**Council of the
European Union**

Brussels, 9 February 2017
(OR. en)

6093/17

**Interinstitutional File:
2016/0352 (NLE)**

PARLNAT 39

NOTE

From:	General Secretariat of the Council
To:	National Parliaments
Subject:	Council Implementing Decision setting out a recommendation on addressing the deficiencies identified in the 2016 evaluation on the application of the Schengen acquis in the field of data protection by Luxembourg

In accordance with Article 15(3) of Council Regulation 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 Schengen, the Council hereby transmits to national Parliaments the Council Implementing Decision setting out a recommendation on addressing the deficiencies identified in the 2016 evaluation on the application of the Schengen acquis in the field of data protection by Luxembourg[1].

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[1] Available in all official languages of the European Union on the Council public register, doc. 5726/17

Council Implementing Decision setting out a

RECOMMENDATION

on addressing the deficiencies identified in the 2016 evaluation of Luxembourg 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 Schengen[2], 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 Luxembourg remedial actions to address deficiencies identified during the Schengen evaluation in the field of data protection carried out in 2016. Following the evaluation, a report covering the findings and assessments, listing best practices and deficiencies identified during the evaluation was adopted by Commission Implementing Decision [C(2016)7200].

(2)   The activities of the Luxembourg data protection authorities ('Commission Nationale pour la Protection des Données' and 'Article 17 Supervisory Authority') and the Ministry of Foreign and European Affairs in providing information on data protection aspects, and in particular on data subjects' rights in relation to the Schengen Information System II and the Visa Information System, are seen as good practice.

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[2]   OJ L 295, 6.11.2013, p. 27.

(3)   In light of the importance of complying with the Schengen *acquis*, and in particular of ensuring that personal data in the national VIS (NVIS) are processed lawfully, priority should be given to implementing recommendation number 7.

(4)   This decision setting out a recommendation should be transmitted to the European Parliament and to the parliaments of the Member States. Within three months of its adoption, the evaluated Member State shall, pursuant to Article 16, paragraph 1 of Regulation (EU) No 1053/2013, establish an action plan to remedy the deficiencies identified in the evaluation report and provide this to the Commission and the Council.

HEREBY RECOMMENDS:

that Luxembourg should

Legislation

1.   in the event that the Luxembourg authorities' discussions about the future of the Article 17 Supervisory Authority (SA) do not result in the SA being merged with the National Data Protection Authority 'Commission Nationale pour la Protection des Données' (CNPD), adopt a Regulation covering the organisational structure and operations of the SA as provided for in Article 17(2) of the Data Protection Law[3] to ensure that the SA performs its tasks in relation to the Schengen *acqui*s correctly;

Data Protection Supervisory Authorities

2.   in order to guarantee the complete independence of the CNPD, reform the national provisions concerning the dismissal of the CNPD's members and substitute members in such a way that the legal basis for dismissal is clearly defined and not only based on an interpretation of the existing legislation. It should be explicitly stipulated that the CNPD's members and substitute members may be dismissed only in exceptional situations, in particular for serious misconduct;

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[3]   The law of 2 August 2002 (as modified) on the protection of persons with regard to the processing of personal data.

3.   clarify and strengthen the situation of the SA. It is for the Luxembourg authorities to decide how the situation of the SA should be clarified and strengthened. This could, for example, consist in merging the CNPD and the SA, as discussed, or in keeping the SA as a separate authority while allocating a budget and the necessary staff with legal and technical knowledge to the SA, as well as adopting the regulation provided for in Article 17 of the Data Protection Law;

4.   if the SA is kept as a separate authority, give it stronger powers, particularly to ensure enforcement of its measures and decisions, for example towards the police. Those powers should be comparable to the powers of the CNPD;

5.   ensure that the SA monitors the lawfulness of the processing of Schengen Information System II (SIS II) personal data as well as the lawfulness of the processing of Visa Information System (VIS) data by the law enforcement authorities, including the checking of log-files on a more regular basis;

6.   ensure that the CNPD monitors the lawfulness of the processing of VIS personal data, including the checking of log-files on a more regular basis;

7.   guarantee that the CNPD and the SA ensure that, at least every four years, audits of data processing operations in the national system of VIS will be carried out. As the deadline for the first audit (October 2015) has not been met, action should be undertaken to fulfil this obligation as soon as possible;

Rights of Data Subjects

8.   consider providing that the SA must give more transparent replies to data subjects requests for access to their personal data stored in SIS II;

9.   ensure that the SA's replies to data subjects' access requests contain information about the right of appeal in court;

10.   ensure that the information on data subjects' rights concerning SIS II on the website of the Grand-Ducal Police is easier to find; this information should also be provided in English;

11.   ensure that the Ministry of Foreign and European Affairs (MFEA) designates a person/unit to deal with data subjects' requests for access, correction or deletion concerning their personal data stored in VIS;

Visa Information System

12.   ensure that the MFEA develops a comprehensive and clear methodology and practice for the self-auditing of the effectiveness of its security measures with regard to data security and data protection, as required under Article 32(2)(k) of Regulation 767/2008 and Article 9(2)(k) of the VIS Council Decision 2008/633/JHA, including a regular check of the lawfulness of the data processing in VIS, based on logs;

13.   ensure that the NVIS logs are stored and deleted in accordance with Article 34 of Regulation 767/2008 and Article 16 of the VIS Council Decision;

14.   implement technical or organisational measures to ensure the deletion of the files from the AE.VIS (national visa database) after the end of the defined data retention periods;

Schengen Information System II

15.   ensure that the police develop a comprehensive and clear methodology and practice for the self-auditing of the effectiveness of their security measures with regard to data security and data protection, as required under Article 10(1)(k) of Regulation 1987/2006 and Article 10(1)(k) of the SIS II Council Decision (2007/533/JHA of 12 June 2007);

16.   ensure that the SIS II logs are used on a regular basis to check the lawfulness of the data processing in SIS II. The police should carry out random checks of the log-files in order to discover any possible misuse of information in the national section of SIS (N-SIS);

Public Awareness

17.   provide general information on the processing of personal data and data protection in relation to SIS II on the website of the Grand-Ducal Police.

Done at Brussels,

For the Council
The President