentionally) on a previous visit. Someone who flies home three days later than planned due to illness can in theory be registered in the Schengen Information System. Given the far-reaching implications this can have, it is important to ensure that no one is inaccurately or wrongfully registered in the system. No such guarantees are in place in the Netherlands.

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1 The Schengen countries are: Austria, Belgium, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Norway, Poland, Portugal, Slovenia, Slovakia, Spain, Sweden and Switzerland.
2 Standing Committee of Experts on International Immigration, Refugee and Criminal Law, see www.commissie-meijers.nl
NO TEST OF PROPORTIONALITY
Firstly, it is important that the proportionality of registering an individual in the Schengen Information System is carefully considered. Such a step should not simply be automatic, as it is at present, even though the Royal Military Constabulary does not issue an alert in all cases. As a result, implementation of the system is arbitrary. There must be systematic and serious consideration of proportionality, something which is lacking in current practice. The aim of the Schengen Information System is to guarantee safety and public policy (ordre public). Giving insufficient consideration to the proportionality of issuing an alert in the Schengen Information System has led to a situation whereby individuals who pose no threat to security or public policy are registered in the system.

WEAK LEGAL POSITION DUE TO INADEQUATE INFORMATION
Secondly, the legal position of those registered in the Schengen Information System is not adequately safeguarded. European and international law require effective legal remedies. The decision to register someone in the Schengen Information System must be made known to the person concerned, and it must also be clear to them how they can contest wrongful or inaccurate alerts.

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1 INTRODUCTION

Kenyan theologian David N. applied for a visa in order to attend his PhD award ceremony at Radboud University Nijmegen. The embassy in Nairobi refused to issue him with a short-stay visa for the Netherlands because there was an alert on him in the Schengen Information System. It turned out that, on returning to Kenya, David N. had not formally reported back. As a result, he had been labelled as an individual who has evaded supervision, and an alert was therefore issued in the SIS. He had been banned from entering the Schengen area for three years. Through his contacts, he was able to bring in a lawyer specialising in aliens law who managed to convince the Immigration and Naturalisation Service that the alert was disproportionate. The alert was removed and a visa issued at the last moment. David N. arrived in Nijmegen just in time to receive his doctorate.

1.1 BACKGROUND

The Schengen Information System is a joint tracking system designed to help maintain public policy and national security in the Schengen area. It was created to compensate for the abolition of internal border controls, as it was felt that far-reaching collaboration would be needed on police and criminal justice matters. The Schengen Information System is a computerised register which gives the police and criminal justice authorities in all the Schengen countries a permanent overview of the international tracking information supplied by other Schengen members. Alerts can be issued in the system on various categories of individuals and objects. It also contains information on undesirable aliens, individuals whose arrest is being sought for the purposes of extradition, missing persons, witnesses and things like firearms, counterfeit banknotes and stolen vehicles.

The information that the member states provide is stored in a central computer in Strasbourg to which every Schengen country is connected and has access. The system offers various possibilities for border controls and other police and customs checks. The authorities concerned need to be able to carry out such checks quickly. The system therefore has a kind of hit/no hit system, which allows the person carrying out the check to see whether the individual in question is the subject of an alert in the Schengen Information System and, if so, what measures are required. No background information concerning the precise reason for the alert is available in the system.

This investigation focuses only on the ‘undesirable aliens’ category (see 1.3 below) in the Schengen Information System. An alert designating a person an undesirable alien in the Schengen Information System has far-reaching implications for the individual concerned. In principle, they will be refused entry to the entire Schengen area for several years. This means that they will not be able to visit their family or come to live, work, study or conduct research here. Such measures are possible if they are necessary in the interests of maintaining public policy and national security. However, they must be justified.

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3 An alert means that someone is registered as an undesirable alien in the Schengen Information System, with the purpose of refusing them entry to the Schengen area in the future.
The National Ombudsman conducted this investigation because a lack of care in processing the data in this system can have major implications for individuals on whom an alert has been issued. Someone who has been designated an undesirable alien in the Schengen Information System can be refused a visa or entry to the entire Schengen area. Few exceptions are made. Undesirable aliens are a vulnerable group, as it is difficult for them to claim redress if they have been wrongly or inaccurately registered in the system, as they are usually outside the Schengen area. The Meijers Committee – the Standing Committee of Experts on International Immigration, Refugee and Criminal Law – asked the National Ombudsman to institute an investigation into the workings of the Schengen Information System.

1.2 AIM OF THE INVESTIGATION
The National Ombudsman investigated the extent to which the implementation of the system in the Netherlands constitutes proper action on the part of the government. He assessed whether the interests of the public are sufficiently safeguarded by the procedures of the Immigration and Naturalisation Service and the Royal Military Constabulary for the issuing of alerts for undesirable aliens. The report closes with a number of recommendations.

The investigation focused on two questions:
1. Is the procedure in the Netherlands that leads to a decision to issue an undesirable alien alert in the Schengen Information System such as to ensure that in each individual case a good balance is struck between the purpose of alerts (maintaining public policy and national security after the removal of internal border controls) and the consequences of registration in the Schengen Information system for the individual designated an undesirable alien (no entry to the Schengen area)?
2. Are individuals designated undesirable aliens in a position to claim redress in the event of a wrongful or inaccurate alert? The key issue here is whether the individual is informed adequately and in good time of the alert, and of the possibility of having a wrongful or inaccurate alert removed?

1.3 SCOPE
This investigation was limited to the issuing of alerts for aliens for the purpose of refusing them entry to the Schengen area. It concerned alerts issued by the Netherlands under article 96 of the Convention Implementing the Schengen Agreement.\(^4\)

Dutch legislation distinguishes between alerts issued declaring someone an undesirable alien and alerts issued for aliens already designated undesirable (see section 2.4). Where necessary, this distinction is also made in this report. The Schengen Information system also includes data on individuals whose arrest is being sought for the purposes of extradition, missing persons, witnesses, and vehicles. These categories were not

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\(^4\) The Schengen Implementation Agreement is the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the Kingdom of the Netherlands, the Kingdom of Belgium, the Federal Republic of Germany, the French Republic and the Grand Duchy of Luxembourg on the gradual abolition of checks at their common borders.
1. Introduction

The investigation dealt with the issuing of alerts designating a person an undesirable alien, and the way in which that person is informed of this fact. Since the majority of alerts are issued on the recommendation of the Royal Military Constabulary, it was decided to focus on the chain proceeding from the Royal Military Constabulary to the Immigration and Naturalisation Service and then to Bureau Sirene. The procedures of the Aliens Police were not investigated.

1.4 STRATEGY

In connection with the investigation, interviews were held at and a working visit was paid to the Immigration and Naturalisation Service, during which the Service showed how alerts are issued.

A number of staff at the Royal Military Constabulary were also interviewed, as well as people from Bureau Sirene, and the privacy officer at the National Police Agency (KLPD). Further information was obtained from the Meijers Committee and from Dr. E.R. Brouwer of Utrecht University, who wrote a PhD thesis on this issue (Digital Borders and Real Rights. Effective remedies for third-country nationals in the Schengen Information System, 2006). Interviews were also held with staff of the Data Protection Authority and with a lawyer specialising in aliens law.

The report of findings was presented to the Minister of Justice, the Minister of Defence and the National Police Agency in March 2010. The Meijers Committee was also given an opportunity to respond to the findings. The Minister of Justice, the Minister of Defence and the Meijers Committee issued a response to the findings, some aspects of which were changed as a result.

1.5 GUIDE FOR THE READER

Chapter 1 of this report is an introduction. It looks at the reasons behind and the aim of the investigation, and the way in which it was conducted. Chapter 2 examines the rules that determine whether an alert is issued for an individual in the Schengen Information System. Chapter 3 describes current practice, considering how alerts are actually issued and how the individual in question is informed. Chapter 4 sets out the National Ombudsman’s findings. The report closes with his recommendations.

1.6 SOME FIGURES

On 15 January 2010, the Schengen Information System contained 16,595 alerts issued by the Netherlands under article 96 of the Schengen Implementation Agreement. Some 85% of proposals to issue an alert received by the Immigration and Naturalisation Service came from the Royal Military Constabulary. These proposals mainly concerned people who had remained in the Netherlands without a valid visa for longer than three days (‘overstayers’), who were identified on leaving the country via Schiphol airport. New alert proposals also referred to aliens designated as undesirable under section 67 of the Aliens Act.

A much smaller number of alert recommendations come from the aliens police elsewhere in the country. Immigration and Naturalisation Service figures for 2009 show that a total of
43% of alerts are issued for people who have outstayed their visa or residence permit. In 40% of cases, the alert was issued in response to a designation as undesirable alien. The Immigration and Naturalisation Service adopts 95% of alert proposals made by the Royal Military Constabulary. Of course the other Schengen states also issue alerts for third-country nationals in the Schengen Information System. On 1 January 2010 a total of 929,546 individuals were registered in the Schengen Information System. Of them, 736,868 had been designated undesirable aliens under article 96 of the Schengen Implementation Agreement.

