The discretion of Member States regarding the issuance and enforcement of SIS alerts on third-country nationals to be refused entry or stay

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<tr>
<td>AFSJ</td>
<td>Area of Freedom, Security and Justice</td>
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<td>CEAS</td>
<td>Common European Asylum System</td>
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<td>CISA</td>
<td>Convention Implementing the Schengen Agreement</td>
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<tr>
<td>CJEU</td>
<td>Court of Justice of the European Union</td>
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<td>CS-SIS</td>
<td>Central system SIS II, SIS II database</td>
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<tr>
<td>EAW</td>
<td>European Arrest Warrant</td>
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<td>ECHR</td>
<td>European Convention on Human Rights and Fundamental Freedoms</td>
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<tr>
<td>ECRIS-TCN</td>
<td>European Criminal Records Information System on Third-Country Nationals</td>
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<td>ECtHR</td>
<td>European Court on Human Rights</td>
</tr>
<tr>
<td>EES</td>
<td>Entry/Exit System</td>
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<td>ETIAS</td>
<td>European Travel Authorisation and Information System</td>
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<td>Eurodac</td>
<td>European Dactyloscopy</td>
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<td>JHA</td>
<td>Justice and Home Affairs</td>
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<td>N.SIS II</td>
<td>National system SIS II</td>
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<td>NI.SIS</td>
<td>Uniform national interface</td>
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<td>SIRENE</td>
<td>Supplementary Information Request at the National Entry</td>
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<td>Schengen Information System</td>
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<td>VIS</td>
<td>Visa Information System</td>
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Chapter 1 | Introduction

1.1 The case of Mrs Kozlovska: effectively banned from the Schengen Area?

Mrs Kozlovska is an Ukrainian citizen who is married to Mr Kramek, a Polish citizen and political activist. The couple lived in Poland for almost ten years. In 2009, Mrs Kozlovska established the Open Dialog Foundation in Poland. The Open Dialog Foundation is a foundation with the objectives to protect human rights, democracy and the rule of law in the post-Soviet area. They publish reports based on the observation and monitoring of human rights in the post-Soviet area. These reports are distributed among EU institutions.¹

In 2017, Poland issued an alert in the Schengen Information System (SIS) for the purpose of refusing entry or stay against Mrs Kozlovska based on Article 24(2) Regulation 1987/2006 (SIS II Regulation).² Based on Article 6 Regulation 2016/399 (Schengen Borders Code), Member States are legally obliged to refuse entry and/or visa to the third-country national against whom a SIS alert with the purpose of refusal of entry or stay has been issued.³ When Mrs Kozlovska travelled to her second home in Brussels after a visit to her native country Ukraine on 14 August 2018, she was stopped by the Belgian border guards and deported to Ukraine.⁴ By doing so, the Belgian authorities were fulfilling their obligations following from the Schengen Borders Code.⁵

The deportation of Mrs Kozlovska drew international attention. According to Mrs Kozlovska, the SIS alert was made because of the anti-government protests her husband participated in against the Polish government in 2017.⁶ Despite the SIS alert, Germany granted Mrs Kozlovska access to the Schengen Area to speak with members of the Bundestag in September 2018, which the Polish government ought to be offensive and a failure to comply with the Schengen system.⁷ Guy Verhofstadt, former prime minister of Belgium and member of the European Parliament, posted on Twitter: ‘Black lists against democracy activists are worthy of authoritarian regimes, not of EU Member States. The Schengen visa ban on Lyudmila Kozlovska must be withdrawn - or Poland’s role in Schengen reviewed’.⁸ Frank Schwabe, member of the German Bundestag and the Parliamentary Assemble of the Council of Europe, stated that ‘it is unacceptable for Poland to prevent a meeting between members of the Bundestag and a human rights activist’.⁹ Ryszard Czarnecki, Polish politician and member of the European Parliament, resents the German authorities for admitting a person against whom a Polish SIS alert has been issued. ‘When one European Union country pranks another by inviting someone who is considered persona non grata, that is not building European solidarity’,¹⁰ according to Czarnecki. After her visit to the German Bundestag, Mrs Kozlovska visited Schengen Member States – despite the SIS alert – on several other occasions. She spoke at an open ALDE session of the European Parliament, two events of the Council of Europe, the United Nations forum on Human Rights, Democracy and the Rule

