Master thesis International and European Public Law

Title:
The Schengen Information System: a comparison of the legal protection of the individual under the Convention Implementing the Schengen Agreement and the SIS II Regulation

Lara van Grinsven LLB
ANR: 665871
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Master International and European Public Law, Union law track
Supervisor: mr. H. Oosterom-Staples
Second reader: prof. mr. J.M. Verschuuren
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Chapter 1: Introduction

1.1 Introduction
Roberto is a 32 year old man from Bolivia, who has just landed at Zaventem, Brussels International Airport. He has come to Europe to visit some of his family members who live in Belgium.

Several years ago Robert lived in the Netherlands. He wanted to work there for a little while in order to send money to his sick mother, but first visited the country for a couple of weeks to see what it was like and investigate job opportunities. A cousin, with whom Roberto was living at the time, convinced him that the quickest way to earn money was to rob the local book store. The two men did not plan the robbery very well and when they left the store the police were already waiting for them. Roberto was arrested and convicted for armed robbery. He was sentenced to a prison sentence of 2 years and 8 months. When Roberto was released from jail he was taken to Schiphol airport. Officers from the Dutch Immigration Service informed him that he was no longer welcome in the Netherlands and they put him on the first flight to Bolivia.

To Roberto that is all a thing of past. He now has a job in a book store and is happy to travel to Belgium to visit his relatives who live there. However, when he hands his passport to the border control officer at Zaventem airport, Roberto's sunny mood is spoiled. The Belgian border official informs him that the Netherlands has issued a SIS alert on Roberto. Roberto is puzzled; he does not know what that means. What is a SIS alert? What does this mean? What is the Belgian border official supposed to do? Is there anything that Roberto can do to have the SIS alert repealed?

The questions above will each be answered in the chapters to follow. Important to note is that the rules governing a SIS alert were recently amended after almost seven years of discussions and debates. These amendments call for a comparison between the old and the new system.

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1 This is a fictional case.
1.2 The legal framework applicable to SIS-alerts

1.2.1 Schengen cooperation

The rules governing alerts in the SIS date back to the 1990s when five Member States decided to join forces in order to realise the goal set out in Article 26 of the Treaty on the Functioning of the European Union (further: TFEU): the realisation of an area in which goods, persons, services and capital can move freely between the Member States without having to undergo checks at the internal borders. For political reasons, no progress was made within the supranational framework of the European Union. Thus, on 14 June 1985 Germany, France, the Netherlands, Luxembourg and Belgium signed the Schengen Agreement that would allow them to move forward albeit it in an intergovernmental fashion. Like Article 26 TFEU, the purpose of the Schengen Agreement was to establish an area without internal frontiers by abolishing amongst others internal border checks on persons, by introducing common standards for checks at the external border. This area is to date more commonly referred to as the Schengen Area.

In 1990 the Convention Implementing the Schengen Agreement (further: SIC) was signed. This Convention that supplements the 1985 Schengen Agreement provided detailed rules that would allow for the actual abolition of internal border checks between the Parties that had signed the Convention. The goal to be achieved by the SIC is that "internal borders may be crossed at any point without any checks on persons being carried out". The Schengen Implementing Convention not only laid down entry conditions for third-country nationals, it also provided detailed rules on a common short stay visa and the setting in place and functioning of the Schengen Information System (SIS).

Over the years more and more Member States became aware of the benefits offered by Schengen cooperation and one by one they signed up to the Schengen Agreement and the Convention Implementing the Schengen Agreement. To allow Sweden and Finland, which were both members of the Nordic Union, to participate in the Schengen framework, it was necessary to make special arrangements so that both Norway and Iceland could participate. At

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3 Internal borders are the common land borders, including river and lake borders of the Contracting Parties, including their airports for internal flights and their sea ports for regular ferry connections exclusively from or to other ports within the territories of the Contracting Parties and not calling at any ports outside those territories. Article 1 Convention Implementing the Schengen Agreement.


5 Also known as Schengen Implementing Convention or SIC.


7 Article 10 Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (SIC), *OJ EC* 2000, L239.

8 Article 92 and 93 SIC.
the time that the Treaty of Amsterdam entered into force on 1 May 1999, only three European Union (EU) Member States were not party to the Schengen agreements, namely the United Kingdom, Ireland and Denmark. In 2008 Switzerland joined as the third non-EU Member State.

The entry into force of the Treaty of Amsterdam had significant impact for Schengen cooperation as Schengen cooperation was transformed into a European competence and the Schengen acquis was given a legal basis in the EC and EU-Treaties. This meant that where in the past Schengen cooperation had been intergovernmental by nature, where States worked together as States and any legal text created obligations of an international nature, from then on cooperation would be subject to the rules in the European Treaty on decision making and judicial protection. Admittedly, the Member States remained in charge, as the role of the European Parliament in the decision making process was limited and special rules governed the position of the Court of Justice, for the first five years after the entry into force of the Treaty of Amsterdam.

Though the Schengen acquis was preserved at the moment the Treaty of Amsterdam entered into force, it has since gradually been replaced by measures that befit the European Union. In 2006, the Schengen Border Code (SBC) entered into force, replacing, amongst others, the provisions in the Schengen Agreement and the Schengen Implementing Convention on entry and residence for the purpose of short stays and providing rules on the controls at external borders.

1.3 Entry and short stays according to the Schengen Border Code

1.3.1 The rule

The Schengen Border Code provides entry conditions for stays by third-country nationals in the European Union that do not exceed a period of '90 out of 180 days', so-called short stays for purposes set out in Annex I to the Schengen Border Code. According to Article 2(6) SBC "a third-country national means any person who is not a Union citizen".

In the Bot case the Court of Justice provided the following clarification of '90 out of 180 days'. According to the Court of Justice third-country nationals are allowed to stay in the

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11 ECJ Case C-241/05 (Nicolae Bot v Préfet du Val-de-Marne), October 2006, 1-9642.
European Union either for a consecutive stay of 90 days in every period of 180 days or several shorter stays of which the sum does not exceed 90 days. When the 90 days have been completed then a third-country national has to leave the Member State, even if the 180 days have not passed. At the end of a period of 180 days there is an obligation to leave the EU-territory, even if the 90 days have not been completed. Only after a new entry does a new period of 180 days commence. It is the third-country national who bears full responsibility for evidence that the '90 out of 180 days'-rule is observed. For this purpose the travel documents of every third-country national are stamped on entry and exit, the absence of which amounts to a presumption that the third-country national has outstayed his period of lawful residence and justifies removal from the EU-territory, unless other documents can be produced which establish beyond any doubt compliance with the '90 out of 180 days'-rule.

The logic underlying the Schengen Border Code is a combined effect of Articles 5 and 13 of that regulation. If one or more of the entry conditions in Article 5(1) of the Schengen Border Code is not fulfilled, Article 13 SBC states that the person shall be refused entry. European citizens do not have to fulfil these conditions, as they fall under the regime of free movement of persons. There are some derogations possible which are set out in Article 5(4) SBC. Section (a) of this provision mentions that if a person does not fulfil all the entry conditions but is in possession of a residence permit or a re-entry visa, he or she may be allowed to enter a given Member State for transit to the country of which he or she has a residence permit or a re-entry visa. Article 5(4)(b) SBC gives people who do not have a valid visa but fulfil all other entry conditions, the possibility to obtain a visa at the border. The last derogation, found in Article 5(4)(c) SBC, concerns a person who does not fulfil one or more of the entry conditions but should be allowed into the territory of the European Union on humanitarian grounds, on grounds of national interest or because of international obligations.

Withholding entry permission means that the border official has to actively prevent that person from entering the European Union. Any decision to withhold entry permission has to be communicated in writing stating the reason for the refusal and can be contested through proceedings contesting the legality of a refusal to grant a right of entry.

The fact that internal borders have been abolished means that people can move between the Member States without checks at internal borders, so once a person has passed

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12 ECJ Case C-241/05 (Nicolae Bot v Préfet du Val-de-Marne), October 2006, 1-9642.
13 Article 11(2) SBC.
14 Article 2(5)(a) SBC.
15 Article 13(4) SBC.
16 Article 13(3) SBC.
the external border control, by satisfying the conditions set forth in the SBC, and moved into the Schengen Area, he or she can move with relative ease between the States irrespective of his or her nationality. Member States want to regulate who can or cannot enter the Schengen Area. In part, they want to stop those who are considered unwanted in the EU at the external border of the Schengen Area. Here, a tension can be seen between the right to freedom of movement and public security and public order. On the one hand, once people have lawfully entered the territory they have the right to free movement and they should be able to exercise this right. On the other hand, States still want to keep an eye on who is in their territory from the view of public safety.

1.3.2 Entry conditions

Article 5(1) of the Schengen Border Code sets out the following entry conditions which third-country nationals have to satisfy to enter and reside in the Schengen Area:

- A valid travel document;
- Justification of the purpose and conditions of the intended stay;
- Sufficient means of subsistence for the duration of the stay;
- Not be a person for whom an alert has been issued in the SIS and not considered to be a threat to public policy, internal security, public health or the international relations of any of the Member States or registered in a national database for this purpose.

Further rules on these conditions are found in the Schengen Border Code (purpose of intended stay and means of subsistence), the Visa Code (short stay visa) and the SIS-II Regulation (SIS-reports). The rules governing SIS-reports in the SIS-II Regulation, that has recently replaced the provisions on SIS-reports in the SIC, will be discussed in detail in Chapters 2 and 3. Here we will consider the other conditions.

1.3.3 Purpose of intended stay and means of subsistence

As has been stated above, the rules on the purpose of intended stay and means of subsistence can be found in the Schengen Border Code. The condition that the third-country national should have sufficient means of subsistence means that the person should be able to cover the costs of his or her stay in the territory, but they should also have sufficient means for their return. The SBC describes how these means of subsistence should be assessed in Article 5(3): "Means of subsistence shall be assessed in accordance with the duration and the purpose

17 Article 5(1)(c) SBC.
of the stay and by reference to average prices in the Member State(s) concerned for board and lodging in budget accommodation, multiplied by the number of days stayed". So, a third-country national needs to be able to afford the most basic accommodation during his or her stay. Cash, travellers’ cheques, credit cards, declarations of sponsorship and guarantees from hosts in the possession of the third-country national can be used to assess the financial means of that individual.\(^{18}\)

In order to justify the purpose of the intended stay the third-country national should be able to produce some documentary evidence at the border. Annex I to the SBC provides a non-exhaustive list of documents that can be used in order to justify stay. For example, a reservation for a hotel room can provide evidence that the person intends to stay for tourism purposes.

Both conditions very much depend on the case at hand. As mentioned, the SBC does not provide exhaustive lists of what counts as evidence towards the justification of the purpose of stay and sufficient means. The border guards depend on the information and the documents provided by the person who wishes to enter to territory in order to make an assessment. However, these are not the only things the third-country national should present at the border to obtain entry permission.

1.3.4 Short stay visa

The second condition mentioned above is that a third-country national must be in possession of a valid visa. A short stay visa is an authorisation that has been issued by a Member State that the person who holds the visa is allowed to stay in or transit through the territory of the Member States for the duration of no more than 90 out of 180 days from the date of first entry in the territory of the Member States.\(^{19}\) The already mentioned Council Regulation (EC) 539/2001 lists which third-country nationals must be in possession of visas when they cross the external borders of the Member States territory. There are two lists that can be found in Annex I and II of this Regulation. Third-country nationals from a country that is on the list of Annex I are required to be in possession of a visa.\(^{20}\) Examples of countries on this list are: Afghanistan, Ghana, India, Ethiopia, Ukraine and Sri Lanka. Nationals from countries on the list of Annex II of this Regulation do not need to be in possession of a short stay visa\(^{21}\),

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\(^{18}\) Article 5(3) third paragraph SBC.