1.7 SCHENGEN INFORMATION SYSTEM II

The number of Schengen states has grown over the years. Given the technical constraints of the Schengen Information System, it was decided that a new system should be developed, known as Schengen Information System II, to allow all EU member states access and to enable new technologies to be applied. The plan was for the new system to be operational in 2006. Test results have however shown that the system still has many problems. It is therefore not expected to be introduced before the end of 2011. The original Schengen Information System has nevertheless been adapted (SISone4all) to allow some functions to be used, partly with the aim of allowing a number of new EU member states access to the system.

Schengen Information System II will not merely offer more technical possibilities, the content will also differ. The Schengen Information System II Regulation (Regulation no. 1987/2006), which has yet to enter into force, includes a more rigorous requirement that every alert be assessed to establish whether it is appropriate and relevant and the case sufficiently important. It also explicitly states that the person concerned must be informed of the alert.
2 RULES LEADING TO AN ALERT IN THE SCHENGEN INFORMATION SYSTEM

2.1 INTRODUCTION
This chapter describes the rules that determine whether an alert may be issued for an individual in the Schengen Information System. They are the rules as applied in practice in the workplace by the Royal Military Constabulary and the Immigration and Naturalisation Service. The investigation found that implementation is based on rules set out in the Aliens Act implementation guidelines 2000. These guidelines constitute the entire body of rules and general instructions to all public officials charged with implementing the Aliens Act and other aliens legislation. They determine the practical implementation of the legislation.

2.2 NSIS AND CSIS
Every Schengen country has developed its own national information system (NSIS) on the basis of agreed specifications, which is linked via the Central Schengen Information System (CSIS) in Strasbourg (France) to the NSIS systems of the other Schengen countries. The central computer, to which every Schengen country is connected, is in Strasbourg and can be accessed by all Schengen countries.
Changes are entered in the NSIS. The NSIS systems are synchronised virtually continuously via the CSIS. The register includes data on the following:
- individuals whose arrest is being sought for the purposes of extradition
- aliens who must be refused entry to the Schengen area
- missing persons
- individuals whose whereabouts must be established
- individuals who must be subject to surveillance, either discreet or overt
- missing minors, with a request to locate and return them
- vehicles registered as stolen or missing in some other way
- blank and named identity documents that have been reported stolen

2.3 THE INFORMATION PROCESSING CHAIN: ROYAL MILITARY CONSTABULARY, IMMIGRATION AND NATURALISATION SERVICE, BUREAU SIRENE
The Royal Military Constabulary and the Aliens Police submit alert proposals to the Immigration and Naturalisation Service. The Immigration and Naturalisation Service is responsible for the substance of the alerts issued for undesirable aliens. Every country that is connected to the CSIS via an NSIS has established a special contact office, known as Bureau Sirene. Bureau Sirene is responsibility for the proper functioning of the NSIS in an administrative sense. It assesses whether alerts in the Schengen Information System conflict with any other alerts. Sirene Nederland is part of the National Criminal Intelligence Department at the National Police Agency. It acts as an enquiries office for all

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5 Aliens Act implementation guidelines 2000, Chapter A3/9, Alerts
cases connected with the NSIS. All ‘hits’ also have to be reported to Bureau Sirene. The department also provides advice on alerts, wanted notices, missing persons reports and all other issues associated with international legal assistance. Any questions from other countries relating to alerts issued by the Netherlands are passed on to Bureau Sirene, which asks the Immigration and Naturalisation Service for the requested information by email or telephone. The Schengen Information System does not state the reason for the alert or give any other background information. Anyone who accesses the system sees only that the alert was issued under article 96 of the Schengen Implementation Agreement. Though it is possible to include more information in a separate window, this cannot be accessed by the other Schengen countries. The Immigration and Naturalisation Service will provide the extra information on request. Article 25 of the Schengen Implementation Agreement provides for consultation between the participating countries. If such consultations lead to an alert needing to be removed from the Schengen Information System, perhaps because another country is prepared to issue a residence permit, the country issuing the alert retains the right to put the individual in question on its national list of alerts (in the Netherlands, this is in the national list of wanted and missing persons, the OPS).

Despite an alert in the Schengen Information System, a third-country national had been issued a residence permit for the Netherlands, on humanitarian grounds. The alert had been issued by Italy which, despite repeated requests by the Netherlands, had failed to remove the alert from the Schengen Information System. As a result, the individual in question was arrested in transit through the Netherlands on the way to Hungary.

2.4 RULES DETERMINING WHETHER AN ALERT IS ISSUED

The Schengen Implementation Agreement sets out rules for the processing of data in the Schengen Information System and provisions to protect the rights of the individual. Alerts for undesirable aliens in the Schengen Information System must comply with the criteria set out in article 96 of the Agreement, which stipulates that data on aliens for whom an alert has been issued for the purposes of refusing entry be entered on the basis of a national alert resulting from decisions taken by the competent administrative authorities or courts in accordance with the rules of procedure laid down by national law. Decisions may be based on a threat to public policy or national security or to national security which the presence of an alien in national territory may pose. Decisions may also be based on the fact that the alien has been subject to measures involving expulsion, refusal of entry or removal, including or accompanied by a prohibition on entry or, where applicable, a prohibition on residence, based on a failure to comply with national regulations on the entry or residence of aliens. Article 94 of the Schengen Implementation Agreement stipulates that the country issuing an alert must determine whether the case is important enough to warrant an alert in the Schengen Information System. This requirement has been tightened up in the SIS II Directive, which is not yet operational, under which the member state must determine
whether the case is adequate, relevant and important enough to warrant entry of the alert in SIS II.

In the Netherlands, section 3 of the Aliens Act stipulates, among other things, that in cases other than those governed by the Schengen Borders Code, entry to the Netherlands will be denied to aliens who constitute a threat to public policy or national security. Section 3, subsection two of the Aliens Act states that rules will be laid down by or pursuant to an order in council concerning refusal of entry under the Act or for the implementation of the Schengen Borders Code.

Article 2.9 of the Aliens Decree 2000 states in this connection that entry to the Netherlands must at any rate be denied on the basis of the fact that an alien represents a threat to public policy or national security, as referred to in section 3, subsection one of the Act, if an alien is the subject of an alert issued for the purposes of refusing entry in the national register of wanted and missing persons or in the Schengen Information System. Article 2.9, paragraph two stipulates that the minister may choose not to refuse entry if he regards this as necessary on humanitarian grounds, on grounds of national interest or because of international obligations. An individual may be granted entry for these reasons, despite the fact that he is the subject of an alert in the Schengen Information System. The general rule is that an alien for whom an alert has been issued will not be permitted to enter the country, as he is regarded as a threat to public policy or national security.

Chapter 9 of the Aliens Act implementation guidelines sets out in more detail the reasons for issuing an alert. The guidelines distinguish between two types of alert issued for undesirable aliens pursuant to article 96. These are: orders declaring a person to be an undesirable alien under section 67 of the Aliens Act (known by the Dutch acronym ONGEW) and undesirable alien alerts (Dutch acronym OVR).

2.4.1 Order declaring a person to be an undesirable alien (ONGEW)
By order of the Minister, an alien may be declared undesirable on certain grounds laid down in the Aliens Act (see section 67 of the Act). In this case, registration in the NSIS occurs after the alien has been expelled from the Netherlands, or has exhausted all the legal remedies to contest the order declaring him undesirable, or has not been given leave to remain in the Netherlands pending the outcome of an appeal. The declaration means that the alien may not reside legally in the Netherlands. As a result, as long as the declaration remains valid, this individual will not be allowed to enter or remain in the Netherlands. Someone who has been declared undesirable will no longer be granted entry to the Netherlands, unless his undesirable status is temporarily suspended. The rule is that persons who have been declared undesirable remain under alert in the Schengen Information System for as long as their undesirable status remains valid.

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2.4.2 Undesirable alien alerts (OVR)

An alert for an undesirable alien is a less simple matter. All the situations listed below lead to the issuing of an alert in the NSIS. The Aliens Act implementation guidelines state that an undesirable alien alert is a special instruction from the minister to public officials responsible for border controls and the supervision of aliens, which is issued in the interests of public policy or national security. Under section 12, subsection 1d of the Aliens Act, an undesirable alien is not permitted to stay in the Netherlands for a conditional period pending the decision on an application for a residence permit. The duration of the ‘OVR’ status depends on the circumstances that gave rise to the alert. An alert will be issued in the following circumstances:

a. expulsion of a non-criminal alien: duration two years;
b. expulsion of an alien who has been the subject of a police report concerning a crime associated with drugs trafficking, but who has not yet been prosecuted: duration two years;
c. expulsion after a custodial sentence of up to three months: duration two years;
d. expulsion after a custodial sentence of three to six months: duration two years;
e. expulsion after a custodial sentence of six months or longer (other than a declaration of undesirability under section 67 of the Aliens Act): duration five years;
f. refusal of entry/expulsion of an alien who has used a counterfeit/falsified travel or identity document or knowingly showed a travel or identity document that did not belong to him: duration five years;
g. in the event that supervision has been evaded: this is the case if an alien does not submit to a measure depriving him of his liberty, or is the subject of supervisory measures as listed in articles 4.37 to 4.39 and articles 4.42 to 4.52 of the Aliens Decree: duration three years;
h. if, in the opinion of the minister, there is concrete evidence that the alien poses a threat to national security: duration ten years.