³ Article 6(1)(d) Regulation 2016/399/EC (Schengen Borders Code).
⁴ Euroactiv 17 August 2017.
⁵ Article 6(1)(d) Schengen Borders Code.
⁶ Open Dialogue Foundation 15 August 2018.
⁸ Verhofstadt, Twitter 17 August 2018.
¹⁰ Ibid.
of Law (which took place in Switzerland), Sorbonne University in Paris, the House of Common Lords in the United Kingdom, the parliament in Hungary and the Italian Senate.\textsuperscript{11} Meanwhile, the national migration procedure of Mrs Kozlovska was pending in Poland. In March 2018, Mrs Kozlovska applied for an EU long-term residence permit because her residence card expired.\textsuperscript{12} In October 2018, the application for an EU long-term residence permit was rejected by the Polish authorities because of the fact that Mrs Kozlovska was included in the national unwanted persons register and in the SIS.\textsuperscript{13} In October 2018, Mrs Kozlovska filed an appeal against this decision before the Head of the Office for Foreigners.\textsuperscript{14} The appeal against the rejection of the EU long-term residence permit is still pending.

Parallel to the procedure for the EU long-term residence permit, a procedure against the inclusion of Mrs Kozlovska in the SIS was carried out. In September 2018, Mrs Kozlovska requested deletion of her SIS alert at the Office for Foreigners of the Mazowieckie Voivodeship Office.\textsuperscript{15} This request was denied, after which she filed an appeal at the Head of the Office for Foreigners.\textsuperscript{16} The Head of the Office for Foreigners upheld the decision not to delete the SIS alert against Mrs Kozlovska.\textsuperscript{17} In December 2018, Mrs Kozlovska filed an appeal against the decision at the Administrative Court in Warsaw.\textsuperscript{18} Eventually, in March 2019, Belgium granted Mrs Kozlovska a long-term residence permit. This is not in contradiction with the obligations following from the SIS alert. The entry-conditions of Article 6 Schengen Borders Code, the absence of a SIS alert included, cannot be invoked if a long-stay residence permit has been issued.\textsuperscript{19} Article 25(1) Convention Implementing the Schengen Agreement (CISA) states that the issuing Member State of a SIS alert against a third-country national has to delete the SIS alert if another Member State granted a long-stay residence permit to the third-country national concerned. Thus, Poland was legally forced to delete the SIS alert against Mrs Kozlovska when she obtained a long-stay residence permit in Belgium. In June 2019, Poland complied with this obligation and the SIS alert of Mrs Kozlovska was deleted.\textsuperscript{20}

1.2 Legal Background

This thesis concerns the grounds for the issuance and (non) enforcement of SIS alerts on third-country nationals to be refused entry or stay. In 1990, the SIS was established as a database for the Member States of the intergovernmental Schengen Agreement.\textsuperscript{21} Since the incorporation of the Schengen acquis into EU law in 1997, the SIS became the biggest EU database and one of the most important databases to control immigration and border control in the EU.\textsuperscript{22} The Schengen Area originates from 1985, when Belgium, France, Germany, Luxemburg and the Netherlands signed the Schengen Agreement. Today, the Schengen Area consists of 26 Member States: 22 EU Member States (Bulgaria, Croatia, Cyprus, the Republic of Ireland, Romania and the United