\(^{20}\) Article 1(1) Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, \textit{OJ EC} 2001, L 81/1.

examples are: Bolivia, New Zealand, Switzerland, Japan and Israel. Third-country nationals who are family members of Union citizens do not have to be in possession of a visa if they have a valid residence permit issued under Article 10 of Directive 2004/38/EC, nor do third-country nationals from countries with whom the Union has special agreements for their citizens concerning the right to freedom of movement.

If the third-country national who wishes to travel to any of the Member States is required to be in the possession of a visa, he or she needs to obtain one while still in his or her own country or country of residence. Visa applications have to be made at a consulate of a Member State. What consulate depends on where the person wishes to travel to. If the person intends to travel to only one Member State, that State is competent on deciding on the visa application. If the third-country national will visit more than one Member State, it is the State that is the main destination which is competent to decide on the visa application. In the case that the individual intends to visit more than one Member State and there is no main destination, competence for the issuing of a visa lies with the Member State "whose external border the applicant intends to cross in order to enter the territory of the Member States". This will be the country of first entry, meaning for example the country where the plane lands or where the land border is first crossed if travelling by car.

It is possible to derogate from the procedure described above and get a visa issued at the external border, but this is only possible in exceptional cases. This can only happen if all the other entry conditions in Article 5 of the Schengen Border Code are fulfilled, the applicant has not been apply to apply for a visa in advance and it is certain that the applicant will return to his country of residence or origin.

The person lodging an application must present the consulate with an application form, a valid travel document, a photograph, pay the visa fee, provide supporting documents indicating the purpose of the journey and proof of sufficient means, and provide proof of the

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24 Article 4(1) Visa Code.
26 Article 5(1)(b) Visa Code.
27 Article 5(1)(c) Visa Code.
29 Article 14(1) Visa Code.
If these conditions have been fulfilled the consulate will declare the individual admissible and examine the application. The consulate will also create an application file in the Visa Information System (VIS). In this system that contains all data relevant for the issuing of short-stay visa, the visa authority will check whether there are reports of a previous visa application made by any of the Member States. Each new application shall be linked to the file of the previous application. The goal of the VIS is to facilitate data exchange between the Member States on short-stay visa, amongst others, in order to prevent fraud and assist in the identification of persons who do not fulfil entry conditions.

During the examination of the application the consulate will check whether or not the other entry conditions as set out in the Schengen Border Code have been fulfilled. The consulate verifies whether:

- The travel document is not false, counterfeit or forged;
- The purpose and conditions of stay are justified;
- The applicant has sufficient means to stay;
- The applicant has not been issued a SIS alert;
- The applicant is not a threat to public policy, internal security or public health, and
- The applicant is in possession of adequate and valid travel medical insurance.

So, before a short-stay visa is issued it is checked whether or not a person has been reported in the SIS. If there is a SIS alert on the individual in question, he will not be issued a visa. This means that there will not be a problem with one of the entry conditions of the SBC, but with two: a person cannot be reported in the SIS and has to be in possession of a valid visa, which as a matter of fact was refused due to the SIS alert.

If a person is refused a visa that person has the right to appeal that decision. This appeal has to be lodged against the Member State that is responsible for taking the final decision on the visa application and it has to be done in accordance with the national law of that Member State.

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30 Article 10(3) Visa Code.
32 Article 8(1-3) VIS Regulation.
33 Article 2(c) and (e) VIS Regulation.
34 Article 21 (1) Visa Code.
35 Article 21(3)(a-e) Visa Code.
36 Article 32(3) Visa Code.
1.4 The impact of SIS-reports on admission procedures

The interesting thing is that not being reported in the SIS is an entry condition in the SBC, so that means that the SIS comes into play during the assessment of the entry conditions directly, but the SIS is also there, albeit slightly less obvious, as a reason to refuse a visa application.

The reason why the SIS is so important is because it plays a role at three different moments in European migration law:

1. It plays a role when a third-country national applies for a visa, since a SIS alert means that no visa will be given;
2. It plays a role when a third-country national wishes to enter the territory of one of the Member States, because a SIS alert means that a person is not allowed to enter the territory;
3. It plays a role when a third-country national wishes to stay in the territory, longer than 90 out of 180 days.

These three points help explain why Roberto from Bolivia does not hear about his SIS-alert until he arrives at the Belgian airport. Bolivia is one of the countries of which the nationals do not require a short-stay visa to enter the Schengen area, so Roberto does not fall in the first category and is not barred from travelling to Europe by virtue of a refusal to issue him a short-stay visa. Nor does he fall in the third category, since he does not wish to stay in the territory for a longer period of time. The second category is the one that applies to Roberto, since he wants to enter the territory of Belgium, one of the Member States to visit family, as a tourist who can stay in the EU for 90 out of 180 days. It is not until he arrives at the border that he is confronted with the SIS-alert, since there is no visa requirement and a SIS-alert does not prevent a person from buying a ticket and boarding a plane to Europe.

1.5 Research questions

The questions raised at the beginning of this chapter will be answered in the chapters to follow, in order to reach an answer to the central research question, which is the following:

What improvement has the SIS II Regulation made to the legal protection of an individual who has been reported in the SIS compared to the old situation under the SIC?

In order to find an answer to the central research question, this research is divided into chapters, each of which will deal with a sub-question necessary to clarify the subject and eventually reach a final conclusion.

37 This will be explained in further detail in Chapter 2.
The second chapter of the research focuses on the SIS, more specifically the legal framework that governs the reports of individuals by Member States in this system. There are two sub-questions that will be answered in Chapter 2: "What is the Schengen Information System and what are the consequences of being reported in the system?" And: "What has changed compared to the old system (under the SIC) when the SIS II Regulation entered into force?" The first part of the chapter will deal with the first question and it will start with a more elaborate description of what the SIS is. There will be a discussion of how data was stored under the SIC and how unwanted aliens were reported as well as the rules set out in the SIS II Regulation, this discussion of the SIS II Regulation can be found in the second part of Chapter 2. The final part of the chapter will contain a comparison between the SIC and the SIS II Regulation with regard to some of the general provisions.

In the third chapter the focus will move away from the SIS in order to take a closer look at judicial protection in the EU. The sub-question that will be answered is: "Does the SIS II Regulation comply with the demands set forth by the principle of effective remedies in Article 47 of the Charter and the Court of Justice's case law and is compliance under the SIS II Regulation better than under its predecessor, the SIC?" The first part of the chapter is dedicated to the judicial architecture under EU law: the role national courts play versus the EU. The second part of the chapter deals with judicial protection under the SIC and the SIS; what are the provisions in these legal documents that are devoted to legal protection. Finally, the notion of effective remedies will be discussed and linked to the SIS. Are effective remedies provided for by the SIC and the SIS II Regulation?

The final chapter will be used to answer the central research question: "What improvement has the SIS II Regulation made to the legal protection of an individual who has been reported in the SIS compared to the old situation under the SIC?" It is also possible that the research will show that there are no improvements or there are not only improvements but also deteriorations with regard to the legal protection of the individual who has been reported in the SIS. So in order to present a complete conclusion chapter 4 will also determine whether there are any remaining, or even new, problems regarding legal protection of the individual after the SIS II Regulation entered into force.

There were two major problems with the SIC that necessitated this research: Member States are definitely allowed to impose entry bans on individuals when they feel they pose a threat to public order or public security. The problem is, however, the rules in the Convention Implementing the Schengen Agreement (SIC) and how they worked in practice. An entry ban is a tool that Member States are allowed to use, but the only way an individual could get the
ban lifted was by complaining to the Member State that reported him or her in the SIS or by going to a national court in any of the Member States. This approach had two major weaknesses. First of all, it was possible to object to the decision in any of the Member States, but only the reporting State could remove or alter the report. This meant that if a State refused to delete the report there was not much more that could be done. The second weakness, was that a verdict obtained from a national court in another Member States could not be enforced in the reporting State. So, effectively an individual reported as an unwanted alien in the SIS could only bring a case in the reporting State if he or she wanted to have the alert removed.

The second problem was that when a person had been reported in the SIS, all other Member States were obligated not to let that person enter the territory according to Article 13 of the Schengen Border Code, this means that the other States had no choice. If a person had been reported by, for instance, the Netherlands, like Roberto from the first paragraph, other States, such as Belgium, had to refuse entry permission and also had to refuse to issue a visa. That makes it physically impossible to go to a court. Arranging legal representation from abroad can be very hard to do. This was how the old rules of the SIC worked, the question is whether the SIS II Regulation works in the same way or if these problems have been tackled. These two main problems are the reason for posing the central research question as can be read above, this means that the conclusion will also deal with these problems in order to determine whether they have been solved or not.

1.6 Methodology
The relevance of this research lies in the fact that in practice problems have been encountered with the SIC and the question is whether these problems are still there after the new Regulation entered into force.

This research is a desk study of books, articles and also very important are the texts of the Convention Implementing the Schengen Agreement, the Schengen Border Code and the SIS II Regulation themselves. These legal texts already contain a lot of information that can be used to clarify some of the questions that have been asked. These legal texts play the biggest role in Chapter 2 and 3. Because Chapter 3 is about judicial protection and the EU legal framework, the Treaty on the Functioning of the EU (TFEU) also comes into play. The TFEU contains the rules on the judicial architecture of the EU and its functioning. Another source that is important in almost all legal research is case law. Many rules that are now seen as common principles have been developed through case law. Jurisprudence is also important
because it can clarify legal rules and judges can even change the law slightly when it leads to unwanted situations.

In order to better explain certain rules or systems examples or cases will be used. For example, in order to clarify how a report in the SIS is made, it will be researched how this happens in practice in the Netherlands. The Netherlands will also be used to illustrate other points, the reason for this is the fact that the author is most familiar with the Dutch legal system. It should be emphasised here that other Member States might experience other or slightly different problems than the Netherlands. Due to the scope of the research, mainly that in the second chapter, it is not possible to discuss all these elements. The research will be limited to the general problems and the Dutch situation will serve as an illustration of how the SIS system works in practice.
Chapter 2: The Schengen Information System: the Convention Implementing the Schengen Agreement and the SIS II Regulation

As discussed in the previous chapter, the Schengen Information System went from being governed by the Convention Implementing the Schengen Agreement (SIC) to the SIS II Regulation last year. The goal of this chapter is to research what the Schengen Information System exactly is and to research what the difference is between how it was regulated under the SIC and how it is regulated under the SIS II Regulation. This will be done by examining what the SIS is and how data is stored. The point of departure is the SIC since this was the legal text that first established the SIS and the rules under the new SIS II Regulation will be compared with the old rules. This chapter deals with two sub-questions. The first: "What is the Schengen Information System and what are the consequences of being reported in the system?" The second: "What changed compared to the old system when the new SIS II Regulation entered into force?" The first question will be dealt with in the first paragraphs of this chapter that also clarifies what the SIS is and does. The second sub-question is addressed in the second main paragraph (§2.2).

2.1 The Convention Implementing the Schengen Agreement

2.1.1 The Schengen Information System

The Schengen Information System was created by the Convention Implementing the Schengen Agreement. The SIS is a governmental database in which a wide range of information can be found, from stolen vehicles to missing persons. However, for the purpose of this research there will be a focus on the SIS alert on unwanted third-country nationals. Member States can insert information about certain individuals in or retrieve information about them from the SIS. It is up to the States to determine whether or not a case at hand is important enough to enter an alert into the Schengen Information System. This means that the State that is planning on making the report has the widest possible margin of appreciation, that State itself can decide if it considers a case important enough or not.