Re. g:
This is by far the most common reason for issuing an alert. Apart from outstaying a visa by more than three days, it also covers evading supervision in other ways. The following obligations are referred to as supervisory measures:

- aliens who are legally resident in the Netherlands must report any change of address or whereabouts to the chief of police within five days, unless they are registered as residents with the local authority in their new place of residence;
- aliens who are not legally resident in the Netherlands must report any change of address or whereabouts in the Netherlands if the Minister of Justice so demands;
- aliens must inform the chief of police if they establish their principal place of residence outside the Netherlands;
- aliens who are not legally resident in the Netherlands must immediately report to the chief of police, in person, in the local authority area in which they are residing;
- aliens who are legally resident in the Netherlands as referred to in section 8i of the Act (conditional period) and who are seeking or commencing work must report this
fact immediately to the chief of police, unless they qualify for one of the exceptions referred to in article 4.24 of the Aliens Decree;

- aliens with a temporary residence permit who no longer fulfil the conditions under which the residence permit was issued must report this fact immediately to the chief of police;

- aliens who are legally resident in the Netherlands as referred to in section 8a-e or l of the Act, whose document providing evidence of their legal status has been lost or become unsuitable for identification purposes, must report this fact immediately in person to the chief of police;

- aliens must furnish a passport photograph and fingerprints at the request of a border control officer or an official charged with the supervision of aliens;

- aliens arriving in the Netherlands for a stay exceeding three months must submit to a tuberculosis test;

- aliens who are legally resident in the Netherlands as referred to in section 8i of the Act and who have come to the Netherlands for a stay exceeding three months must report to the chief of police in person within three days of their arrival;

- aliens who are legally resident in the Netherlands as referred to in section 8i of the Act and who have come to the Netherlands for a stay not exceeding three months must report to the chief of police in person within three days of their arrival;

- aliens in possession of a visa or a border crossing document on which a competent authority has noted that the holder must report to the aliens police must report to the chief of police in person within three days of their arrival in the Netherlands;

- aliens who are not legally resident and are awaiting departure or expulsion must report regularly to the chief of police. Aliens who are awaiting a decision on their residence application and who may have been given leave to await that decision in the Netherlands must also report to the chief of police;

- aliens must surrender their residence documents for the Netherlands to the chief of police once they are no longer legally resident, or they establish their principle place of residence outside the Netherlands, or when they acquire Dutch nationality.

In accordance with the Aliens Act implementation guidelines, any failure to comply with these obligations constitutes a reason to issue an alert for the alien in the Schengen Information System.
2.5 RULES DETERMINING WHETHER THE INDIVIDUAL IN QUESTION IS NOTIFIED

The Aliens Act implementation guidelines provide a frame of reference for public officials working with the Schengen Information System. The guidelines do not state that an individual must be informed of the fact that an alert has been issued for them in the Schengen Information System. Like the Schengen Implementation Agreement, they only refer to the right to inspection and the right to request correction. The Aliens Act implementation guidelines state that the Immigration and Naturalisation Service must, at any rate, remove an alert from the NSIS once it has expired. An alert will be removed if there are changes in circumstances that necessitate this. According to the guidelines, this is at any rate the case if:

a. the basis for the alert no longer exists (for example because the order declaring the person to be an undesirable alien has been withdrawn);
b. the alien demonstrates that the alert was issued on unjustified grounds;
c. the alien is granted permission to visit the Netherlands;
d. the alien possesses a valid residence permit for the Netherlands and is the subject of an alert in the SIS issued by another Schengen state;

The State Secretary for Justice has made the following statement concerning the issue of adequately informing the person for whom the alert has been issued:7

‘… The grounds for issuing an alert are clear. A third-country national who may assume on the basis of his actions that an alert is likely to be issued may invoke his right to information on the alert. If he finds he is the subject of an alert, he may then have recourse to the available remedies to have the alert removed…’

Everyone has the right to know whether his details have been registered in the Schengen Information System. Anyone who is registered in the system has the right to request that the data be corrected, supplemented, removed or protected if they are factually inaccurate, incomplete or not relevant for the purpose or purposes for which they were registered, or are otherwise unlawfully stored. The right to inspection and correction or removal is enshrined in articles 109 and 110 of the Schengen Implementation Agreement and sections 35 and 36 of the Personal Data Protection Act.8 The Aliens Act implementation guidelines refer to sections 35 and 36 of the Personal Data Protection Act. There is no mention of sections 33 and 34 of the Personal Data Protection Act which state that, with some exceptions, individuals must be informed that their data have been collected, and for what purpose.

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7 Memorandum to the Meijers Committee on practical problems associated with alerts in the Schengen Information System, 2 April 2009.
8 For the right to inspection, correction and removal, the Aliens Act implementation guidelines refer to sections 35 and 36 of the Personal Data Protection Act. However, the National Police Agency maintains that the Personal Data Protection Act applied to aliens alerts only until 1 January 2008, and that since the Police Data Act entered into force on that date – under which the term ‘police data’ includes personal data stored by the police for the implementation of certain special items of legislation (including the Aliens Act) – it must be assumed that the art. 96 alerts in the NSIS also fall under the Police Data Act.
Aliens submit requests for inspection, correction or removal of data relating to them in the Schengen Information System to the National Police Agency, which forwards the request to the Immigration and Naturalisation Service. The Immigration and Naturalisation Service must provide a decision on the request, in writing, within four weeks of receipt. This is a decision within the meaning of the General Administrative Law Act, against which an objection or appeal may be lodged. Before lodging an appeal, an alien may submit a request for mediation to the Data Protection Authority (CBP), which is authorised to mediate or advise on such requests. If mediation fails to resolve the situation, the alien can still lodge an appeal against the decision. In practice, mediation is used only occasionally in relation to the Schengen Information System.

2.6 CLOSING REMARKS
Alerts are issued for aliens in the Schengen Information System for the purpose of refusing them entry. The purpose of the Schengen Information System is to maintain public policy and security within the Schengen area. Alerts must be viewed in this light. Alerts are issued for aliens on the basis of a national alert issued as the result of a decision by the competent administrative or criminal justice authorities. This decision may only be taken by a body competent to do so. In the Netherlands, in the case of undesirable aliens, this is the Immigration and Naturalisation Service. The criteria in the Aliens Act implementation guidelines that indicate whether an order must be issued declaring an individual to be an undesirable alien, or the fact that someone has been declared an undesirable alien pursuant to section 67 of the Aliens Act, determine whether an alert must be issued for them in the Schengen Information System. Under the Aliens Act implementation guidelines, public officials charged with border control or with the supervision of aliens must always submit a proposal for an alert to the Immigration and Naturalisation Service when they encounter aliens who meet these criteria.

The Aliens Act implementation guidelines do not state that an alien must be informed that he is or will be the subject of an alert in the Schengen Information System. It is however noted that the individual has the right to information on request, as well as the right to request correction or removal of the alert. The decision as to whether to grant such a request is a decision within the meaning of the Administrative Law Act, which means that it is possible to lodge an objection or appeal against it.
3 SCHENGEN INFORMATION SYSTEM ALERTS IN PRACTICE

3.1 INTRODUCTION
This section describes how alerts are actually issued in the Schengen Information System, covering the role of the Immigration and Naturalisation Service and the National Police Agency’s Bureau Sirene. The Royal Military Constabulary submits a proposal for an alert to the Immigration and Naturalisation Service, which then decides whether to adopt the proposal. Bureau Sirene administers the data in the Netherlands’ NSIS, verifying the data entered by the Immigration and Naturalisation Service.

3.2 IMPLICATIONS OF AN ALERT DESIGNATING A PERSON AN UNDESIRABLE ALIEN IN THE SCHENGEN INFORMATION SYSTEM
A person for whom an alert has been issued in the Schengen Information System will in principle be refused entry to the Schengen area. The purpose of alerts in the Schengen Information System issued under article 96 of the Schengen Implementation Agreement is to refuse the alien in question entry to the Schengen area for a certain length of time, in the interests of maintaining public policy and national security in the Schengen area. Article 25, paragraph one of the Schengen Implementation Agreement stipulates that a country considering whether to issue a residence permit to an alien for whom an alert has been issued for the purpose of refusing entry must first consult the country that issued the alert. The residence permit may be issued only for pressing reasons, particularly on humanitarian grounds or because of international obligations. If the alien is issued with a residence permit, the Contracting Party that issued the alert will withdraw the alert, but may register the alien in question in its own national system. The Schengen Borders Code also in principle stipulates that third-country nationals may not enter if they are the subject of an alert in the Schengen Information System issued for the purpose of refusing entry. In practice, an alert in the Schengen Information System therefore means that the person will in principle no longer be admitted to the territory. Exceptions may be made on humanitarian grounds, on grounds of national interest or because of international obligations.

