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OUTCOME OF PROCEEDINGS

From:	General Secretariat of the Council
On:	13 October 2016
To:	Delegations
No. prev. doc.:	12608/16
Subject:	Council Implementing Decision setting out a recommendation on addressing the deficiencies identified in the 2015 evaluation of the Netherlands on the application of the Schengen acquis in the field of data protection

Delegations will find in the annex the Council Implementing Decision setting out a recommendation on addressing the deficiencies identified in the 2015 evaluation of the Netherlands on the application of the Schengen acquis in the field of data protection, adopted by the Council at its 3490th meeting held on 13 October 2016.

In line with Article 15(3) of Council Regulation (EU) No 1053/2013 of 7 October 2013, this Recommendation will be forwarded to the European Parliament and national Parliaments.

Council Implementing Decision setting out a

RECOMMENDATION

on addressing the deficiencies identified in the 2015 evaluation of the Netherlands on the application of the Schengen acquis in the field of data protection

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to Council Regulation (EU) No 1053/2013 of 7 October 2013 establishing an evaluation and monitoring mechanism to verify the application of the Schengen acquis and repealing the Decision of the Executive Committee of 16 September 1998 setting up a Standing Committee on the evaluation and implementation of Schengen¹, and in particular Article 15 thereof,

Having regard to the proposal from the European Commission,

Whereas:

- (1) The purpose of this decision setting out a recommendation is to recommend to the Netherlands remedial action to address deficiencies identified during the Schengen evaluation in the field of data protection carried out in 2015. Following the evaluation, a report covering the findings and assessments and listing the best practices and deficiencies identified during the evaluation was adopted by Commission Implementing Decision [C(2016)3890].
- (2) The efforts of the Ministry of Foreign Affairs (hereinafter MFA) to establish clear and uniform rules on the protection of personal data for External Service Providers (hereinafter ESPs) by including those rules in the framework agreement between the MFA and the ESP are seen as a good practice.

¹ OJ L 295, 6.11.2013, p. 27.

- (3) It is important to remedy each of the deficiencies identified with the least possible delay.
- (4) This decision setting out a recommendation should be transmitted to the European Parliament and to the parliaments of the Member States. Within six months of its adoption, the evaluated Member State shall, pursuant to Article 16(8) of Regulation (EU) No 1053/2013, provide the Commission its assessment on a possible implementation of the recommendations, including indications of possible further improvements,

HEREBY RECOMMENDS:

The Netherlands should

Data Protection Supervisory Authority

1. in order to guarantee the complete independence of the Dutch Data Protection Authority (hereinafter DPA) abolish the national provisions according to which the Minister of Security and Justice has the power to decide on status matters concerning high-grade/management-level staff of the secretariat of the DPA (level 14 or higher);
2. in order to guarantee the complete independence of the DPA abolish the national provisions according to which the Minister of Security and Justice can decide on the effective and efficient use of the DPA's resources;
3. in order to guarantee the complete independence of the DPA reform the national provisions concerning the budget of the DPA in such a way that the Ministry of Security and Justice cannot influence the DPA's annual budget proposal before it is included in the overall budget proposal of the Ministry of Security and Justice and sent to the Parliament for adoption;
4. ensure that the DPA monitors the lawfulness of the processing of Schengen Information System II (hereinafter SIS II) personal data including the checking of log files on a more regular basis;

5. ensure that the DPA monitors the lawfulness of the processing of Visa Information System (hereinafter VIS) personal data including the checking of log files on a more regular basis;
6. ensure that the DPA takes responsibility for the outcome of the VIS audit which has been ordered by the Ministry of Security and Justice, also on behalf of the MFA, from the Ministerial Auditing Service (Auditdienst Rijk), and takes the necessary follow-up measures. This should include an additional audit by the DPA itself of any aspect which has not been covered by the audit so far;
7. ensure that any future VIS audit will be either carried out by the DPA itself or ordered directly by the DPA from an independent data protection auditor. The auditor must stay under the control and responsibility of the DPA which therefore has to provide a clearly defined purpose, scope and methodology for the audit as well as guidance and supervision concerning the audit and its final results;

Rights of Data Subjects

8. align the national provisions on the deadline for replying to access requests with the deadline enshrined in the SIS II legal framework;
9. provide more information on data subjects' rights concerning SIS II – including templates for letters exercising those rights – also on the English website of the DPA;
10. provide information on data subjects' rights concerning SIS II on the website of the National Police (hereinafter NP);
11. inform data subjects about the risks of sending personal data over the open Internet; the Netherlands should consider creating a secure channel for sending data subjects' requests for access, correction and deletion concerning SIS II data and providing information on that matter on the websites of the NP and the DPA;

12. clarify in the information available to data subjects (in particular in the 'Schengen Visa Application Form' and the Immigration and Naturalisation Service [hereinafter INS] brochure on 'Short stay visa for the Netherlands') to which authority data subjects should address their requests for access, correction and deletion concerning VIS data and which authority will deal with those requests;
13. provide information on data subjects' rights concerning VIS, also on the English website of the DPA;

Visa Information System

14. clearly define and document the distribution of tasks and responsibilities between all the different actors involved in the Visa application and issuing procedure (MFA, INS, Consular Posts [hereinafter CPs], Regional Support Offices [hereinafter RSOs] and ESPs) concerning the processing of personal data in the VIS. The documentation should lay out in detail how the MFA is fulfilling its responsibilities as controller of VIS data processing. The MFA should consider how – in its role as data controller – it can verify that all actors involved are fulfilling their respective responsibilities towards VIS data processing;
15. ensure that the MFA performs regular checks on the lawfulness of data processing in VIS, based on logs;

Schengen Information System

16. ensure that the NP carries out active evaluation and regular checks regarding the lawfulness of users' access to SIS II data. The NP should consider the use of technical tools for searching and analysing NSIS logs;
17. clarify in the national provisions that NSIS II records shall be deleted at the latest three years after their creation and may only be kept longer if they are required for monitoring procedures that are already under way. In so doing, it should be clarified that the national law providing for a five year retention period for the logging of the national systems of the NP is not applicable to NSIS records;

Awareness Raising

18. provide general information on SIS II and VIS on the English website of the DPA;
19. provide information on SIS II on the English website of the NP;
20. provide more easily accessible information on VIS, the processing of personal data in the visa application and issuing procedure and data subjects' rights on the websites of the MFA, CPs, ESPs and INS;
21. provide links to the website of the DPA on the websites of the NP, MFA, CPs, ESPs and INS.

Done at Brussels,

*For the Council
The President*