There are three different categories of data, as found in Article 94(2) SIC, that can be stored in the database. Those three categories are:

1. Persons for whom an alert has been issued in Article 96 SIC;
2. Objects referred to in Article 100 SIC;
3. Vehicles referred to in Article 99 SIC.

38 Article 94(1) Convention Implementing the Schengen Agreement.
The category of data that we are interested in is the first: persons for whom an alert has been issued. The purpose of the SIS, stated in Article 93 SIC, is “to maintain public policy and public security, including national security, in the territories of the Contracting Parties”. However, as these concepts are not defined, this means that it is left up to the discretion of the States to decide what they mean and how broad they interpret them. The absence of a shared understanding of these notions has meant that in the past Member States could store reports in the SIS which did not satisfy the conditions in the SIC. As the system is based on mutual trust, all Member States had to accept and act upon these reports as prescribed by the Schengen rules. 39

The SIS works as follows: The national alert is entered in a national database, the National Schengen Information System (N-SIS). Each national system is linked to the Central Schengen Information System (C-SIS) in Strasbourg and through the C-SIS all the national systems are linked together.40 This means that changes are made in the own national system which is synchronised with the C-SIS all of the time. To clarify, recall the case of Roberto presented in the first chapter. In his case the Netherlands will have entered the alert on him as an unwanted person in their national database which is linked with the central database. It is through this central database that Belgium is informed of the alert on Roberto since the Belgian national information system is also linked to the central database.

In the remaining sections of this sub-chapter on the SIC we will consider in detail which information is listed in Article 94 SIC (§2.2) and the conditions for reporting persons as unwanted alien, found in Article 96 SIC (§2.3).

2.1.2 Storing data in the SIS

Article 94 SIC determines which information can be entered in the SIS. This is an exhaustive list, Contracting Parties cannot enter more information than the categories provided for by Article 94(3) SIC which are:

- Surname and forenames, any aliases possibly entered separately;
- Any specific objective physical characteristics not subject to change;
- First letter of second forename;
- Date and place of birth;

39 Article 5(1)(d) juncto Article 13 Schengen Border Code. Acting upon a report in the SIS means that Member States have to refuse a third-country national who has been reported in the SIS entry to the territories of the Member States.
• Sex;
• Nationality;
• Whether the persons concerned are armed;
• Whether the persons concerned are violent;
• Reason for the alert;
• Action to be taken.

It is specifically mentioned that other kinds of data are not allowed to be entered into the system.\textsuperscript{41} Furthermore, there is mention that Contracting Parties have to determine whether "a case is important enough to warrant entry of the alert in the Schengen Information System".\textsuperscript{42} This means that there should be some sort of balancing test made by the State to assess whether or not it is really necessary to enter an alert on an unwanted person in the SIS.

\subsection*{2.1.3 Reports on unwanted aliens}

The previous paragraph set out what kind of information can be entered in the SIS. This paragraph will focus on who can be the subject of a report entered in the SIS. A person can be reported as unwanted in the SIS if he is considered a threat to public order or national security and safety.\textsuperscript{43} An important provision regarding the SIS in the Convention Implementing the Schengen Agreement is Article 96 SIA. This deals with the actual SIS-alert. It states in paragraph 1 that:

"data on aliens for whom an alert has been issued for the purposes of refusing entry shall 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 and procedures laid down by national law".

In short the national alert is made by a decision of the competent authority in accordance with national rules. For the Netherlands the competent authority is the \textit{Immigratie- en Naturalisatiedienst} (Immigration and Naturalisation Service)\textsuperscript{44}. This authority is advised by the \textit{Koninklijke Marechaussee} (Royal Marshals or Royal Military Constabulary, the border authorities) and the \textit{Vreemdelingenpolitie} (Aliens Police), who can make suggestions to report an alien as unwanted in the N-SIS.

There are two groups of people on which Member States can issue a SIS alert. The first group is people who pose a threat to public policy, public security or national security.

\textsuperscript{41} Article 94(3) SIC.
\textsuperscript{42} Article 94(1) SIC.
\textsuperscript{43} Article 96 SIC..
\textsuperscript{44} The Dutch abbreviation IND will be used.
The Convention Implementing the Schengen Agreement states two different situations in which such a threat may arise in particular. The first concerns criminal offences committed by third-country nationals and is set out in Article 96(2) SIC:

1. When an alien has been convicted for an offence carrying a penalty involving deprivation of liberty of at least one year;
2. When there are serious grounds for believing an alien has committed serious criminal offences, or in respect of whom there is clear evidence of an intention to commit such offences on the territory of a Contracting Party.

This means that committing a criminal offence or being suspected of having committed or planning to commit such an offence is a legitimate reason for a Member State to issue a SIS alert.

It was mentioned earlier that the concepts of public policy, public security and national security have not been defined in the SIC. Past experience reveals different ideas among the Member States as to how these should be applied in practice. This can lead to embarrassment of other Member States which have to withhold entry permission. An example is the case of Ms Mills, a Greenpeace activist from New Zealand. Ms Stephanie Mills had taken part in protests against French nuclear tests in the Pacific in 1995. This was reason enough for France to enter an alert on Ms Mills in the SIS for reasons of public order. Several years later, in 1998, Stephanie Mills travelled to the Greenpeace headquarters in Amsterdam. However, at Schiphol airport the border officials checked her passport and discovered that she was entered in the SIS three years before. Ms Mills argued that she was no longer active in this campaign, but this was to no avail: "Dutch officials showed some embarrassment, but had no choice but to refuse her entry onto Schengen territory." This case clearly shows how different opinions between Member States could lead to potentially embarrassing situations. The Netherlands, in this case in the capacity of Dutch officials, would not have refused entry on the sole ground of Ms Mills having taken part in protests against nuclear testing. However, as the case clearly states: the officials had no choice. Third-country nationals who have been reported in the SIS shall be refused entry permission to the territories of the Member States. It does not matter whether the refusing Member State agrees with the SIS report or not.

45 Article 96(2) SIC.
46 Statewatch, EU-Schengen, Greenpeace campaigner refused entry to Schengen, September - October 1998 Vol. 8 no 5, p. 6.
47 Statewatch, EU-Schengen, Greenpeace campaigner refused entry to Schengen, September - October 1998 Vol. 8 no 5, p. 6.
48 Article 5(1)(d) juncto Article 13(1) Schengen Border Code.
The second group of people on which a Member State can issue a SIS alert is aliens who have been "subject to measures involving deportation, refusal of entry or removal which has not been rescinded or suspended, 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". This means that people who have unlawfully entered a Member State and/or reside there unlawfully, on the basis of the national law of a Member State, can be issued an entry ban. An entry ban refers to "measures meant to reinforce the effectiveness of a removal by prohibiting the alien from entering or staying in the country, to the effect that he will consequently be refused a visa or refused entry when he appears at the border, and sometimes that his unlawful presence on the territory may be considered a criminal offence". This entry ban can then be entered into the Schengen Information System, the consequence of which will be a refusal to enter the EU territory by all Member States by virtue of Article 5(1) SBC read in conjunction with Article 13 of that Regulation.

Reports on the groups of unwanted aliens as mentioned above shall be kept for a maximum of 10 years. After 10 years the report will be deleted from the Schengen Information System due to the lapse of time.

2.1.4 The shortcomings
The Schengen Implementing Agreement leaves room for States in deciding who they wish to report in the system, since not all concepts have been clearly defined. This can be explained by how the SIS came into being: it is part of the Schengen acquis, which started out as intergovernmental cooperation. The idea behind this, is that the Contracting States hang on to their sovereignty and decision-making powers. Because this margin of appreciation was left to the Schengen States, each State used the criteria to determine whether or not an individual should be reported in the Schengen Information System as it saw best fitting.

The first sub-question of this chapter can now be answered. The question was: "What is the Schengen Information System and what are the consequences of being reported in the system?"

The Schengen Information System is a database. Each Schengen Member has its own National Schengen Information System (N-SIS) in which it inserts data. This N-SIS is linked

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49 Article 96(3) SIC.
51 Article 113(1) SIC.
to the Central Schengen Information System (C-SIS) in Strasbourg. All N-SIS are linked to C-SIS, which means that through C-SIS they can access information from other States’ N-SIS.

The SIS can be used to report a variety of things, from stolen vehicles and missing persons to people subject of an entry ban. The people reported in the SIS because of an entry ban are what this research focuses on.

An individual can be reported in the SIS if a State considers him to be a threat to public policy, public security or national security. This can be the case when that person has, for instance, committed a criminal offence in that State or did not comply with immigration laws.

As set out in paragraph 2.1.3, when a SIS-alert has been issued in accordance with Article 96 of the Schengen Implementing Agreement, this has as a consequence that a third-country national no longer satisfies all the entry conditions in Article 5(1) of the Schengen Border Code. More specifically, Article 5(1)(d) SBC is not fulfilled; a person should not be subject of an alert in the SIS. This in turn means that Article 13 SBC comes into play, the entry conditions have not been fulfilled, which means that a third-country national shall be refused entry to the territory of the Schengen Area. If an alien turns up at an external border, for instance that of the Netherlands, he will be refused entry permission. The Dutch IND will be notified, but in principle the person will not be allowed to enter the EU territory. The person concerned is notified of the decision to withhold entry permission, for which the Schengen Border Code provides a standard form on which the correct box for refusal is ticked by the border authorities. The standard form also provides information on the means of redress which can be used to contest the decision.53

Furthermore, the person will also not be granted a visa. Article 32(1)(a)(v) of the Visa Code54 states that a visa shall be refused if the applicant “is a person for whom an alert has been issued in the SIS for the purpose of refusing entry”.

So, this is how the SIS used to work under the old regime, but on 9 April 2013 the SIS II Regulation entered into force. The question is: Has the new Regulation changed the way in which reports are made? That is what will be discussed in the next main paragraph.

53 Article 13(2) SBC in conjunction with Annex V, Part B to the Schengen Border Code.
2.2 The SIS II Regulation

2.2.1 The new Regulation

After discussing the old system governed by the SIC in the previous paragraph, we now turn to the new rules. In 2004 and 2005 the use of the first SIS was already extended, for instance by giving Europol and Eurojust access to the database.\(^{55}\) However, it was clear that a new SIS was needed. One of the reasons that necessitated a new SIS was the enlargement of the EU.\(^{56}\) The old SIS could only host 18 States, but the EU has now surpassed that number. Other reasons for updating the system were the possibility of introducing the use of new technology, such as the use of biometric data (photographs and fingerprints), the interlinking of alerts, and the functionality of sharing information with the other databases, i.e. the Visa Information System.\(^{57}\) It is now also possible to run searches on the basis of incomplete data. A final new addition made by the SIS II Regulation is the fact that "persons listed on the EU terrorists lists based on decisions by the Sanctions Committee of the UN Security Council\(^ {58}\) can be included in the SIS".\(^ {59}\) These are all new functionalities that should make the working of the SIS II more effective for Member States than the SIS I.\(^ {60}\) For instance, the interlinking of alerts can be useful to make connections between certain people who belong to the same criminal network.