If an alien reporting to a border control post in order to enter the Netherlands is found to be the subject of an alert in the Schengen Information System (this is known as a ‘hit’), he will be refused entry by the public official charged with border control, who will report the fact to Bureau Sirene. This happens on a daily basis. Bureau Sirene then informs the Immigration and Naturalisation Service. If the hit concerns an alien entering with a valid visa or residence permit, this is regarded as conflicting information, and the Immigration and Naturalisation Service will be contacted. The Immigration and Naturalisation Service then decides if the person in question should be allowed to enter. If an alien for whom an alert has been issued makes a further request for entry, he will in principle be refused. The Immigration and Naturalisation Service decides on regular requests for entry or for asylum. The Schengen countries apply different criteria for registration in the Schengen Information System.
A sailor from Cape Verde was working for a Dutch shipping company. He applied to the River Police for a two-week extension to his Schengen visa, which was valid until 26 March 2006. He had worked as a sailor for years, and had therefore been issued a Schengen visa on dozens of occasions. He had never had any dealings with the police or criminal justice authorities. The sailor needed the extension to his visa because the ship on which he was due to sign on was scheduled to arrive in Rotterdam on 10 April 2006. His application was refused verbally and without explanation. On 10 April 2006 he reported for duty on the ship, planning to disembark again in the Netherlands 14 days later. When he attempted to do so, he was refused entry, as an alert had been issued for him in the Schengen Information System. It later appeared that the reason for the alert was that he had remained in the Netherlands for 16 days without a valid visa (from 25 March to 10 April 2006). The alert caused the sailor major problems. He had a Dutch partner and child, and was due to marry on 28 September 2006. His ship was to dock in a number of European countries and arrive in Romania on 22 September 2006. He planned to travel from Romania to the Netherlands for his wedding, but was unable to do so because of the alert.

The applicant’s lawyer asked the Immigration and Naturalisation Service to remove the alert from the Schengen Information System. On 6 November 2006 the Immigration and Naturalisation Service informed the lawyer that the applicant was registered in the Schengen Information System because he had evaded supervision as an alien by overstaying his visa in the Netherlands. According to the Immigration and Naturalisation Service, his registration was an objective fact (record of fact) and had come about in accordance with the law. The alert would automatically expire on 10 April 2009. The Immigration and Naturalisation Service pointed out that despite the alert in the Schengen Information System, any country with access to the Schengen Information System was free to admit the individual in question after weighing up the interests involved. He could therefore request entry despite the alert. After the alert was issued for him in the Schengen Information System, the individual in question repeatedly requested entry to the Netherlands for short periods, and was refused on each occasion. After an exchange of correspondence and various proceedings the Immigration and Naturalisation Service decided to remove the alert from the Schengen Information System on 21 June 2007.

3.3 UNDESIRABLE ALIEN ALERTS IN PRACTICE

If officers of the Royal Military Constabulary working at the border crossing points at Schiphol encounter an alien who, according to the criteria in the Aliens Act implementation guidelines, is liable for registration in the Schengen Information System, they complete forms M 93 (notification of alert) and M 100 (which indicates ‘independent departure by an alien found to be illegal during a departure check’), and an official report is drawn up, with the aid of an interpreter if necessary. These forms are then passed to the head of the post who submits the alert proposal to the Immigration and Naturalisation Service. The decision as to whether the alert proposal should be passed on to the Immigration and Naturalisation Service lies with the head of the border crossing post. The head bases his decision on the criteria in the Aliens Act implementation guidelines 2000 (A3/9.2.1 and A3/9.2.2), as referred to in section 2.4 of this report. If one of these criteria is met, the head will in principle submit a request for an alert to the Immigration and Naturalisation Service.
There are situations in which, although his situation meets the criteria in the Aliens Act implementation guidelines, an alien’s name will not be put forward to the Immigration and Naturalisation Service.

- If, in accordance with the Aliens Act implementation guidelines, an individual is liable for an alert but his flight is about to depart, catching the flight will take precedence over checking the story and completing the formalities for an alert to be issued. The priority in such cases is to enable people to depart. If officers of the Royal Military Constabulary decide to let someone exit the country without issuing an alert proposal, no official report will be drawn up. The person will however be entered in the Royal Military Constabulary’s system, known as the Aliens Basic Information System. The Immigration and Naturalisation Service will be unaware that someone who met the criteria for an alert under the Aliens Act implementation guidelines did not have their name put forward, since no proposal for an alert has been made. The decision-making process is not transparent.

- An individual who claims to have kept to the terms of their visa but does not have an entry stamp must prove that they have not overstayed their visa. The Royal Military Constabulary must be able to verify their story on the basis of documentation. If the Royal Military Constabulary regards the information supplied as adequate, a correction stamp will be entered in the passport, allowing the period of validity to be calculated. If the decision is taken to allow the individual to depart without proposing that an alert be issued, no official report will be drawn up, nor will any proposal be submitted to the Immigration and Naturalisation Service.

- The Royal Military Constabulary might decide for humanitarian reasons (the ‘human factor’) not to propose that an alert be issued for someone. This might be because of the number of days that the individual has overstayed his or her visa, or the reasons for this (e.g. visit to a hospital, a death, pressing economic interest etc.). This occurs only on an incidental basis, however. No criteria have been drawn up to support such decisions, and the decision-making process is not transparent.

The Royal Military Constabulary mentioned an example in which the ‘human factor’ played a role. An elderly woman reported to the border crossing point at Schiphol to leave the country. Her Dutch visa had expired two weeks before. She was ill and was returning to her country of origin to die. The Royal Military Constabulary therefore decided not to propose that an alert be issued in the Schengen Information System.

A Turkish woman spent 14 days in a Dutch hospital following a road accident. As a result, she left for Turkey a week late. An alert was issued for the woman in the Schengen Information System following a proposal.

The Royal Military Constabulary most commonly issues alerts (in 43% of cases) on the basis of ground g in the Aliens Act implementation guidelines. The other commonly used ground is designation as an undesirable alien pursuant to section 67 of the Aliens Act.

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Ground g concerns evading supervision. An alert may be issued on this ground if an alien does not have an entry stamp and is unable to prove where and when he entered the Schengen area, or if the entry stamp in his travel document indicates that he has overstayed his visa by more than three days. These people are known as ‘overstayers’. They include aliens who have remained in the Netherlands for more than three days after their tourist visa expired, or aliens who have not departed the country after an asylum procedure, but who later decide to return to their country of origin of their own volition, with the aid of the International Organization for Migration (IOM). Aliens for whom alerts are issued on this ground are entered in the Schengen Information System for a period of three years. The other grounds stated in the Aliens Act implementation guidelines 2000, such as ‘expulsion of non-criminal aliens’ are rarely used.

The Immigration and Naturalisation Service decides whether the Royal Military Constabulary’s proposal should be adopted, and whether an alert should actually be issued. The Immigration and Naturalisation Service is responsible for the quality of alerts in the Schengen Information System. In over 95% of cases, it adopts the alert proposals of the Royal Military Constabulary. In these cases, the Immigration and Naturalisation Service then actually enters the alert in the Schengen Information System. Only if there is a clear error will the alert not be entered into the system. The Immigration and Naturalisation Service only verifies that the alert criteria listed in the Aliens Act implementation guidelines have been met. It also checks whether the facts presented in the official report are correct. If, for example, it states that the alien was detained, the Immigration and Naturalisation Service will check whether this is consistent with the Correctional Institutions Service’s detention list. It also checks its own system to see if the individual in question is the subject of any current proceedings. Only if there are any doubts, or if incomplete information has been provided, is the Immigration and Naturalisation Service’s file accessed, information sought from other bodies (e.g. court judgments) or other information sources consulted (e.g. the Criminal Records System). If an alert is actually issued in the Schengen Information System, an authorised official of the Immigration and Naturalisation Service enters the data in the system using a code. The data are first entered in the national system. A second official then checks the accuracy of the alert. The alert is then confirmed with a press of a button, and immediately appears in the CSIS, the computer in Strasbourg. The Immigration and Naturalisation Service therefore enters the alert directly into the Schengen Information System.

The National Police Agency is responsible for ensuring the NSIS functions properly (in an administrative sense). The Immigration and Naturalisation Service is responsible for the substance of article 96 alerts. The National Police Agency checks that the alerts entered by the Immigration and Naturalisation Service do not conflict with other alerts. Bureau Sirene manages the data in the NSIS and checks the ‘input’ from the Immigration and Naturalisation Service.

The Aliens Act implementation guidelines, A3/9.6.3.1, at a, states that officials may, on the basis of an individual assessment, consider removing the alert on an overstayer after six months if they conclude that the basis for the alert no longer exists due to changed circumstances. To establish whether changed circumstances require removal of the alert, the official must establish whether the alien no longer poses a threat to public policy. For this to be the case, they must satisfy the following conditions:

- this must be the first time that the alien has been the subject of an alert for overstaying his visa;
- he must have no criminal record.
Naturalisation Service. It also checks retroactively whether alerts comply with all the criteria.

