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**LIMITE**

**SIRIS 44  
CONOP 13  
ENFOPOL 56  
COMIX 236**

**NOTE**

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from :            Presidency

to :              SIS/SIRENE Working Party (Mixed Committee EU/Iceland, Norway and  
Switzerland, Liechtenstein)

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5153/09 SIRIS 5 ENFOPOL 5 COMIX 19  
17172/08 COPOL 97 CONOP 101 CODUN 60 RECH 421 JAI 711 EDUC 289  
MI 558 UD 238 IND 234  
16613/1/08 REV 1 SCH-EVAL 150 COMIX 878  
15934/08 SIRIS 152 COMIX 842

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Subject :        Reinforcing use of Article 99

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Following the discussions held at SIS/SIRENE Working Party and also at the SIRENE Task Force concerning the enhancement of use of Art. 99 alerts, Presidency hereby presents a document to support the use of Art. 99 alerts in Member States for better co-operation while fighting against serious and/or organized crime and terrorism and to prevent threats to public security.

The Article 99 alerts are not employed equally by the Member States as proved by the statistics of its use.<sup>1</sup> Indeed, several countries hardly ever use this type of alert. There are several reasons for the diversity and difficulties in its use.

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<sup>1</sup> Statistical analysis of the use of the Schengen Information System. 15934/08 SIRIS 152  
COMIX 842

## “Surveillance”

One issue is the word “surveillance” used in paragraph 1 of the Article 99 of CISA. “Surveillance” makes believe that the Article 99 is a matter of judicial co-operation – surveillance/observation – and therefore that the judicial authorities are involved in the procedure for entering Article 99 alert in SIS. Such approach slows the procedures and also limits the number of alerts, as the use of surveillance/observation in the judicial meaning is restricted by reason of the strong impact on human rights.

But the interpretation of use of Article 99 alerts as surveillance/observation in the judicial meaning is not appropriate. Surveillance/observation is a procedure for collecting evidence by active and continuous following of the subject. In the case of Article 99 alerts, the subject is not actively and continuously followed by the police. Only if the person incidentally encounters the police during a police check, is the information about this contact reported. Therefore the use of Article 99 alerts should be recognized as a police co-operation matter (linked with police checks).

To support the above mentioned interpretation, the wording of the Council Decision on SIS II<sup>2</sup>, Article 36 (which covers the present Article 99 alerts), should be considered. There the word “surveillance” is replaced by the more appropriate word “check”.

## Use of Article 99 alert for prevention

The provisions of the Schengen Convention foresee two purposes of the alert (not mentioning national security para. 3): prosecution of criminal offences and prevention of threats to public security. So it is possible to use the Article 99 alert not only within ongoing investigations **but also for preventive tasks** when the conditions stipulated in the rest of the Article 99(2) are fulfilled. The use for prevention is further supported by the wording of Article 99(2)(b), which stipulates “...gives reason to suppose that he/she will also commit extremely serious offences **in the future**”.

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<sup>2</sup> Council Decision 2007/533/JHA on the establishment, operation and use of the second generation Schengen Information System (SIS II)

## “Criminal offences”

The definition of the offences falling within the scope of Article 99(2) is not precise in the current wording of CISA. The Council Decision on SIS II could provide us with a better definition on that by making (non-exhaustive) reference to Article 2(2) of the Framework Decision on EAW<sup>3</sup>. This approach appears logical bearing in mind the consistent use of this list of crimes listed whenever the term “serious crimes” comes up. This interpretation provides broad possibility for use of Article 99 alerts.

## Entering Article 99 alerts

A decision to enter an Article 99 alert is an exclusively national level matter. So it is up to national authorities to find an appropriate approach keeping in mind common responsibility for the security in the Schengen area.

It must be taken into account that the SIS is not used only at borders or for police controls on the streets. It is a very important tool for the criminal police, where any information (including the hit on Article 99 alerts) may be crucial for the success of an investigation or preventive action, especially when dealing with serious crimes including terrorism.

As the Best Practice, it is recognized that **use of an Article 99 alert should always be one of the measures considered when dealing with serious crimes and/or threats to public order or as a supportive measure when dealing with searches for dangerous criminals<sup>4</sup>.**

Finally, the French initiative<sup>5</sup> and the Council Conclusions and new lines for action by the European Union in combating the proliferation of weapons of mass destruction and their delivery systems<sup>6</sup> as well as the Presidency document on Better use of SIS and SIRENE for child protection<sup>7</sup> should be recalled as they aim at enhancing the use of Article 99 alerts.

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<sup>3</sup> Framework Decision 2002/584/JHA

<sup>4</sup> See the relevant Best Practice in 16613/1/08

<sup>5</sup> 14356/3/08 REV 3 JAI 541 ENFOPOL 196 SIRIS 143 VISA 322 CRIMORG 176 COMIX 746

<sup>6</sup> See 17172/08 COPOL 97 CONOP 101 CODUN 60 RECH 421 JAI 711 EDUC 289 MI 558 UD 238 IND 234, page 12, last two indents.

<sup>7</sup> 6367/09 SIRIS 24 ENFOPOL 33 COMIX 140; 6368/09 SIRIS 25 ENFOPOL 34 COMIX 141

## Conclusions

With regard to previous discussion, the Presidency recapitulates by noting that there is a call for enhanced use of Article 99 alerts.

The Presidency would therefore like to invite Member States

- to promote the use of Article 99 among their national competent authorities,
- to adopt a proactive approach to the use of Article 99 alerts and fully exploit Article 99 alerts for the purpose of prosecuting criminal offences and for the prevention of threats to public security as well as preventing threats to internal or external national security,
- to consider implementation of the interpretation of the Article 99 CISA as described in this document to enhance the use of Article 99 alerts.

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