The new SIS II Regulation was adopted in 2006, yet it took until last year, 9 April 2013, for the SIS II Regulation\(^ {61}\) to enter into force and provide a legal basis for SIS II.\(^ {62}\) The purpose of the SIS II is "to ensure a high level of security within the area of freedom, security and justice of the European Union, including the maintenance of public security and public policy and the safe-guarding of security in the territories of the Member States".\(^ {63}\)

The entry into force of the SIS II Regulation took so long due to years of debate on both technical and organisational issues. One of the issues was the new functionalities created by SIS II. These new functionalities are useful for the national authorities. However, there are

\(^{55}\) Boeles 2009, p. 423.


\(^{57}\) Christou 2008, p. 650.

\(^{58}\) Article 26(1) SIS II Regulation.

\(^{59}\) Boeles 2009, p. 423.

\(^{60}\) Here the abbreviation SIS I is used to indicate that this was the old SIS as governed by the SIC. This is done in order to better distinguish this SIS I from the SIS II.


\(^{63}\) Article 1(2) SIS II Regulation.
also downsides. For example, the interlinking of alerts can be very effective to fight criminal networks, but individuals are "no longer assessed on the basis of data relating only to himself or herself, but on the basis of his or her possible association with other persons".\footnote{Christou 2008, p. 650.} The problem with this is that there is no longer an individual assessment and this is not in accordance with the proportionality principle which will be discussed in paragraph 2.2.3.

It has been described in the previous chapter that the SIS I started out as a database created through intergovernmental cooperation and the purpose of which was to abolish internal border checks and harmonise the rules on external border checks. One of the changes realised by the SIS II is that it has brought the SIS under the EU mandate. This means that not only do the EU rules on decision-making apply, but also the general principles of EU law, the Charter of Fundamental Rights and judicial review has become an issue of EU law rather than being directed by national law.

\subsection*{2.2.2 The Schengen Information System II}

The scope of the SIS II Regulation can be found in Article 2(1) of that Regulation. The Regulation "establishes the conditions and procedure for the entry and processing in SIS II of alerts in respect of third-country nationals, the exchange of supplementary information and additional data for the purpose of refusing entry into, or stay in, a Member State". The Regulation also determines the technical structure of the SIS, the responsibilities of the Member States, general data processing and the rights of persons concerned and liability of the Member States.

The technical architecture of the SIS II is comparable to that of SIS I. There is still a central system (Central SIS II) that consists of: a technical database (CS-SIS) which contains the central SIS II database.\footnote{Article 4(1) (a) SIS II Regulation.} Then there is a uniform national interface (NI-SIS) and a national system (N.SIS II) for each of the Member States. Like with the SIS I, these national databases communicate with the central system.\footnote{Article 4(1)(b) SIS II Regulation.} This means that Member States still will never enter their reports directly into the Central SIS II. They enter, update, delete or search for information through their own N.SIS II, it is through this system that they acquire information from and transmit information to the central database which passes data to and from Member States.\footnote{Boeles 2009, p. 423.}
Each Member State is responsible for the security of their own N.SIS II. They need to protect data, deny unauthorised access and prevent unauthorised data input into the system.\(^{68}\) Furthermore, the Member States also have to ensure that the data is not only protected but that it is also dealt with confidentially.\(^{69}\)

### 2.2.3 Storing data in the SIS

The SIS II Regulation limits the Members States in the sort of information they can enter into the SIS II but compared to the old SIC there are more categories of data. Member States can only enter the following information on persons into the system\(^{70}\):  

- Surname(s) and forename(s), name(s) at birth and previously used names and aliases;
- Any specific, objective, physical characteristics that are not subject to change;
- Place and date of birth;
- Photographs;
- Fingerprints;
- Nationality/nationalities;
- Whether the person concerned is armed, violent or has escaped;
- Reason for the alert;
- Authority issuing the alert;
- A reference to the decision giving rise to the alert;
- Action to be taken;
- Link(s) to other alerts issued in SIS II.

There is not only a limitation on what kind of information the Member States can enter into the SIS II, there is also a proportionality requirement. This entails that before a Member State issues an alert, that State has to evaluate "whether the case is adequate, relevant and important enough to warrant entry of the alert in SIS II".\(^{71}\) This principle should have as an effect that States are not too quick in entering alerts into the SIS and report more diligently. However, this principle conflicts with another provision, as was mentioned in paragraph 2.2.1. There it was described that people who are interlinked with criminal networks are not assessed on an individual basis. This is very peculiar since the proportionality principle specifically states that each case has to be evaluated on its own merits.

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\(^{68}\) Article 10(1) SIS II Regulation.  
\(^{69}\) Article 11 SIS II Regulation.  
\(^{70}\) Article 20(2) SIS II Regulation.  
\(^{71}\) Article 21 SIS II Regulation.
A further point to consider is that once a report has been entered into the SIS II, it is not entirely clear for how long that report shall be kept in the system. Article 29 SIS II Regulation states in paragraph 1: "Alerts entered in SIS II pursuant to this Regulation shall be kept only for the time required to achieve the purposes for which they were entered". The reporting Member State is required by the Regulation to review the alert within three years after issuing it and determine whether or not there is a need to keep the alert.\textsuperscript{72} However, if a Member State decides that there is a need to keep the alert, it could, in theory, remain in the system indefinitely as the Member State decides on extension of the alert every three years.

\textbf{2.2.4 Reporting unwanted persons}

Let us now consider alerts on unwanted persons in more detail, as that is what we are specifically interested in. An alert on an unwanted person shall be issued on the basis of a national alert that is the result of a decision of a national authority or court, made after an individual assessment. This decision to refuse entry or stay is based on the person in question being a threat to national security, public policy or public security.\textsuperscript{73} The reading of the concept 'threat' is the same as under the SIC:

1. the third-country national has been convicted in a Member State of an offence carrying a penalty involving deprivation of liberty of at least one year;\textsuperscript{74}
2. a third-country national in respect of whom there are serious grounds for believing that he has committed a serious criminal offence or in respect of whom there are clear indications of an intention to commit such an offence in the territory of a Member State.\textsuperscript{75}

If an individual is considered to be such a threat, the Member State must issue a report. This means that a Member State has to enter information on that individual in SIS II, there is no margin of appreciation.

A Member State may issue an alert if there is a prohibition of entry or prohibition of residence for a certain third-country national which is the result of an expulsion or refusal of entry decision or removal due to a failure to comply with national rules on entry or residence. In other words, a Member State can also issue a report on a third-country national who, for example, has not satisfied entry conditions or has outstayed his or her visa. As can be read, the word may is used here. This means that the choice whether or not to report is left to the

\textsuperscript{72} Article 29(2) SIS II Regulation.
\textsuperscript{73} Article 24(2) SIS II Regulation.
\textsuperscript{74} Article 24(2)(a) SIS II Regulation.
\textsuperscript{75} Article 24(2)(b) SIS II Regulation.
Member State in question. This second category on who the Member States may report is a rather broad category; failure to comply with national immigration rules.\textsuperscript{76} This means that, contrary to the first category, Member States have a very wide margin of appreciation with regard to this second category.

2.3 Differences between the SIS II Regulation and the SIC

As mentioned above, there was a need for a new SIS for various reasons, such as the need for new functionalities. So, the first eye catching difference between the SIC and the SIS II Regulation is the inclusion of these new functionalities in the listed data that is to be inserted in the SIS, including the use of biometric data. The authorities argued that this would enable them to make quicker identifications and would reduce the chance of unwanted third-country nationals entering into Europe.

A second difference, as was also mentioned in the previous paragraph, is that the SIS II Regulation allows for more categories of information to be entered into the SIS. Article 94(3) SIC limits the information that can be entered to names, any specific objective physical characteristics not subject to change, date and place of birth, sex, nationality, whether the persons concerned are armed and violent, the reason for the alert and the action to be taken. Above a list was already provided describing the categories of information that can now be entered in the SIS. The basis is the same as that in the SIC, but, as mentioned before, the new functionalities need to be taken into account. The new categories in the SIS II are photographs, fingerprints, whether the person has escaped, the authority issuing the alert, a reference to the decision giving rise to the alert and links to other alerts issued in SIS II. This is a considerable increase of information on a person compared to the SIC. The rationale behind this is that it should make the system work better and make border checks more effective, at least from a Member State’s perspective. The downside is what this increase in information reportable in SIS II means for the protection of the rights of the individual. This is a subject that will be discussed in greater detail in the next chapter.

A third difference between the SIC and the SIS II Regulation, is that the SIS II Regulation does not contain a clear provision that determines how long a SIS alert can be stored in the database. It is only stated in Article 29(1) SIS II Regulation that an alert shall be kept only for the time required to achieve the purposes for which they were entered, and it continues by stating that the reporting Member State shall review the alert within three years after issuing the report, but there is no provision limiting how often this can happen. Article

\textsuperscript{76} Boeles 2009, p. 419.
113 SIC stated that under that regime, data could only be kept for a maximum of 10 years. When looking at only this provision, one could doubt whether or not this is an improvement for the individual since there is no longer a clear maximum duration for a report. It is not proportional to keep a person in the system for years and years if that person has not given a reason for this. So this implies that the change from a clear maximum duration of a report to a review every three years with the possibility of keeping the report indefinitely cannot be seen as an improvement for an individual who has been reported in the SIS.

A fourth difference is that under the new rules of the SIS II Regulation more authorities are entitled to access data stored in the SIS II. Previously under the SIC, only the European Commission, the national authorities of the Member States and the SIRENE authorities had access to the system and they only had access to data which they needed to perform their tasks. The new Regulation, however, also grants Europol and Eurojust access to SIS II, both organisations are involved in criminal law acts and not immigration matters, but can now use information collected for immigration purposes for their criminal investigations. If a person has been reported in the SIS for committing criminal acts or for ties with criminal organisation it could be useful and proportional for Eurojust and Europol to have access to the system in order to combat crime. However, not everyone who has been reported in the SIS is a known criminal, so in these cases it seems disproportional for Europol and Eurojust to have access to the data in the system.

A final distinction is the fact that the SIS II Regulation takes, albeit slightly, more notice of other European rules. As Boeles argues, it is possible that the entry of data into SIS II "may be in conflict with obligations under EC law or international law". Article 25(1) SIS II Regulation states that "an alert concerning a third-country national who is a beneficiary of the right of free movement within the community [...] shall be in conformity with the rules adopted in implementation of that Directive". This means that the rules of the Citizens Directive need to be taken into account. This was not the case with the SIC though the ECJ found against Spain when it had not observed the rules in Directive 2004/38/EC.

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78 These authorities are responsible for the exchange of supplementary information. This is information that is connected to a SIS II alert but this information is not stored in the SIS itself.
79 Boeles 2009, p. 424
that Spain had failed to fulfil its obligations under Directive 2004/38/EC and that it should have verified "whether the presence of those persons constituted a genuine, present and sufficiently serious threat to one of the fundamental interests of society." So in practice it did mean that Spain had to take into account the rules of the Citizens Directive and that Spain should have performed a balancing test.

Overall, the new Regulation seems to mainly benefit the Member States and not the individual. After all, more data on him or her can be entered, the report can be kept indefinitely, and more actors have access to the data. This means that authorities will know more about the individual, but has it provided that individual with more tools to protect him-or herself against intrusive actions?

2.4 Conclusion
The goal of this chapter was to answer the sub-question: What has changed compared to the old system when the new SIS II Regulation entered into force? The previous paragraph contains the answer to that question. In a more general concluding way, it can be argued that the SIS II Regulation has made the SIS fall under the European Union mandate and that it has created several extra uses and functionalities. The SIS II can also be used by more actors, such as Europol and Eurojust. Another difference that should not be overlooked is the fact that there are not only new functionalities, but Member States are also permitted to enter more information in the SIS II than they could in the SIS I.