\textsuperscript{11} Open Dialogue Foundation 20 March 2019.
\textsuperscript{12} Ibid.
\textsuperscript{13} Ibid.
\textsuperscript{14} Ibid.
\textsuperscript{15} Ibid.
\textsuperscript{16} Ibid.
\textsuperscript{17} Ibid.
\textsuperscript{18} Ibid.
\textsuperscript{19} Article 14(1) Schengen Borders Code.
\textsuperscript{20} Information obtained from the lawyer of Mrs Kozlovska.
\textsuperscript{21} Open Dialogue Foundation 20 March 2019.
\textsuperscript{22} Brouwer 2008, p 1.
Kingdom are EU Member States who are excluded from the Schengen Area) and 4 non-EU Member States (Iceland, Norway, Switzerland and Liechtenstein). The aim of the Schengen cooperation is to create an area without internal border controls. To realize internal open borders, the external borders had to be controlled. The fact that the internal borders opened was compensated with the so-called compensatory Schengen measures, embodied in the Convention Implementing the Schengen Agreement (CISA). The most important compensatory measure was the creation of the SIS, which became operational in 1995. The SIS contains alerts on persons and goods. Alerts on persons can be issued against persons wanted for arrest for extradition purposes, third-country nationals to be refused entry or stay in the Schengen Area, missing persons, witnesses and persons summoned to appear before the judicial authorities, or persons wanted for purposes of discreet surveillance or specific checks. The SIS is extensively used by its Member States. In 2017, the Member States consulted the SIS more than 5 billion times and the SIS included 896.791 alerts on persons, 501.996 of which were on third-country nationals to be refused entry or stay in the Schengen Area. This thesis will focus on SIS alerts on third-country nationals to be refused entry or stay, which can be issued on two grounds. First, SIS alerts on third-country nationals to be refused entry or stay can be issued based on Article 24(2) SIS II Regulation, if the third-country national concerned is considered to be a threat to public policy, public security or national security based on a national decision. Secondly, based on Article 24(3) SIS II Regulation, a SIS alert can be issued based on an immigration decision including expulsion, refusal of entry or removal. The second ground should be read in conjunction with Directive 2008/115/EC (Return Directive). The immigration decisions referred to in Article 24(3) SIS II Regulation, are the immigration decisions which include an entry-ban as defined in the Return Directive. SIS alerts can be issued by any of the Schengen Member States and should be enforced by the other Member States. The case of Mrs Kozlovska raises several questions regarding the issuance and enforcement of SIS alerts. Does the fact that one Member State marked her as threat to national security and public order means she must automatically be refused entry or stay in the other Member States? And when can Member States decide not to enforce a SIS alert issued by another Member State? The balance between on the one hand the discretionary power of Member States regarding the definition of a ‘threat to public policy or public security’ and the principle of mutual trust, and on the other hand the legal protection of the third-country national against whom an alert has been issued, is at stake in this situation. Discretionary power of Member States means that Member States have freedom of

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23 European Commission, ‘Schengen Area’, accessible through: https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/schengen_en (last accessed: 30-06-2019). NB: this thesis is reasoned from pre-Brexit perspective, as the exact consequences of Brexit are yet to be determined.

24 Article 2 CISA.


26 The 1990 CISA is the agreement which supplements the 1985 Schengen Agreement (for further information, see Chapter 2.2).

27 Brouwer 2008, p 49.

28 Respectively Article 95-99 CISA.

29 eu-LISA 2018.

30 Article 24(3) SIS II Regulation.

31 This will be elaborated on further in Chapter 3.3.

32 Article 6(1)(d) Schengen Borders Code.

33 This thesis exclusively discusses SIS alerts on third-country nationals to be refused entry or stay. Therefore, unless explicitly mentioned otherwise, the term ‘SIS alert’ refers to a SIS alert for the purpose of the refusal of entrance or stay.
interpretation regarding certain aspects of EU law. EU immigration law leaves wide discretionary powers to Member States. There is no European consensus on the definition of threat to public policy or public security, which leaves wide discretion for Member States in defining a threat to public policy or public security. As mentioned above, SIS alerts are issued based on the existence of a threat to public policy, public security or national security. Member States thus enjoy wide discretionary powers in issuing SIS alerts. This results in divergent interpretations of the grounds for the issuance of a SIS alerts for the purpose of refusal of entry or stay between Member States. Generally, Member States are obliged to enforce SIS alerts of other Member States based on the principle of mutual recognition. Mutual recognition presupposes mutual trust. The principle of mutual trust is justified by the presumption that all Member States comply with EU law, fundamental rights in particular. The discretionary power of Member States regarding the definition of a threat to public policy, public security or national security has been limited by the Court of Justice of the European Union (CJEU). The CJEU case law shows different interpretations of the public policy exception under different EU frameworks. Thus, the framework in which the public order grounds are being assessed, is decisive for the applicable CJEU case law. As said before, the second ground for the issuance of a SIS alert is, de facto, when an entry-ban in compliance with the Return Directive has been imposed. An entry-ban is imposed when no period for voluntary departure has been granted or the obligation to return has not been complied with. Article 7(4) Return Directive states that one of the grounds when Member States may refrain from a period for voluntary departure is if there is a risk to public policy or security. In Zh and O, the CJEU ruled on Article 7(4) Return Directive that (1) the suspicion or conviction of a criminal offence does not automatically entails that a person is a risk to public policy, and (2) a criminal conviction cannot be the sole reason for the assumption of a risk to public policy, in addition the third-country national concerned has to pose a ‘genuine, present and sufficiently serious threat affecting one of the fundamental interests of society’. The requirements following from the Zh and O case are the same as those following from the previous judgment of Commission v Spain, where the CJEU ruled that the existence of a SIS alert does not automatically justify the qualification of a threat to public policy if the third-country national concerned is the spouse of an EU citizen. In sum, Member States have to address additional criteria in the public risk assessment of SIS alerts based on Article 24(3) SIS II, but do the criteria of Zh and O also apply for alerts based on Article 24(2) SIS II, as in the case of Mrs Kozlovska? And are there possibilities – or even obligations – for Member States not to enforce a SIS alert? The situation of Mrs Kozlovska illustrates the relevance and actuality of the topic of this thesis: the discretionary power of Member States regarding the definition of ‘a threat to public policy, public security or national security’ of Article 24(2) SIS II, and the obligations or possibilities for Member States not to enforce a SIS alert.