For example, *Bureau Sirene* checks whether an alert conflicts with any missing or wanted person alert. If so, *Bureau Sirene* will ask the Immigration and Naturalisation Service to contact the body that entered the wanted or missing person alert. It must then be established which alert is most important. If the alien in question is already the subject of an alert based on article 95 of the Schengen Implementation Agreement (wanted or missing person), an alert based on article 96 of the Schengen Implementation Agreement (refusal of entry to an alien) may also be issued. This means that the alien may appear twice in the Schengen Information System, on different grounds. Such situations are tolerated on the basis of arrangements between the 25 Schengen countries. It might also be that several countries issue an alert for the same individual, under article 96, for example.

Every month, the head of the border crossing post and the Operational Support Brigade of the Royal Military Constabulary meet with the Immigration and Naturalisation Service at Schiphol. The Royal Military Constabulary will if necessary contact the Immigration and Naturalisation Service in Zwolle, which processes proposed alerts, to discuss individual cases, if it is not sure which category of alert is applicable, for example. The Immigration and Naturalisation Service has pointed out that it is sometimes difficult to explain the difference between the various categories of undesirable alien set out in the Aliens Act implementation guidelines 2000. The difference between ‘expulsion of non-criminal alien’ and ‘evading supervision’ (which includes overstayers) is difficult, for example. An alien will often fall into both categories, so a choice has to be made. If, in the alert proposal, the Royal Military Constabulary indicates that an alert can be issued on several grounds, the Immigration and Naturalisation Service will opt for the ‘most serious’ category. In other words, the alert with the longest period of validity. In the case of undesirable aliens, the date of departure given in the documents from the Royal Military Constabulary or the Aliens Police is adopted. The Immigration and Naturalisation Service does not weigh up any interests if the Royal Military Constabulary or the Aliens Police makes a proposal. As indicated in the Aliens Act implementation guidelines 2000, the different types of alert are valid for periods ranging from two to ten years. Once this period has elapsed, the alert must be automatically removed. However, it is not possible to enter different terms of validity in the Schengen Information System, where each alert is automatically valid for three years. A month before the expiry date, an assessment is made to determine whether the alert should be extended. This will often be necessary when an alien has been declared undesirable. One month before the three years are up, *Bureau Sirene* (at the National Police Agency) sends a warning that the expiry date is imminent. The Immigration and Naturalisation Service has its own Excel file in which it keeps a record of the correct expiry dates, which differ from the standard dates in the Schengen Information System, in order to ensure that alerts are removed or extended at the correct time.

### 3.4 DESIGNATION AS AN UNDESIRABLE ALIEN IN PRACTICE

Sometimes the Royal Military Constabulary encounters an alien entering or leaving the country who meets the criteria for designation as an undesirable alien by the Immigration
and Naturalisation Service, pursuant to section 67 of the Aliens Act. In such cases, the Royal Military Constabulary submits a proposal that the alien be declared undesirable to the Immigration and Naturalisation Service. If the Immigration and Naturalisation Service decides to declare the person to be an undesirable alien, the Royal Military Constabulary will serve the designation order on the alien if possible. If this is not possible, it will be published in the Staatscourant (Government Gazette). After the serving or publication of the designation order, an alert will be issued for the alien in the Schengen Information System. The instructions for Designation of Undesirable Aliens pursuant to section 67 of the Aliens Act describe the procedure that the Royal Military Constabulary must follow step by step. The criteria set out in section 67 of the Aliens Act must be met for an alien to be declared undesirable. Generally speaking, the alien must have been found guilty of a criminal offence by a court of law.

The Immigration and Naturalisation Service file is always consulted when an undesirable alien designation order is issued, to check among other things whether notice has been given of the designation order, and whether proceedings are still in progress. The check will, for example, establish whether the designation order has already been served on the alien or, if this was not possible, published in the Staatscourant. The alert for the alien declared undesirable will take effect on the date on which the alert becomes irrevocable, after any objection or appeal procedure is completed.

The Royal Military Constabulary arrests an alien with invalid travel and identity documents (counterfeit or falsified documents, or the travel and identity documents of another person). Prior to 2008, a person without valid travel and identity documents would generally not be permitted to enter the country under aliens law (inadmissible), and would be sent back to their country of origin. This would not be reported in the Schengen Information System. Nowadays, they would face criminal prosecution. Now that the matter is a criminal offence, the person in question can be given an on-the-spot penalty at Schiphol. If found guilty, they may be declared an undesirable alien under section 67 of the Aliens Act, and an alert will be issued for them in the Schengen Information System. The number of undesirable alien designation orders has risen sharply since criminal prosecutions have been brought for non-compliance with article 231 of the Criminal Code (travelling with a counterfeit or falsified travel document).

### 3.5 NOTIFICATION OF ALERT

#### 3.5.1 Undesirable aliens

Since June 2009, Royal Military Constabulary procedure has stated that an alien must be verbally notified that the Royal Military Constabulary plans to submit a proposal to the Immigration and Naturalisation Service for an alert to be issued in the Schengen Information System. The official report must state whether such notice has been given, using the following wording:

> ‘I, the reporting officer, informed the individual concerned (in [language] through an interpreter) that in view of the fact that he/she had overstayed his/her visa, by means of this official report a request would be submitted to the Immigration and Naturalisation

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*de Nationale ombudsman*
Service for an alert to be issued for the purpose of refusing him/her entry to the Schengen area.

The Royal Military Constabulary estimates that verbal notification was given in 80% of cases up to June 2008. This was neither stated in the official report nor recorded in any other way.

3.5.2 Aliens declared undesirable
The Royal Military Constabulary informs the alien in writing of the intention to declare them to be an undesirable alien pursuant to section 67 of the Aliens Act. The letter is available in ten languages. If necessary, the person concerned is informed with the aid of an interpreter. Explaining the implications of this status is a labour-intensive process for the Royal Military Constabulary. If the person concerned is indeed designated an unwanted alien, he will receive a designation order and an information sheet, available in a range of languages, explaining that the designation order means that they will not be able to enter the Schengen area.

3.6 INSPECTION, CORRECTION AND REMOVAL IN PRACTICE
The vast majority of requests submitted to the National Police Agency are requests for inspection, from aliens who wish to know whether they have been registered in the Schengen Information System. Some two hundred such requests are received each year. In 80% of cases, the requests concern alerts based on article 96 of the Schengen Implementation Agreement. These are simple requests which can be dealt with by stating whether and why an alert has been issued.

Requests for removal from the Schengen Information System are forwarded to the Immigration and Naturalisation Service. Requests for mediation by the Data Protection Authority are rare.

The Immigration and Naturalisation Service stringently applies the rules in the Aliens Act implementation guidelines when considering requests for removal. As long as the criteria in the guidelines are met, the Immigration and Naturalisation Service will maintain the alert. The Aliens Act implementation guidelines (A3/9.6.3.1) state that an alert may be removed if circumstances have changed such that it is necessary to remove the alert. This will at any rate be the case if:

a. the basis for the alert no longer exists (e.g. because the undesirable alien designation has been withdrawn);
b. the alien shows that the alert was issued on unjustified grounds;
c. the alien is granted leave to remain in the Netherlands;
d. the alien is granted leave to remain in another member state.

There is no test of proportionality. The Aliens Act implementation guidelines state that humanitarian reasons do not in themselves constitute sufficient grounds to remove an alert. Humanitarian reasons may however be considered in deciding whether to grant a request for entry.

The following quote from a 2006 letter from the Immigration and Naturalisation Service to a lawyer is illustrative in this respect:
‘… In summary, the Schengen Information System is a record of fact (whereby in this case no inaccuracies have been found in the records) and it is up to the authorities to weigh up the facts and interests in considering any subsequent request for entry …’

Information from lawyers has suggested that inaccurate or disproportionate alerts can sometimes cause people great problems. An alert will not be removed simply because it is disproportionate. The discretion to allow an individual to enter the country despite an alert in the Schengen Information System is based on humanitarian grounds, grounds of national interest or international obligations.

The Immigration and Naturalisation Service also assesses any requests for removal from the Schengen Information System on the basis of the criteria for registration set out in the Aliens Act implementation guidelines. If these are met, the alert will be maintained.