Taken together, all these novelties should make the use of SIS II quicker and more efficient than its predecessor. However, we should be careful not to take a too one-sided look at these changes. There have been big changes, but do these changes also provide individuals who have been reported in the SIS tools to protect themselves and if so, which? This will be examined in the next chapter, where the focus will be on European judicial protection and the difference, if there is any, between the judicial protection provided for in the SIC and that is provided for by the SIS II Regulation.

82 ECJ C-503/03, Commission v Spain, [2006] ECR 1-1097, paragraph 59.
Chapter 3: Judicial protection

Roberto from Bolivia has been used throughout the chapters as a case to illustrate the problems faced by third-country nationals who are subject of a report in the SIS. He was refused permission to enter the territory of Belgium at Zaventem airport because he did not fulfil the entry conditions set out in Article 5 of the SBC, since he was reported in the SIS. Recapitulating: Belgium was obliged to withhold entry permission by virtue of Article 13 SBC that essentially obliges Member States to refuse entry permission if one or more entry condition in Article 5(1) SBC is not satisfied. As Roberto had been reported in the SIS by the Dutch authorities, he did not satisfy all entry conditions, which left Belgium with no other choice than to withhold entry permission, as the exceptions in Article 5(4) of the SBC did not cover the situation of Roberto. As long as Roberto is reported as an unwanted alien in the SIS, Member States have to withhold entry permission, so Roberto, if he wants to enter the Schengen Area lawfully, will have to first contest the legality of the SIS-report with a view to having it removed from the system. So the question is: What can Roberto do about this SIS-alert? Where can he turn to in order to have this alert removed and thereby secure a right to enter the European Union? This is the topic of our analysis in this chapter. This analysis will allow us to answer the following sub-question: "Does the SIS II Regulation comply with the demands set forth by the principle of effective remedies in Article 47 of the Charter and the Court of Justice's case law and is compliance under the SIS II Regulation better than under its predecessor, the SIC?" The first step that needs to be taken in order to find an answer to this sub-question is to determine which authority Roberto needs to turn to if he wishes to have his SIS-alert removed or changed. To do this it is necessary to take a closer look at the European Union’s judicial architecture (§3.1). Once we have established the competent judicial authority, closer consideration can be given to the rules of procedure, which apply to procedures to have an alert removed from the SIS (§3.2). The assessment of compliance of the rules on the removing of alerts from the SIS will be assessed in the light of the principle of effective remedies in §3.4, after we have considered what amounts to an effective remedy in §3.3.

3.1 The judicial architecture of the EU

The judicial architecture of the EU is a special model of cooperation between the national courts of the Member States and the Court of Justice of the European Union (further: the Court of Justice). In order to determine which authority Roberto should turn to we need to examine this EU judicial architecture. Our starting point is Article 19(1) TEU that reads:
"The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed. The Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law."

According to Article 19(1) TEU, Member States are obliged to ensure effective legal protection in fields covered by Union law. Connected to this is Article 47 of the Charter of Fundamental Rights of the EU. This article gives individuals the right to an effective remedy and to a fair trial. This right will be explained in greater detail in paragraph 3.3.

This provision also makes clear that judicial review within the EU legal framework takes place at both the European and the national level. It is therefore necessary to determine how judicial review has been allotted to the two levels. For this purpose, let us take a look at Article 19(3) TEU that follows the obligation for Member States to ensure effective legal protection by providing a list of procedures in which the Court of Justice is competent to adjudicate in accordance with the Treaties. From this provision and the other provisions on legal procedures in the Treaty on the Functioning of the European Union it transpires that, as a rule of thumb, it can be said that national courts are competent to adjudicate on compliance with Union law when it is applied by national authorities. To ensure uniform application of Union law, they can seek guidance from the Court of Justice by referring questions on the validity and interpretation of Union law to that court as provided for in Article 267 TFEU.

The Court of Justice of the European Union mainly deals with three types of procedures: infringement procedures, preliminary questions and direct appeals. The preliminary questions will be discussed in the next paragraph since these are closely connected to the role of the national courts. Infringement procedures are usually cases brought by the EU, represented by the European Commission, against a Member State for non-transposition of directives or not timely or wrongly implementing directives. The infringement proceedings can, however, also concern incorrect application of other sources of Union law. Member States are the ones accountable for their own acts or omissions, meaning that the wrongful implementing or non-transposition of a directive can be accounted to that Member State. A Member State could also bring a case against another Member State for those reasons, however, this hardly ever happens. This is a politically unwise thing to do, since it is seen as interfering with the affairs of another Member State. The infringement procedure

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83 Article 258 TFEU.
84 Article 259 TFEU.
exists to ensure the rule of EU law and also to secure the efficiency of the decentralised system of enforcement, meaning that Member States are the ones which need to ensure compliance with the rules in their own territory.

Second, there is the direct appeal procedure. In this procedure the Court reviews the validity or legality of acts of the EU that have direct effect vis-à-vis third parties. This is something that only the Court of Justice of the EU can do, not national courts, since the Court has a monopoly on the interpretation of EU law and on decisions on validity of EU law. A direct appeal is the only possibility of a direct review in the EU regime and the only way to go straight to the CJEU. Article 263 TFEU determines which acts may be reviewed, namely:

"acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the Council intended to produce legal effects vis-à-vis third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties".

An individual could use the direct appeal procedure to bring a case directly before the Court of Justice, however, this does not happen very often. For natural or legal persons may only bring proceedings "against an act addressed to that person or which is of direct and individual concern to them, or against a regulatory act which is of direct concern to them and does not entail implementing measures". 85 So, the criterion is that the act must in some way affect one person in particular. When the act in question is, for example, a decision to fine a company for a violation of competition law, it is obvious that the act directly effects only that company, since only that company has to pay the fine. In this case, it is necessary that the company in question has direct access to the Court of Justice since a national court cannot rule on the legality of a Commission decision. Overall, however, acts of a more general nature are not eligible for direct review by the Court of Justice.

To sum up, the Court of Justice is responsible for the bigger picture of uniformity of Union law across the EU as well as the validity of Union legislation, whilst the national courts are responsible for adjudication in cases concerning the application of Union law by the national authorities. In the preliminary reference procedure we see a further nuance of the division of tasks: the Court of Justice adjudicates on the law, where the national courts apply the interpretation given by the Court of Justice of Union law to the facts of the case. It is now

85 Article 263 fourth paragraph TFEU.
time to turn our attention to the procedural rules that apply to national courts adjudicating in cases concerning Union law.

3.1.1 The national court as guardian of Union law
As said, what makes the judicial architecture of the EU special is the fact that it is a system of joint or shared responsibilities between the EU and national judges, as reflected in Article 19 TEU. There is no hierarchy between the Court of Justice and national courts; they are considered to be equal partners in judicial protection equally responsible to ensure the full effectiveness of Union law. There are, however, some rules governing the relationship between the Court of Justice and the national courts of the Member States.

The national courts are the ones which initially receive the complaint that Union law has been violated by national authorities lodged by an individual. When an individual can take a case to a national court, is first and for all, a matter of national law. Like any case, the national court has the monopoly to adjudicate on the matter, but the Court of Justice has a monopoly on reviewing the validity of EU acts and the interpretation of EU law, for which purpose the preliminary reference procedure was set up. The thought behind this division of tasks is that the Court of Justice is better placed to safeguard the correct application and coherence of EU law throughout the EU, while national judges are better placed to protect the individual complainant since they have more on the ground knowledge of the facts of the case and the national rules. So, the national court has the more classical role of a court that resolves disputes, while the CJEU is not primarily concerned with dispute resolution but ensuring uniform application of EU law in all 28 Member States.

Though national law governs procedures before national courts, Union law does impose limitations on the competence of national courts. Thus, when applying Union law the national courts must take the principle of sincere cooperation into account. This principle, also known as the fidelity principle, can be found in Article 4(3) TEU. This principle entails both a negative and a positive obligation for the Member States. The negative obligation is that Member States should not take action or enact legislation that frustrates EU law. The positive aspect is that the Member States have to do what they can in order to ensure compliance with EU law. At first glance this might not be of much concern to the national judges, however, judges are also part of the Member States and in that way they too are bound by the principle of sincere cooperation. National judges have to ensure that the objectives of the Union are

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86 Article 274 TFEU.
87 Article 267 TFEU.
realised by, if necessary, disapplying national law that conflicts with Union law in an individual case.

As said, it is the national court to which the individual turns when his or her rights have been violated by national authorities, even when these rights are derived from an EU source of law. If the right breached has direct effect then the national court should give precedence to the provision of Union law over conflicting rules of national law. Direct effect means that EU law is directly applicable in the Member State regardless whether that Member State has to adopt national measures to implement that rule of Union law, as is the case with Directives, or not and the provision invoked is sufficiently clear and precise. This obligation is related to the principle of supremacy of EU law and, in the case of Directives the principle of Union loyalty mentioned above. Supremacy means that EU law takes precedence over any conflicting national law, irrespective of the date on which the rules were adopted and the source of law in which the national rule is found.

As said, it is the national court that decides on the facts of the case and how to apply EU law to the case. If, however, the national court is unsure about the validity or interpretation of a certain piece of EU law and feels it needs clarity on this point, that national court can, or in some cases must, make a reference to the Court of Justice in which it asks that court to answer so-called preliminary questions. The Court of Justice will issue a preliminary ruling containing its views on the interpretation of the piece of EU legislation in question or the validity of an act of Union law. Though not strictly speaking part of the Court of Justice's competence, in practice it will consider the national rule at stake in the light of Union law. The national court decides on the case, taking this preliminary ruling into consideration, as required by the principle of Union loyalty.

3.1.2 The competent court to hear Roberto's case
So, what does this mean for Roberto? To which court should he turn in practice? In most cases involving EU law, the national courts are the court where an individual should bring his case. An individual can only directly turn to the CJEU through the means of a direct appeal. In order to do this an act should be challengeable and have legal effect and it should affect an

91 Chalmers 2011, p. 150.
92 Article 267 TFEU.
individual in a direct and specific way. When a person is entered into SIS II these conditions can be seen as fulfilled, after all, it is a decision directed at that person and no one else and the legal effect is that the person who is entered into the SIS database cannot enter the European Union lawfully, nor acquire a short-stay visa. However, as we established in paragraph 3.1 of this chapter, the Court of Justice can only review acts or decisions of EU institutions and agencies. The decision to report a third-country national in the SIS is, however, made by a national authority, as we saw in Chapter 2. The Court of Justice, therefore, has no competence to review such a decision, so there is no possibility of direct appeal to that court. This confirms that an individual reported in the SIS has to turn to a national court that will adjudicate on the matter in accordance with national rules of procedure and paying due respect to the principles of supremacy, Union loyalty and direct effect. If it needs clarification from the Court of Justice on a point of EU law, then it can make a reference to that court asking the latter to answer one or more preliminary questions on the interpretation and/or validity of EU law, in this case the Schengen Border Code and/or the SIS II Regulation. This sheds some light on Roberto's situation, he now knows that he should turn to the national court, but what are the rules that govern this court's procedure?

3.2 Rules on procedure
As said national courts adjudicate in accordance with national procedural rules as EU law does not provide for a general body of procedural rules. Having said this, this should not be misinterpreted as meaning that the EU has no procedural rules whatsoever. On the one hand, there can be rules on procedure in EU law if these rules have their legal basis in a specific Regulation or Directive, as is the case with the SIS II Regulation. On the other hand, EU law prescribes that national procedure involving questions of EU law should comply with the principle of national procedural autonomy and general principles of Union law, discussed in §3.1.1 of this Chapter. The former will be considered in §3.2.1-§3.2.3, the latter in §3.2.4.

3.2.1 Judicial protection in the SIS II Regulation and the SIC
As set out in Chapter 2, the entry into force of the SIS II Regulation resulted in many changes including increased functionalities and uses of the SIS compared to its predecessor the SIC. The Member States are allowed to enter more data into the SIS in comparison with what was allowed under the SIC, which makes it all the more important to have a high level of legal protection. The question here is: How is legal protection organised in the SIS II Regulation and does this, and if so how does this, differ from the SIC? The SIS II Regulation will be the point of departure, since that is the currently applicable legislation. However, while discussing
the SIS II Regulation it will be compared with the SIC in order to determine how the two differ and whether or not the changes made to the provisions on judicial redress can be considered to be an improvement.

3.2.2 Changing or removing data from the system

The SIS II Regulation has a separate chapter dedicated to data protection, just like the SIC.93 A first observation that can be made is that in the SIS II Regulation several references are made to Directive 95/46/EC. This is a Directive on the protection of individuals with regard to the processing of personal data and the exchange of such data.94 A reference to the Data Protection Directive is found, for instance, in Article 40 SIS II Regulation. This link between the two Regulations did not exist in the SIC, since the latter was adopted prior to the incorporation of the Schengen acquis into the Union legal order and, as such, was strictly speaking not a piece of EU legislation, though it had been given a legal basis in the Treaties following the entry into force of the Treaty of Amsterdam in 1999. As no agreement could be reached on the legal basis of the SIS-provisions, the fall back clause meant that it became an act that belonged to the so-called – intergovernmental - third pillar, rather than becoming part of the rules on the Area of Freedom, Security and Justice which had been incorporated into the – supra-national - EC Treaty and, as such subject to other rules of Union law. The link between the SIS II Regulation and the Directive seems to be an improvement, because Directive 95/46/EC aims to protect data and it also elaborates on the right to access to information.

A second novelty of the SIS II Regulation is that it contains a proportionality principle in Article 21, as has been mentioned in greater detail in the previous chapter. Under the SIS II Regulation the Member States now have to determine if the alert is important enough, relevant and adequate to be included in the SIS II. This can be seen as an improvement compared to the SIC, since it requires Member States to rethink their report; it emphasises that these decisions should not be taken lightly considering the effects for the individual concerned. However, the final decision is still with the Member State and if the case is important in their opinion, an alert can be issued. So, even if this principle might be somewhat of an improvement compared to the SIC, it nonetheless still allows a lot of Member State discretion.

93 Chapter 3 of Title IV SIC and Chapter VI SIS II Regulation.
Access to data
Like the SIC, the SIS II Regulation provides individuals with the right to access data relating to them that has been entered in the SIS II. This right is to be "exercised in accordance with the law of the Member State before which they invoke that right." Member States have the competence to decide whether a request of access to data can be granted directly or if the national supervisory authority should deal with the matter. National law thus determines that the decision whether to grant such access has to be made by a national supervisory authority. This means that although there is a right to access to information, a national authority can decide not to communicate the requested information. In the Netherlands there is a direct right to access data. The individual right to access data reported in the N.SIS is regulated by Article 25 of the Wet politiegegevens. An individual has to send a written request for information to the data protection official of the National Police (gegevensbeschermingsfunctionaris van het Korps Landelijke Politiediensten). Article 27 of the Wet politiegegevens states three grounds to deny the access to information: if this is necessary for the effective execution of police work, if there are important interests of third persons at stake and the security of the state. If access is denied an individual can turn to the Dutch authority for the protection of personal data (College Bescherming Persoonsgegevens, further: CBP). The CBP can look into the case at hand and research whether data that has been entered in the SIS, has been entered in accordance with the Schengen rules. An alternative to this, or in case mediation by the CBP fails, is to bring a case before a national court.

The SIS II Regulation provides an escape if the reporting Member State refuses to grant access to the data that has been entered in the SIS by allowing the individual to turn to another Member State with a request for information. However, as this Member State first needs to let the reporting State communicate its position, this can be a very time consuming alternative.

Correction of data
An individual who knows of a report may want to have the data amended as they are, in his or her eyes, incorrect. The SIS II Regulation, like its predecessor, provides every individual with
a right to have inaccurate data corrected and to have unlawfully stored data deleted. In the SIC the right to access to information and the right to have inaccurate data corrected could be found in two different Articles, but in the SIS II Regulation these have been grouped together under one article. However, due to this change it has become unclear where an individual has to turn to in order to get information deleted or corrected, because the competent authority has not been identified. The SIS II Regulation only states that an individual has this right, but nothing more.

In the SIC, however, it was clear that only the reporting State could modify, add to, correct or delete a SIS-alert. This meant that if an individual would want to make sure his alert was altered or removed he could only go to the State that had reported him/her in the first place. The trouble with this was that the reporting State might not be willing to revoke its decision; it might not have changed its opinion and might still believe the individual to be a threat to society, for instance. As can be read in paragraph 2 of the Article 106 SIC, other Member States were never able to alter information, even if that other State had evidence that the data was factually incorrect or unlawfully stored. The only thing other States could do were they to pick up on these issues, was to inform the reporting State about the problem, which then had to check the information. As was made clear in the previous paragraph, other Member States can grant the right to information, so it was not an impossibility, but it is an unrealistic alternative because non-reporting States were rather toothless if they felt that the individual was right in his or her assertion that the data stored was incorrect.

If the reporting State was unwilling to amend the data in the SIS, Article 106(3) SIC stated that "the Contracting Party which did not issue that alert shall submit the case to the joint supervisory authority". The joint supervisory authority could then give its opinion on the matter and draw up a report.

Does the omission to include such a provision in the SIS II Regulation, mean that an alert can be removed by any of the States? This is not clear. The national court to whom Roberto turns could refer this question to the Court of Justice for clarification.

Notification of a report
Besides the right to access to data and the right to have incorrect data corrected or deleted, the SIS II Regulation provides the individual who has been reported in the SIS II the right to be

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101 Article 41(5) SIS II Regulation.
102 Article 110 SIC.
103 Article 106 SIC.
104 Article 106(3) SIC and Article 115 SIC.
informed of this. However, this is not necessary in all cases according to the SIS II Regulation. When personal data has been obtained from another source than the individual himself, for instance from a database or a relative, or when providing information to the individual is impossible or would involve a disproportionate effort on the part of the reporting State there is no obligation to provide it. National security, defence, public security and the prevention, investigation, detection and prosecution of criminal offences are also considered to be reasons not to provide information to the individual. In these cases an individual shall not be informed of the SIS-alert, nor of his right to access to the data stored, but this does not mean that the individual does not have this right to access to the data stored, it only means that he is not informed of the fact that he has this right.

Even though the right to information has its limitations, it is still an improvement compared to the SIC which contained a right of access to documents and a right to ask for correction or removal of the report, but there was no right to be informed that there was a report in the first place. The national authorities were not obliged to notify a person that they had reported him in the Schengen Information System. Of course, this was a major flaw, because this undermines the legal position of an individual. If a person does not know he is entered in the SIS he also does not know that he is restricted in his travels or that there is action he can take in order to have the report removed. The SIS II Regulation has addressed this issue by providing that individuals who are reported in the database should be informed of this in writing. This will allow the individual to take action before such time as he or she wants to travel to the European Union. So, under the new Regulation individuals are better informed and there should be less unpleasant surprises at the external border. It is a shame, however, that there are several exceptions in which case this information shall not be provided. Especially the provision that states that the information shall not be provided if it "proves impossible or would involve a disproportionate effort" is regrettable because it is a

105 Article 42(1) SIS II Regulation.
106 Article 42(1) SIS II Regulation juncto Articles 10 and 11 Directive 95/46/EC.
107 Article 42(1) and (2) SIS II Regulation.
108 Article 42(2)(c) SIS II Regulation.
vague definition and it allows a lot of leeway for the Member States.\textsuperscript{110} But being informed is one thing, getting incorrect data removed or corrected is another.

**Removal of the report by lapse of time**

There is one more way to have data removed from the SIS, but this way is not something the individual concerned can influence. Data is removed from the SIS if the retention period of the alert elapsed. In the SIC this retention period was 10 years, after that time the report was deleted.\textsuperscript{111} However, there is no clearly defined retention period in the SIS II Regulation. There is only the very vague provision that states that alerts are only kept for the time required to achieve the purpose for which they were entered.\textsuperscript{112} This creates legal uncertainty since an individual cannot be sure anymore that his SIS-alert will be removed by lapse of time and he is dependent on the Member State to remove the alert. An issuing State is required to evaluate the alert within three years, but if that State decides it is still necessary the alert is kept and this process repeats itself every three years.\textsuperscript{113} This can have the effect that an alert is kept in the SIS II for a longer period than the maximum of 10 years under the SIC, with no guarantees for the individual that the report will be removed at all.

**3.2.3 Legal protection**

In the previous sub-sections we have looked at the tools available to the individual other than taking his or her case to a court that is competent to review such a case. Article 43 SIS II Regulation is dedicated to remedies which have to be made available to individuals reported in the SIS II. This Article is an expression of the right of access to justice; it states that "any person may bring an action before the courts or the authority competent under the law of any Member State to access, correct, delete or obtain information or to obtain compensation in connection with an alert relating to him".\textsuperscript{114} It is important to note that the SIS II Regulation obliges the Member States to mutually undertake efforts to enforce final decisions handed down.\textsuperscript{115} This is important because this was not the case under the SIC. Under the old rules a judgment handed down in another Member State did not mean it could be used in the reporting State to the effect that a report found to be incorrect was removed from the SIS or corrected.

\textsuperscript{110} Article 42(2)(a)(ii) SIS II Regulation.
\textsuperscript{111} Article 113(1) SIC.
\textsuperscript{112} Article 29(1) SIS II Regulation.
\textsuperscript{113} Article 29(2)(4) SIS II Regulation.
\textsuperscript{114} Article 43(1) SIS II Regulation.
\textsuperscript{115} Article 43(2) SIS II Regulation.
The right to judicial protection in the SIC was very similar to that currently found in the SIS II Regulation, but there is one rather crucial difference. Article 111(1) SIC stated that: "any person may, in the territory of the each Contracting Party, bring before the courts or the authority competent under national law an action to correct, delete or obtain information or to obtain compensation in connection with an alert involving them". This article reveals a drawback of the old system: under the SIC the right to bring an action before a court in any of the Member States was a rather empty phrase, since judicial decisions from one Member State could not be enforced in another. The problem being that "there is no sanctioned obligation for the reporting Member State to comply with a ruling that is handed down by a national court of another Member State". This made the right to litigate in another Member State than the reporting one rather useless, since it did not help the individual at the end of the day. The SIS II Regulation addresses this issue by stating that Member States should mutually enforce final decisions handed down by courts or national authorities. This means that under the new SIS II Regulation bringing a case before the authorities in another Member State should be a more effective remedy compared to the way it worked under the old SIC.