3.7 IDENTITY FRAUD

One problem associated with alerts in the Schengen Information System is identity fraud. Some people use a number of aliases, or the identity of another person. Even though it might be clear that a person’s identity is being used by someone else, that person’s details will remain in the Schengen Information System, in order to allow the person misusing them to be found. Such situations can, for example, arise if a suspected terrorist uses the personal details of an innocent person, and no other data are available on the suspected terrorist. To prevent a situation whereby the person whose identity has been stolen is unable to travel without repeatedly being arrested, the Schengen countries have devised a special form known as the ‘Q form’, which indicates cases of stolen identity. The form is issued to the person whose identity is being misused, to help prevent any negative implications of the alert. The National Police Agency notes:

‘…Personal data are sometimes misused. An alien who has been designated undesirable uses the personal details of another person and an alert is issued on the basis of those details. If the authorities are not aware of any other main identity, the alert under the false identity is maintained. The Immigration and Nationalisation Service indicates that a Schengen Information System alert cannot be removed in such circumstances, because it was issued legally for an individual designated an undesirable alien. The Immigration and Nationalisation Service does however order a Q form to be compiled to prevent problems for the person whose identity has been misused. The Q form ensures that cases of misuse of personal data are known to all Schengen countries. The individual involved is also issued with a copy of the form. If they are stopped during a border check, they should make it known that a notice has been posted in the Schengen Information System and that the Sirene office of the country in question can verify this fact…’

3.8 CLOSING REMARKS

The criteria in the Aliens Act implementation guidelines determine whether an alert is issued for an alien in the Schengen Information System. The guidelines, which set out
general instructions for all officials responsible for implementing the Aliens Act and the regulations based on it, state that officials charged with border control or the supervision of aliens must always submit an alert proposal to the Immigration and Naturalisation Service with respect to all aliens meet the criteria described in A3/9.2.1 and A3/9.2.2. The Royal Military Constabulary informs the alien in writing about the Immigration and Naturalisation Service’s intention to declare him an undesirable alien. If the individual concerned is actually declared undesirable, he is served an order accompanied by an information sheet available in many languages. The information sheet explains the designation and the fact that it means that the alien will no longer be permitted to enter Schengen countries.

If the Royal Military Constabulary intends to submit an alert proposal to the Immigration and Naturalisation Service for an undesirable alien, the individual in question is informed verbally, and this is noted in the official report. This has been an official part of Royal Military Constabulary procedure since June 2009. Prior to that, though verbal notification was given in most cases, no record was made of the fact in the official report.

Some 85% of the alerts that the Netherlands issues in the Schengen Information System are issued in response to a proposal from the Royal Military Constabulary at Schiphol. 43% of alerts are issued on the grounds that someone has evaded supervision. This means that the alien has overstayed his visa in the Netherlands by three days or more, or has failed to comply with the obligations stated in articles 4.37 to 4.39 and 4.42 to 4.52 of the Aliens Decree, which basically oblige aliens to report to the chief of police if there is any change in their circumstances. For example, if an alien residing in the Netherlands with a visa fails to inform the police that he has moved to another address, this may lead to an alert being issued.

The Immigration and Naturalisation Service always adopts the Royal Military Constabulary’s alert proposals, without itself weighing up whether an alert should be issued. It only checks whether the criteria have been met, and regards the alert as a record of fact. If an alien for whom an alert has been issued seeks entry to the Netherlands, he may be admitted despite the SIS alert on humanitarian grounds, on grounds of national interest or because of international obligations.

When a request is received for an alert to be removed from the Schengen Information System, the Immigration and Naturalisation Service again assesses whether the criteria laid down in the Aliens Act implementation guidelines have been met. If so, the alert will remain in the system, unless

- the basis for the alert no longer exists (e.g. because the undesirable alien designation has been withdrawn);
- the alien can prove that the alert was issued on unjustified grounds;
- the alien is granted the right to enter the Netherlands;
- the alien is granted the right to enter another member state.
4 FINDINGS AND RECOMMENDATIONS

4.1 INTRODUCTION

The Schengen Information System is a kind of blacklist. If the Netherlands designates an individual an undesirable alien in the Schengen Information System, he will not in principle be able to gain entry to any of the 25 countries in the Schengen area. An alert has major implications for the person concerned, severely hampering his freedom of movement, and effectively banning him from Europe. This can impact on a person's work, studies or family life. The restriction applies for a number of years, depending on the grounds on which the alert was issued. Such a drastic measure may be taken only if there is good reason for it.

An alert in the Schengen Information System is often a basis for refusing an individual entry to the Schengen area. Article 2.9 of the Aliens Decree states that an alert for the purposes of refusing entry must be viewed as an indication that the individual in question poses a threat to public policy. Under section 3 of the Aliens Act, this leads to the individual being refused entry to the Netherlands. However, in certain circumstances the minister may decide to admit an individual to the Netherlands, despite the fact that an alert has been issued for them, on humanitarian grounds, on grounds of national interest, or because of international obligations. When an alien appears on this blacklist, he will not in principle be permitted to enter the country, unless he can demonstrate that there are humanitarian grounds for admitting him.

4.2 HUMAN RIGHTS AT STAKE

The Schengen Information System contains the personal details of individuals who are not in principle to be granted entry to the Schengen area. The legal basis for their data to be stored by the authorities lies in article 8 of the European Convention on Human Rights, and article 10 of the Constitution of the Netherlands. Personal data may be stored in the Schengen information system only if provided for by law, and if necessary in a democratic society. No such list may be kept without good safeguards. Privacy legislation sets standards for the drafting of blacklists.

Proportionality is the watchword when it comes to protecting personal privacy. Before data are entered in the Schengen Information System, interests must first be specifically weighed up, on the basis of the principles of proportionality and subsidiarity. The damage to the person’s interests must not be disproportionate to the purpose of entering the data. The purpose of the system is to maintain public policy and national security after the abolition of internal border controls. The interest of the individual concerned lies in his right to free movement. This interest will weigh more heavily in the case of one alien than another. Article 47 of the Charter of Fundamental Rights of the European Union provides for a right to effective legal remedies. The European Court of Justice is competent to hear cases concerning the SIS, and therefore hears cases in which this right is invoked. Article 13 of the European Convention on Human Rights states that everyone whose rights and

Austria, Belgium, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Norway, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden and Switzerland.
freedoms as set forth in the Convention are violated must have an effective remedy before a national authority. The National Ombudsman has investigated whether this right of access to legal remedies has been put into practice in such a way that third-country nationals who have, for example, been inaccurately or wrongfully listed in the Schengen Information System, have easy and effective access to such remedies.

4.3 PROPER GOVERNMENT ACTION AND THE SCHENGEN INFORMATION SYSTEM

A government must respect human rights for it to be deemed to be acting in a proper manner. Respect for human rights must therefore be safeguarded in legislation, and in its implementation. The National Ombudsman has investigated whether the government uses the Schengen Information System in such a way as to ensure that human rights are respected. In this investigation, the National Ombudsman assessed how the government has translated the right to respect for privacy and the right to legal remedies into practice in respect of the Schengen Information System. He focused particularly on the following aspects:

1 Proportionality: are people disproportionately affected by inclusion in the blacklist?

Does the Dutch procedure that leads to a person being designated an undesirable alien in the Schengen Information System guarantee that, in every individual case, a balance is struck between the purpose of alerts (maintaining public policy and national security after the abolition of internal border controls) and the implications for the individual designated an undesirable alien in the system (no entry to the Schengen area)?

(See re. 1 Proportionality: pp. 25)

2 The procedure for informing the individual concerned that they have been registered in the Schengen Information System and that they have a right of access to equitable remedies

Are aliens who have been designated undesirable really able to effectuate their rights in the event of an unjustified or inaccurate alert? Basically, an individual must be informed in good time about the alert and the possibilities for having an unjustified or inaccurate alert removed from the system.

(See re. 2 Incomplete information: pp 31)
Re. 1 Proportionality: People are disproportionately affected by the way the list operates

Procedure as applied in practice
The Aliens Act implementation guidelines list criteria that determine whether alerts are issued for aliens in the Schengen Implementation System. If an alien meets these criteria, under the guidelines the Royal Military Constabulary must submit an alert proposal to the Immigration and Naturalisation Service. The guidelines give officers of the Royal Military Constabulary no scope for weighing up the factors in an individual case. Officially, specific individual circumstances play no role in the issuing of an alert. Staff of the Royal Military Constabulary note that ‘the law is our guide’.

Exceptions are sometimes made, either because the person is about to miss their flight and there is no time for the procedure to be completed (departure has priority), or on humanitarian grounds. Such exceptions are not compliant with the instructions. When the Royal Military Constabulary makes such an exception, it is not transparent and cannot therefore be checked. The Immigration and Naturalisation Service is unaware of the fact that such an exception has been made, despite the fact that it is responsible for the substance of undesirable alien alerts.

The Immigration and Naturalisation Service almost always adopts Royal Military Constabulary alert proposals. It will not do so only if administrative errors have been made. The Immigration and Naturalisation Service does not judge a case on its merits, which might lead it to decide not to issue an alert.

The Aliens Decree stipulates that an alien for whom an alert has been issued in the Schengen Information System will be refused entry except on certain specific grounds. In practice, an alien for whom an alert has been issued must prove humanitarian grounds in order to be granted entry. Alternatively, he may decide to contest the alert itself, an option taken by many individual who find themselves in this situation.