3.2.4 National procedural autonomy
It has been determined that the court competent to hear Roberto's case, or indeed the case of anyone reported in the SIS II as an unwanted alien, is the national court. Therefore national procedural rules apply to the case. The procedural rules that have been described above are specific for the SIS II Regulation. Whenever the EU has not provided for procedural rules in an act of secondary EU law, as, for instance the SIS II Regulation, or where such rules do not cover all procedural aspects, the principle of national procedural autonomy takes effect. The principle of national procedural autonomy refers to the freedom of the Member States to apply their own rules of procedures, such as, for instance, time limits to bring a case. In other words a Member State is free to organise its judicial system as it wants and is normally respected by the Court of Justice. This is logical since it is a sign of respect for the national legal system. The consequence of not providing for rules of procedure is that differences in national rules of procedure will mean different levels of judicial protection between the Member States which are not remedied by the principle of procedural autonomy.

Even under the principle of national procedural autonomy, Member States competence is restricted. In this case by two principles: the principles of equivalence and effectiveness.

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116 Oosterom-Staples 2011, p. 113.
117 Article 43(2) SIS II Regulation.
Effectiveness means that national rules of procedure should not "render virtually impossible or excessively difficult the exercise of the rights conferred by [Union] law".\textsuperscript{119} For instance, a time limit should not make it more difficult or impossible to bring a claim based on EU law than on national law before a national court. This means that you should be allowed to bring a case before a national court on the basis of EU law if this is the case for a similar case based on a breach of national law and that the remedy provided is effective. In other words, an individual like Roberto should be able to bring a case before the national court and he should be able to effectively enjoy his right to a fair trial and an effective remedy.

Equivalence refers to non-discrimination, so when there is for instance a time limit, this should apply equally in all cases, it should be neutral as to whether it is a claim based on EU law or on national law.\textsuperscript{120} In the case of the SIS II this means that a person entered in the SIS database should be treated the same as someone entered in a similar national database. In the Netherlands the comparison could be made with the GBA (\textit{Gemeentelijke Basisadministratie Persoonsgegevens}). Each municipality has one of these databases on the citizens who live in the said municipality. If data in this system is incorrect a person can request the local authority to change the data. If the individual disagrees with the decision the local authority has made, that person can file a written objection with the city council which then decides on the matter. The individual can appeal this decision at the lowest level national court if he or she does not agree with that decision. This is a procedure typical to Dutch administrative law. So, this means that a person reported in the SIS should have basically the same rights. He or she should be able to request a change, object to a decision and appeal to that decision in the lowest level court.\textsuperscript{121} In practice this means that an individual who has been reported in the SIS has to request a change or deletion of the report from the IND.\textsuperscript{122} The lowest level Dutch court an individual who has been reported in the SIS can turn to is the court in The Hague which has a special Immigration Chamber.\textsuperscript{123}

\textsuperscript{119} Case C-228/98, Charalampos Dounias v Ypourgio Oikonomikon, [2000] ECR I-00577, under heading summary, paragraph 4.
\textsuperscript{120} Steiner & Woods 2009, p. 193.
\textsuperscript{122} Article 12.8.1 Vreemdelingencirculaire 2000 (A).
\textsuperscript{123} Retrieved from: https://ind.nl/EN/individuals/residence-wizard/other-information/entry-ban. Under the heading: Legal remedies against an entry ban.
When analysing both the principle of effectiveness and equivalence in SIS cases in the light of the right to an effective remedy and the right to a fair trial, it will become clear that there is some tension between the SIS and these principles.

3.3 What is judicial protection?
The reason for devoting almost an entire paragraph to the way in which judicial protection is arranged under the SIS II Regulation is the fact that the principle of effective judicial protection can be seen as a right. It is found in several different sources of law. First of all, there is Article 19(1) of the Treaty on the European Union (TEU). This Article states that "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law". Upon entry into force of the Treaty of Lisbon, the Charter of Fundamental Rights of the EU became legally binding and gained the same status as the TEU and the TFEU.\textsuperscript{124} According to the Charter, that takes inspiration from the European Convention on Fundamental Rights, in particular Articles 5, 6 and 13, the right to judicial protection means that everyone has the right to an effective remedy before a tribunal in a case in which one or more of their rights guaranteed by EU law are violated. So judicial protection basically means that when a person finds his or her rights violated, that person should be granted the possibility of going to a court to have his/her case examined; it is about the access to justice.\textsuperscript{125}

The right to judicial protection in the ECHR is found in two separate provisions as that Convention identifies two separate rights which, together, ensure effective judicial protection: the right to a fair trial\textsuperscript{126} and the right to an effective remedy.\textsuperscript{127} Article 47 of the Charter and Article 6 ECHR can be seen as really capturing the essence of the principle of effective judicial protection. However, they are not the same. First of all, the ECHR only refers to criminal and civil proceedings and not administrative proceedings. Article 47 of the Charter, however, explicitly includes administrative proceedings as proceedings in which an effective remedy has to be made available. Nonetheless, in substance the rights are the same and interpreted in the same way, but the Charter has added value in that it binds the EU itself and all its institution vis-à-vis every individual where EU rights are at stake. This means that the EU itself has to respect the rights that have been laid down by the Charter and the EU itself can, therefore, be a violator of such rights.

\textsuperscript{124} Article 6(1) Treaty on the European Union.
\textsuperscript{125} Article 47 Charter of Fundamental Rights of the EU.
\textsuperscript{126} Article 6 ECHR.
\textsuperscript{127} Article 13 ECHR.
According to EU law, judicial protection must be effective.\textsuperscript{128} This means that a person going to court is entitled to a fair and public hearing which must take place within a reasonable time by an independent and impartial court that is established by law.\textsuperscript{129} This also means that the individual who started the proceedings should be able to be advised, defended or represented by a lawyer. A final point that can be taken from Article 47 of the Charter is an important one, namely, that legal aid shall be made available for those who otherwise cannot afford going to court since that would mean that they would not have effective access to justice.

The notion of effective remedies is closely linked to that of effective judicial protection. As described, effective judicial protection means that individuals have access to justice and that they are entitled to a fair hearing by an impartial court. Effective remedies are connected to this notion of access to justice, however, it does not stop at merely being able to access a court and have your case heard. The principle of effective remedies also means that an individual is entitled to receive a binding decision in his or her case "through which rights are enforced and violations of rights are prevented".\textsuperscript{130} So, it means that there should be an actual 'fix to the problem'. This could be a payment of compensation to the victim or the government should stop or amend its activities that cause the violation of rights.

\subsection*{3.4 Conclusion}
The sub-question of this chapter was: Does the SIS II Regulation comply with the demands set forth by the principle of effective remedies in Article 47 of the Charter and the Court of Justice's case law and is compliance under the SIS II Regulation better than under its predecessor, the SIC?

It has become clear in the previous paragraphs that several major changes have taken place when the SIS II Regulation replaced the SIC. Some of these changes were positive, some negative. Something that can be viewed as negative is that so much is still left up to the Member States: they can decide for how long an alert is kept, whether an alert is proportionate, whether providing information involves a disproportionate effort. What can be regarded as positive is that individuals who have been reported in SIS II have, in general, a right to be notified. This is a huge improvement compared to the SIC, since people are not left in the dark and they are also told what the consequences are of such a report.

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\item \textsuperscript{128} Article 47 Charter of Fundamental Rights of the EU.
\item \textsuperscript{129} Article 47 Charter of Fundamental Rights of the EU.
\item \textsuperscript{130} Oosterom-Staples 2009, p. 65.
\end{itemize}
\end{footnotesize}
Something that has also improved greatly is the fact that the right to go to any national court has become a much more effective remedy. Under the SIC, it was not possible to force Member States to change or delete a report with a decision from another national court, but now this is a possibility. Member States should mutually enforce final decisions handed down by courts, which means that Member States have no choice but to listen. So, on paper, this right has turned from an ineffective into an effective remedy. However, after examining the SIS II in the previous chapters, it can be argued that this does not provide for an effective remedy in practice. It is more effective than the SIC, since judgments made by national courts of other Member States have to be enforced by the reporting State. However, this right to go to court is an empty one if an individual cannot appear in this court. It is very hard for the individual reported in the SIS to bring a case to court since he or she is not allowed to enter the EU territory. If that is impossible, it is very difficult to get a binding decision that enforces the rights of an individual. This means that, although at first sight the SIS II Regulation seems to provide a more effective remedy than the SIC, in practice it is not more effective than before. After all, there is a right to go to a national court, but a person cannot physically get to this court. So, in reality it does not matter that a person can go to any of the national courts of the Member States, since he or she cannot enter any of their territories. So, the biggest problem of all, as mentioned in the first chapter, remains: the individual still cannot enter the territory to bring a case before a national court. So, all in all when balancing the pros and cons of the new Regulation and looking at the letter of the law, it becomes clear that in practice there are still difficulties. At first glance, the SIS II Regulation might seem like an improvement, however, it does nothing to tackle the real problem and that is the fact that individuals reported in the SIS are denied entry permission to the EU and therefore in effect making it hard to bring a case before a national court. The only option could be to enlist the aid of a lawyer so that he will bring a case before a national court in the name of the person reported in the SIS. This possibility and its effectiveness will be elaborated on in the next chapter.

As for Roberto, he has no place he can turn to by himself. He could bring his case to a national court in any of the Member States, but he is not allowed onto the territory of any of those Member States. Can we really say that the remedies provided for by the SIS II Regulation are effective if a person who is alerted in the SIS has no real possibility to physically bring a case before a court? There is only the option of trying to arrange legal aid. Due to the judicial architecture of the EU there has to be a certain coherence of the system: if people have the right of access to a court, they should be able to exercise this right at some
level, which is either the national level or the Court of Justice by a direct appeal procedure. This coherence is lost in the case of the SIS II Regulation, which means that people like Roberto end up in a legal no-man's-land, they have a right but cannot effectively exercise this right at any level because they cannot access the territory where the court is located.
Chapter 4: Conclusion

The research that has been done in the previous chapters can now be used to answer the central research question as set out in the first chapter: "What improvement has the SIS II Regulation made to the legal protection of an individual who has been reported in the SIS compared to the old situation under the SIC?"

In paragraph 1.5 two major problems that existed under the SIC were presented. The first problem was that countries used the SIS alert as an entry ban, which is a legal tool. However, the only option to have the ban lifted was either to complain to the reporting State that entered the alert in the SIS or to go to the national court of any of the Member States. The two weaknesses of this approach were that, first of all, only the reporting State could remove or alter the report even though it was possible to object to the decision in any of the Member States. Second, a judgment obtained from a national court in another Member State could not be enforced in the reporting State. This meant that the right to bring a case in any of the Member State was an ineffective right. After all, an individual would have to bring a new case before the national court of the reporting Member State in order to have the SIS alert removed or altered.

The second problem presented in the first chapter, was that once a person has been reported in the SIS, all other Member States are under the obligation to withhold that person entry permission. So other Member States have no choice but to deny access to the territory even if they would disagree with the alert.\textsuperscript{131} The problem with this was that it made it physically impossible for an individual reported as an unwanted alien in the SIS to enter the territory in order to bring his or her case before a national court. So the real problem was that there was no effective legal protection.

4.1 The first problem

The need for data in the SIS to be correct has only increased after the entry into force of the SIS II Regulation. After all, the types of information that can be reported in the SIS have increased, more actors such as Europol, which is an organisation involved in criminal law acts and not immigration, can access the data, and finally data can be kept in the SIS indefinitely. There is no longer a clear provision that determines how long an alert can be kept, which has been explained in detail in Chapter 2.

\textsuperscript{131} Article 13 SBC.
Since there has been an increase in the kinds of information the Member States can report, it seems that solving the problems that existed with the SIC with regard to legal protection has become even more pressing. The first of the weaknesses discussed above was that under the SIC only the reporting State could remove or alter an alert. The problem with this was that the reporting State might not be willing to revoke its decision. Other Member States were never able to alter information, even when that other State was in possession of evidence that proved that the data was factually incorrect or unlawfully stored. Unfortunately, the SIS II Regulation does not clearly change this situation. On the contrary, nowhere in the SIS II Regulation is there a provision that determines who can remove a report. Under the old rules of the SIC an individual at least knew where to go, that was to the reporting State, which might be unwilling to remove or alter the report. That was ineffective. However, under the SIS II Regulation this ineffectiveness has changed to legal uncertainty. Due to the lack of a provision it is unclear whether the rules are still as they were, the reporting State has sole competence to alter or remove a report, or whether this means that any of the Member States can remove an alert.

The second weakness, was that under the SIC judgments from one Member State could not be enforced in another. This means that the possibility to bring a case before any of the national courts did not help the individual who had been reported in the SIS as an unwanted alien, since only a verdict from the national court of the reporting State could be enforced in that State and thereby force a national authority to alter or remove a report. This right to bring an action before a national court in any of the Member States was an empty phrase. The SIS II Regulation has significantly changed the practical effectiveness of this right. Under the SIS II Regulation a person has the same right, to bring an action before a court in any of the Member States. The difference is that the SIS II Regulation specifically states that Member States are under the obligation to mutually enforce final decisions handed down by national authorities. This should mean that bringing a case before the authorities in another Member State is a more effective remedy now, since the final decision by that national court has to be enforced, also by the State that has initially reported a person as an unwanted alien in the SIS and might be unwilling to alter or remove the report.

To sum up, the first main problem that existed with the old rules under the SIC has only partially been dealt with. The right to bring an action before a court in any of the

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132 Article 106(2) SIC.
133 Article 43(1) SIS II Regulation.
134 Article 43(2) SIS II Regulation.
Member States has gone from being ineffective to being effective. However, the SIS II Regulation has also created legal uncertainty since it is no longer clear who has the authority to remove or alter a report made in the SIS. The problem with the SIC was that the reporting State might be unwilling to cooperate, but the problem now is that it is not even certain anymore if the reporting State is the only one competent to remove or alter a report.

4.2 The second problem
The second main issue that caused problems under the SIC, was that a person reported in the SIS could not physically go to court to bring an action, because he or she was not allowed to enter the territory of any of the Member States. Once a person has been reported in the SIS, the other Member States have to abide by the rules and refuse that person permission to enter the territory of the EU. It has already become clear in the previous chapters that the SIS II Regulation has not changed this in any way. There are no special rules for people who want to challenge a SIS alert and cannot enter the territory. It is left up to the individual to find a way to challenge the report in the SIS without being able to enter the territory of the EU. A solution could be to find legal aid, however, this might also be challenging due to the distance and a person reported in the SIS might not know who to approach in order to obtain legal aid in one of the Member States. This will be elaborated on in paragraph 4.4.

4.3 Central research question
What improvement has the SIS II Regulation made to the legal protection of an individual who has been reported in the SIS compared to the old situation under the SIC? Finding an answer to this question was the goal of this research. Answering this question is not as straightforward as it seemed to be at the start of this research.

The SIS II Regulation has made many changes in various areas compared to the SIC. These changes include some improvements that have been made to the legal protection of individuals who have been reported in the SIS. The main improvement of the SIS II Regulation compared to the SIC is that Member States now have to mutually enforce final decisions handed down by national courts with regard to a SIS report, making the right to bring an action before a court in any of the Member States more effective and not just an empty phrase. Another improvement the SIS II Regulation has made to the legal protection of an individual who has been reported in the SIS, is the proportionality principle that has been introduced by the SIS II Regulation. This emphasises that Member States should not take a decision to report an individual in the SIS lightly and have to determine if the alert is

135 Article 21 SIS II Regulation.
important, relevant and adequate. Furthermore, the SIS II Regulation also provides that an
individual who has been reported in the SIS shall be informed of this, albeit a right subject of
a number of exceptions. This was not the case under the SIC, which created a strange
situation. After all, the SIC gave people who had been reported in the SIS the right to access
data related to them and have this data corrected, altered or removed, but the people who
could invoke these rights did not even know they were reported in the SIS in the first place.
Under the SIS II Regulation there is now an obligation to inform a person in writing that he or
she has been reported in the SIS, what such a report means and that he or she has a right to
access the data and a right to have data rectified. This means that people should know that
they cannot enter the territory of the Member States and this should prevent some unpleasant
situations at the border.

These three new provisions have improved the legal protection of individuals who
have been reported in the SIS. However, even though this paragraph answers the central
research question in a narrow sense, it does not tell the complete story.

4.4 Remaining problems
There are still numerous problems that remain, and there are also new problems that have
been created by the SIS II Regulation. The fact that there is no longer a clear provision that
regulates the removal of a report due to lapse of time is one of these new problems. Under the
SIC a report was always removed after 10 years. Under the SIS II Regulation a Member State
is obliged to review the report every 3 years and can keep doing this if it determines that the
report is still relevant. This could mean that in practice reports are kept in the SIS indefinitely.
Another new issue created by the SIS II Regulation, is that it has not identified the authority
that has the competence to delete or correct inaccurate data. It only gives an individual the
right to have inaccurate data corrected, but it does not become clear to whom the individual
has to turn to. Another major problem is that it is now also unclear which State has the
competence to remove a SIS alert from the system. This used to be the reporting State, but the
SIS II Regulation does not contain any provision to this effect.

In reality, there really is no improvement. The root problem has not been dealt with:
an individual reported as an unwanted alien in the SIS cannot enter the territory of any of the
Member States for the purpose of contesting the legality of the decision to report him or her in
the SIS. The fact that this is still not possible takes away the meaning of the positive changes,
since a person reported in the SIS cannot make use of these for him or her beneficial changes.

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136 Article 42(1) SIS II Regulation.
That person cannot bring a case before a national court in one of the Member States because he or she is denied access to Europe and, therefore, denied access to effective judicial protection. This issue existed under the SIC and it still exists today. Of course, this is a very difficult problem to solve. Member States will not be very willing to adopt some sort of special regulation that would allow third-country nationals, who have been reported in the SIS, to enter the territory in order to bring an action before a court. First of all, some people might really have a report on them entered in the SIS that is factually incorrect or that is not proportional. However, there are also many people who are in the system for a very good reason. Member States might be unwilling to let any person with a SIS alert into the territory due to a fear that some of these people might not show up in court and will then be able to move through Europe. A second problem is that some Member States are notorious for the length of their court cases, such as Italy. So, what to do then? Should the individual be allowed to stay in the territory for as long as the court proceedings take? That too is unrealistic.

A solution could be to have some sort of legal aid available for people who have been reported in the SIS. After all, the right to legal aid has been made explicit by Article 47 of the Charter of Fundamental Rights of the EU. It has been mentioned in paragraph 3.3 that legal aid shall be made available "in so far as such aid is necessary to ensure effective access to justice". It would seem that this right also applies to individuals who have been reported in the SIS who lack sufficient resources to obtain legal aid by themselves. After all, a person reported in the SIS cannot bring a case before a national court himself which means that the only way to bring a case is through the use of a lawyer. So legal aid is needed to ensure effective access to justice, because if there is no legal aid there is no access to justice possible at all.

In the Netherlands there is the possibility of going to a Legal Help Desk (Juridisch Loket), these Help Desks can be found in numerous places in the Netherlands. These Legal Help Desks are there to help people with legal disputes come into contact with a lawyer. The problem for an individual reported in the SIS is that he cannot go to one of these Help Desks since he cannot come to the Netherlands. A further problem is that their website is only in Dutch which is of no help to a third-country national who does not speak the language, but they could try to call or email one of these Legal Help Desks. In order obtain legal aid in the Netherlands an individual already needs to have hired a lawyer, because it is that lawyer who

137 Article 47 Charter of Fundamental Rights of the EU.
has to apply for financial aid at the Dutch Legal Aid Board (Raad voor Rechtsbijstand). This means that a third-country national should have already hired a lawyer before he can obtain legal aid. The right to legal aid in the Netherlands is regulated by law by the Wet op de rechtsbijstand. However, this law only contains provisions with regard to legal aid for people who reside in the Netherlands and people who reside in another EU Member State. There is no mention of a right to legal aid for people residing outside the EU. What this basically means is that in order to make use of the right to legal aid in the Netherlands, a person first has to be in the Netherlands or one of the other EU Member States. This means that once again a person reported in the SIS has a problem: he cannot go to court himself but he cannot apply for legal aid either since that requires presence on the territory of one of the Member States and that is exactly what is made impossible by the SIS alert. The only possibility left for a third-country national who has been reported in the SIS as an unwanted alien is to contact a lawyer on their own accord and pay for that lawyer themselves. However, a third-country national can find several obstacles in his way to finding a lawyer to represent him in court. The person might lack the resources to go out and actively seek help. Second, the third-country national has to find information in a language he or she can understand. For instance, a Bolivian man like Roberto who does understand any Dutch will have to find information in a language he can understand or find someone who can help him translate. Third, a case concerning a SIS alert has to be brought before an Immigration Chamber in the Netherlands, this means that Roberto would not only need a lawyer, he would need a lawyer specialised in migration law. For a person not familiar with the Dutch language or the Dutch legal system these obstacles can be very frustrating and make judicial protection ineffective.

As mentioned above, it is unlikely that Member States will allow individuals who have been reported in the SIS onto the territory. So there should be a solution in the form of legal aid specifically for persons reported in the SIS. A possibility is to create a special mechanism that would allow people to apply for legal aid the moment they are informed that they have been reported in the SIS, regardless whether they are on the territory of the EU or not. Since people have the right to be informed in writing that they have been reported in the SIS, it would not be too difficult to attach a form that would enable them to apply for a legal aid scheme. Of course, there would still be issues in cases where people fall in the category that does not need to be informed of the SIS alert, but there should be a special provision that all who are reported in the SIS can apply for legal aid, whether they apply for it right after the

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140 Afdeling III and Afdeling IIIA Wet op de rechtsbijstand.
report has been made or after several years. The problem is that such a scheme might not be viewed upon very favourably by many Member States. Especially in times of economic difficulties and budget cuts most States might not be willing to make legal aid available for people they do not even want in their territory. So there is no clear solution, but the present situation is also not acceptable.

4.5 Final conclusion
The fact that an existing problem which has such a huge impact, it denies effective access to justice, could not be solved is disappointing, but what is also worrying is that, arguably, the overall legal protection of the individual has deteriorated and not improved after the entry into force of the SIS II Regulation. In the previous paragraphs there were two enumerations: one of improvements made by the SIS II Regulation to the legal protection of an individual who has been reported in the SIS compared to the old situation under the SIC, another of examples in which the position of the individual has deteriorated. One could conclude that out of the three main issues, the SIS II Regulation only solves one, but does nothing to improve the other and only worsens a third, namely the issue that now there is no clarity anymore to which State an individual should turn in order to have a report removed. The other changes, as mentioned in the previous paragraph, also give cause for concern. Especially the fact that reports could potentially be kept in the SIS indefinitely.

The comparison that has been made in this research between the SIC and the SIS II Regulation shows that the EU is trying to harmonise legislation amongst its Member States and the fact that the Member States have to come to an agreement on new legislation. This means that sometimes Member States have their own interest in mind and tend to lose focus of what is in the interest of the individual. This means that people like Roberto are still in the same position, they are caught in a legal no-man's-land due to a SIS alert.
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