Ministry of Justice’s position
The then State Secretary for Justice made the following statement in a letter of 2 April 2009 to the Meijers Committee: 12

‘… Behaviour giving rise to an alert and the duration of its validity are clearly and unambiguously described in Dutch policy, thus setting standards and defining consequences for the actions of third-country nationals, without any distinction between individuals. This is not to say that there is never any individual assessment of applications or requests from third-country nationals for whom alerts have been issued. Such assessment takes place after an alert has actually been issued. This allows individual circumstances to be taken into account in deciding on requests for access or entry for third-country nationals for whom an alert has been issued. Individual assessments are also made in response to requests for the removal of alerts by third-country nationals …’

12 Letter of the State Secretary for Justice to the Meijers Committee. Ref.: 5589356/09/DMB, 2 April 2009
In February 2009 the then State Secretary for Justice wrote as follows to the House of Representatives:\footnote{House of Representatives, 2008-2009 session, 23 490, no. 542, 2 February 2009}

‘… The issuing of an alert under article 96 of the Schengen Implementation Agreement means that the alien in question will in principle be refused entry to the countries in the Schengen area during the period of validity of the alert. If an official responsible for the supervision of aliens in the Netherlands encounters an alien for whom an alert has been issued by another member state for the purposes of refusing entry, that individual will be expelled…’

These passages confirm that the criteria in the Aliens Act implementation guidelines inform practice in the Netherlands. Officially, the decision as to whether an alert should be issued for someone is taken without distinguishing between individuals. It has been suggested that this is simply a \textit{de facto} administrative action, which need not necessarily have consequences. However, the second quote confirms that an alert in principle leads to the individual in question being refused entry. This was also confirmed in interviews. That is why the Meijers Committee and a number of court judgments in both the Netherlands and Germany have stipulated that an alert must be regarded as a decision that has legal implications.\footnote{The Hague district court: 8 December 1999, JV 2000/59, The Hague district court: 8 March 2002, JV 2002/162, Breda district court: 11 March 2005, reg. no.: AWB 04/24331} In the Netherlands, such a decision is therefore a decision within the meaning of the General Administrative Law Act.

In her letter of 2 April to the Meijers Committee, the State Secretary for Justice stated that\footnote{Letter from the State Secretary for Justice to the Meijers Committee. Ref.: 5589356/09/DMB, 2 April 2009}

‘… the mere fact that an alert is issued in the SIS does not necessarily give rise to an action with legal implications, but is no more and no less than an indication to officials. Actions that might be taken subsequent to the alert, such as refusal of entry to Schengen in the event of alerts issued under article 96 of the Schengen Implementation Agreement, have legal consequences against which legal remedies may be sought. In its current form, registration of an alert in the SIS is an administrative action, not an action with legal implications…’

Later in the same letter the State Secretary notes that

‘… member states are free to pursue their own admissions policy and to decide whether they grant or refuse entry to third-country nationals for whom an alert has been issued. An alert is therefore nothing more than a way of drawing the attention of the officials concerned…’
National Ombudsman’s findings

One of the criteria for proper government action that the National Ombudsman applies in his assessments is proportionality. This means that, in pursuing an aim, the authorities must employ a means that does not impose an excessive burden on those concerned and that is in proportion to the aim. As we have already said, proportionality is a key concept when it comes to constitutional respect for individual privacy. Proportionality means that the Schengen Information System, which aims to maintain public policy and national security in the Schengen area, may not impose an unnecessarily heavy burden on the aliens who are registered in the system. In other words, the Dutch procedure leading to a decision to designate someone an undesirable alien and issue an alert for them in the Schengen Information System, and the implications of such an alert, must be such that it can be guaranteed that in each individual case a good balance is struck between the purpose of the alert (maintaining public policy and national security after the abolition of internal border controls) and the implications of registration in the system for the individual who is thus designated an undesirable alien (no entry to the Schengen area). The National Ombudsman considered the following:

- the criteria for registration
- how account is taken of individual circumstances
- the nature of the alert: whether it is merely a warning or has legal implications
- whether decisions are taken in a uniform or arbitrary manner

Registration criteria too lax

The registration criteria currently used are generally too lax. This means that people readily fall into the category of eligible for an alert. An alien who overstays his visa in the Netherlands by just three days – because of illness, for instance – may have an alert issued for him. With such criteria, a normal life event or a minor error can lead to an alert being issued, with the consequence that the individual concerned can barely gain access to the Schengen area. It therefore has a major impact on them. The National Ombudsman believes that the question of what individuals the government really wants to register in the Schengen Information System should be reconsidered, on the basis of the following principles:

- the error should be such that this person has to be refused entry in the interests of public policy and national security after the abolition of internal border controls
- the error should in principle justify not allowing the individual in question to enter the Schengen area for several years
- the damage to the alien’s interests in terms of his right to free movement must not be disproportionate to the purpose served by the Schengen Information System (security)
No test of proportionality
The State Secretary indicates that applying unambiguous criteria leads to implications for all third-country nationals, without distinguishing between individuals. There may however be individual circumstances that make registration disproportionately burdensome, such as in the example of a woman who had to be admitted to hospital on her way to Schiphol, and overstayed her visa as a result. She was registered in the system, which will have major implications if she ever wants to enter the Schengen area again. To prevent such situations, the Immigration and Naturalisation Service should perform a test of proportionality based on the facts of the case, considering whether registration would in this individual case lead to disproportionate consequences for the alien concerned. Of particular importance is the issue of whether there are mitigating circumstances. The factors considered in making the decision must be recorded, so that they can be verified if necessary.

Alert is more than a warning
As the Secretary of Justice indicated, in entering individuals in the system, the Immigration and Naturalisation Service engages in a *de facto* administrative action: if someone meets the criteria in the Aliens Act implementation guidelines, an alert is issued. The guidelines state that an alert is a *de facto* administrative action that is not open to judicial review. However, decisions on applications for the removal of alerts must be regarded as decisions within the meaning of section 1:3, subsection one of the General Administrative Law Act. This means that an objection or an appeal may be lodged against the decision as to whether to remove the alert. The State Secretary for Justice has maintained that an alert in the Schengen Information System does not automatically mean that an alien will not be granted entry to the...
4. Findings and recommendations

Schengen area. The minister may after all decide to grant entry on humanitarian grounds, on grounds of national interest, or because of international obligations. The National Ombudsman believes this argument belies the reality. The basic rule is that an alien for whom an alert has been issued will not be permitted to enter the country. He is regarded as a threat to public policy or national security. In the Netherlands an alert is in itself regarded as a reason for refusing a person entry to the Schengen area. Article 2.9 of the Aliens Act states that entry to the Netherlands must at any rate be refused on the basis of the fact that an alien poses a threat to public policy or national security if he is the subject of an alert in the Schengen Information System for the purposes of refusing entry. Article 5 of the Schengen Borders Code also stipulates as an entry condition for third-country nationals that they may not be persons for whom an alert has been issued in the SIS for the purposes of refusing entry. An alert in the Schengen Information System will lead to a person being refused entry unless, in the opinion of the minister, there are humanitarian grounds, national interests or international obligations that mean they must be allowed to enter the country. An alert therefore has direct implications for the alien in question. Someone for whom an alert has been issued in the Schengen Information System will, after all, only qualify for entry if they can demonstrate that there are humanitarian grounds for them to be allowed to enter the country, despite the alert. In practice, therefore, an alert is more than simply a warning.

<table>
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<th>Difference between being the subject of an alert in the Schengen Information System and not being the subject of an alert on arrival in the Netherlands:</th>
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<tr>
<td>• An alien who meets all the entry requirements and is not the subject of an alert in the Schengen Information System will be allowed to enter the country.</td>
</tr>
<tr>
<td>• An alien who meets all the entry requirements but has been designated an undesirable alien in the Schengen Information System will not be allowed to enter the country unless the minister believes he must be admitted on humanitarian grounds, on grounds of national interest or because of international obligations.</td>
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The statutory framework does not allow an alert to be treated merely as a warning. The stipulation that individuals for whom an alert has been issued in the Schengen Information System must at any rate be refused entry unless the minister deems otherwise on humanitarian grounds or because of international obligations allows no scope for this. A warning would mean that an alert were simply an indication that the case requires careful consideration. In such a situation, a request for entry by an alien for whom an alert had been issued would always be examined to establish the reason for the alert, and whether it should preclude entry in this case. This would be a careful procedure. It would not, however, be compatible with the current system, where the mere fact that an alert has been issued for an alien is accorded such significance. This supports our earlier conclusion that, in practice, individual cases must be assessed with care and restraint to establish whether an alert should in fact be issued.

If the registration criteria were such that the error in principle justified a person being refused entry to the Schengen area for several years, and a test of proportionality were performed prior to registration in the Schengen Information System, the authorities would be justified in allowing that person to enter – in line with current legislation – only in
special circumstances, such as on humanitarian grounds, on grounds of national interest or because of international obligations. The current system whereby a person is entered in the Schengen Information System in response to a minor error has disproportionate consequences. The example of the theologian from Kenya illustrates this point well. When he applied for a visa to attend his PhD award ceremony, it was rejected because he was the subject of an alert in the Schengen Information System. He had been entered in the system because he had not officially reported that he was leaving the country after his previous visit. In this way, an alien can suffer disproportionate disadvantage if an alert is issued for him following a minor error, and can be admitted only on humanitarian grounds. This is not right and proper.

From the point of view of proper government action, the National Ombudsman believes that, when an alien for whom an alert has been issued in the Schengen Information System applies for entry, an assessment must always explicitly be made as to whether this is possible, despite the alert. It would be appropriate for the alien in question to be given an opportunity to explain the circumstances. If it is decided not to admit a person to the country, reasons must be given for the decision. Simply citing the alert in the Schengen Information System is not sufficient. The arguments presented should show that account has been taken of the specific individual circumstances. An objection or appeal may be lodged against a decision not to grant entry.

A US citizen who had been studying in the Netherlands had failed to inform the chief of police that he had returned to the United States. He had however ensured he was removed from the local authority database. During a routine check of addresses, it was noted that he had been removed from the database. This gave rise to a notification of ‘departure, destination unknown’, and to the man in question being designated an undesirable alien in the Schengen Information System. The reason for the alert was ‘evading supervision’. The man discovered the alert when he tried to attend a conference in Germany a few years later. On arrival in Frankfurt, he was refused entry to Germany.
4. Findings and recommendations

Arbitrary alerts
In practice, the Royal Military Constabulary appears to weigh up interests in some cases, and not in others. Why this is so is clear neither to the alien concerned, nor to the Immigration and Naturalisation Service.

An alert will not, for example, be issued if the person in question is about to miss their flight, since ‘departure has priority’. Sometimes there are humanitarian grounds for not issuing an alert (the ‘human factor’). Again, it is not clear how such a decision is arrived at. The National Ombudsman is of the opinion that this procedure does not lead to clear decisions, and causes alerts to be issued arbitrarily. Any exceptions, and the reasons for them, must therefore be recorded. This would make the actions of the Royal Military Constabulary and the Immigration and Naturalisation Service transparent and verifiable, and the individual concerned would be able to take action against any errors. Furthermore, it would allow both organisations to monitor their own consistency. The Immigration and Naturalisation Service is responsible for the substance of alerts issued for undesirable aliens, and thus bears ultimate responsibility for the decision as to whether a person is designated an undesirable alien.

Conclusion
The National Ombudsman has concluded that the implications of alerts for the alien concerned were not considered when the current method of implementation was introduced. There are insufficient guarantees that the effects of the system will be proportionate. This violates the principle of proportionality, and therefore also the human rights that form the basis of this principle, such as those enshrined in article 8 of the European Convention on Human Rights.

Re. 2 Incomplete information on Schengen Information System alerts and lack of clarity concerning legal remedies

Provision of information in practice
Order declaring a person to be an undesirable alien
The Royal Military Constabulary writes to the alien informing him of the Immigration and Naturalisation Service’s intention to designate him an undesirable alien. If the individual concerned is indeed designated an undesirable alien, he will be sent a copy of the order and an information sheet, which is available in many languages, explaining the designation and the fact that it means he will no longer be granted entry to the Schengen countries.

Undesirable alien alert
If the Royal Military Constabulary intends to submit a proposal for an alert to be issued for an undesirable alien to the Immigration and Naturalisation Service, the alien in question receives verbal notification. This has been stipulated in the Royal Military Constabulary’s instructions since June 2009. The fact of the notification is recorded in the official report. Prior to the introduction of the new instructions in June 2009, though verbal notification was given in most cases, this was not noted in the official report.
4. Findings and recommendations

Request for removal
In the event of a request to remove an alert, the Immigration and Naturalisation Service again strictly applies the criteria in the Aliens Act implementation guidelines. Such an alert is not removed if it meets these criteria. There is therefore no test of proportionality when requests for removal are considered. The Aliens Act implementation guidelines state that humanitarian grounds in themselves do not justify removal of the alert.

An alien was refused a visa for Spain because the Netherlands had issued an alert for him as an undesirable alien in the Schengen Information System. The individual involved is a ship’s captain, and therefore travels a lot. He explained that he had once accidently overstayed his visa on a business trip to the Netherlands (he had assumed the visa was valid for a month, but it was only in fact valid for ten days). The reason given for the alert was evading supervision. In June 2008 he submitted a request for removal to the National Police Agency, which forwarded it to the Immigration and Naturalisation Service. Seven months later, the Immigration and Naturalisation Service responded to his request, and removed him from the Schengen Information System. The alert would have automatically expired one month later.

Ministry of Justice’s position
The then State Secretary stated in her letter of 26 June 2008 to the Meijers Committee that

‘… The fact that a proposal for an alert is submitted does not automatically mean that an alert will be issued. It is not therefore appropriate for this information to be shared in advance with the individual concerned. When this does in fact lead to an alert being issued for the individual, it might not always be possible to inform him …’

National Ombudsman’s findings
As regards the right of access to legal remedies, it is important to consider whether this right has been translated into practice in such a way that the alien has access to effective legal remedies if he is the subject of an inaccurate or wrongful alert in the Schengen Information System.

A third-country national for whom an alert has been issued must be enabled to contest inaccurate or wrongful alerts. This means, among other things, that when issuing alerts, the government must make every effort to inform the person involved. Everyone who has been designated an undesirable alien in the Schengen Information System must be informed of the fact, in as far as is reasonably possible. This is, after all, a vital first step in rectifying any errors.

People must also be able to inspect the data relating to them in the system. If they discover information that is factually inaccurate or otherwise wrongful, they have the right to request correction or removal of this information.

16 Letter from the State Secretary for Justice to the Meijers Committee. Ref.: 5550123/08, 26 June 2008
The National Ombudsman has noted that aliens are informed of alerts in the Schengen Information System. An alien who is designated undesirable is informed of this fact in writing. Undesirable aliens are given verbal notification that an alert is to be issued, and a record of the fact is noted in the official report. Things have therefore improved in this respect. However, the National Ombudsman believes that undesirable aliens must also be informed in writing of the alert. The Royal Military Constabulary could hand them an information sheet produced specially for the purpose. The State Secretary’s argument that the Royal Military Constabulary only proposes that an alert be issued, and that that is not therefore a suitable moment to inform the alien, belies the reality. After all, the Immigration and Naturalisation Service adopts virtually all the proposals it receives from the Royal Military Constabulary. An information sheet could also draw attention to the fact that a proposal is being issued, and that proposals are almost always adopted. An alien for whom an alert has been issued is not informed of the legal remedies open to him if he wishes to contest a wrongful or inaccurate alert. The National Ombudsman believes that this extra information is necessary to guarantee access to legal remedies. Proper government action requires that aliens who are registered for the purpose of refusing entry are made aware of the legal remedies available to them. They must be informed of their right of inspection and the right to request correction or removal. In accordance with the applicable criteria, refusal of such a request is a decision within the meaning of the General Administrative Law Act, against which an objection or appeal may be lodged. The alien must also be told how he can avail himself of this right. The current method of providing information to undesirable aliens is not therefore right and proper. In order to give people a genuine opportunity to exercise their basic right of access to legal remedies, aliens must be informed in writing of the alert, and made aware of the legal remedies available to them.

RECOMMENDATIONS
The National Ombudsman recommends that the entire system (from alert to the assessment of requests for entry) be reconsidered, to prevent aliens from being disproportionately affected. The implications of an alert for the alien in question have not been sufficiently taken into account in current practice. This observation leads the National Ombudsman to make the following recommendations:

1. The National Ombudsman recommends that the question of which individuals should be registered as undesirable aliens in the Schengen Information System be reconsidered. The criteria leading to registration must be re-examined, on the basis of the following principles:
   - the error must be such that refusing this person entry is necessary in connection with public policy and national security after the abolition of internal border controls;
   - the error must in principle justify someone not being allowed to enter the Schengen area for several years;
   - the damage to the interests of the alien in terms of his right to free movement must not be disproportionate to the goal served by the Schengen Information System (security).
Alongside stricter criteria, a test of proportionality also needs to be introduced. The outcome of the test should be officially recorded, and the alien should have access to it if he so desires.

2. Implementation should be arranged in such a way that an alien who requests entry should not be automatically refused because of the fact that he is the subject of an alert. Before deciding to refuse him entry, in the interest of proper government action, explicit consideration should be given to whether there are humanitarian grounds, grounds of national interest or international obligations that justify him nevertheless being granted entry. If it is decided not to allow someone to enter the country, the reasons must be made clear. Simply citing the alert in the Schengen Information System is not enough. It should be made clear how any special factors, such as humanitarian factors, have been taken into account. The reasons stated should reveal how account has been taken of the specific individual circumstances. A decision to refuse entry is open to objection and appeal.

3. An alien for whom an alert has been issued or for whom an alert proposal is submitted must be informed in writing of his right of inspection and the legal remedies available to him to contest any wrongful or inaccurate alert. The National Ombudsman believes this extra information is essential for people to actually have access to effective legal remedies. He recommends that aliens who are registered for the purpose of refusing entry be informed of the legal procedures available to them to call the alert into question.
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