37 Battjes et al 2011, p 5.
38 CJEU 21 December 2011, Joined Cases C-411/10 and C-493/10 (N.S. and others), para 83.
39 For example, see CJEU 8 December 2011, C-371/08 (Ziebell), paras 67-73.
40 Article 11(1) Return Directive.
41 CJEU 11 June 2015, C-554/13 (Zh and O), para 54.
42 Ibid., para 60.
43 CJEU 31 January 2006, C-503/03 (Commission v Spain), paras 53-59.
1.3 Research questions
The main research questions of this thesis read as follows:

1. Taking into account the discretionary power of Member States to issue SIS alerts for the purpose of refusal of entry or stay on the basis of 24 (2) SIS II Regulation, which limitations can be derived from the case-law of the CJEU addressing the use of public policy or national security grounds to issue a SIS alert based on Article 24(3) SIS II Regulation following the Return Directive?

2. Taking into account the principle of mutual trust and mutual recognition underlying the Schengen system, on the basis of which rights or legal obligations are Member States allowed or even obliged not to enforce a SIS alert?

Sub-questions that are relevant in answering the first research question are: Who can issue SIS alerts?; What are the grounds for the issuance of a SIS alert?; What is the relationship between the SIS II Regulation and the Return Directive?; What are the consequences of a SIS alert?; What are the requirements following from the CJEU case law on the public order grounds for the imposition of an entry-ban?; And can these requirements be applied to Article 24(2) SIS II Regulation?

Sub-questions that are relevant in answering the second research question are: In which situations are Member States obliged to refrain from the enforcement of a SIS alert by law? What is the relationship between the principle of mutual trust and the SIS? What is the role of the principle of mutual trust in the AFSJ? What does the CJEU rule on the principle of mutual trust in other areas of the Area of Freedom Security and Justice, such as the Dublin III Regulation and the European Arrest Warrant? Are there situations in which Member States are not allowed to automatically enforce SIS alerts? And does the case law of the CJEU on the principle of mutual trust and the AFSJ poses possibilities or obligations on Member States not to enforce a SIS alert?

1.4 Methodology
In order to answer these questions, a general overview of the background and history of the Schengen System is given (Chapter 2). This serves as a background for the subsequent Chapters. As to the methodology and sources of this Chapter, the main sources of this Chapter are the legislative texts of the CISA and the SIS II Regulation. Further, secondary sources are used to provide comments on the development of the SIS.

In Chapter 3, the criteria for the issuance of SIS alerts and consequences of SIS alerts are discussed in detail in order to provide a comprehensive overview on the current criteria for the issuance of SIS alerts and the consequences of SIS alerts. Hereby, special attention is given to the relationship between the SIS II Regulation and the Return Directive. As to the methodology and sources of this Chapter, it first and foremost focusses on the legislative texts of the SIS II Regulation and the Return Directive. Where necessary, the criteria following from the SIS II Regulation and Return Directive are clarified with the case law of the CJEU. Further, empirical information about the use of SIS alerts and entry-bans is used in order to show how the issuance of SIS alerts and imposition of entry-bans works in practice. Using this method prevents a legal description which is not a realistic reflection of the law in practice.

Having clarified the criteria for the issuance of SIS alerts and the consequences of SIS alerts, Chapter 4 discusses three recently adopted regulations (which are not yet in force). The three regulations will
affect the grounds for the issuance of a SIS alert and the consequences of a SIS alert in the future. Due to the limited scope of this thesis, only the most importance changes following from these regulations are discussed. As to the methodology and sources of this Chapter, it mainly uses the legislative texts of the three regulations that are discussed. Case law of the CJEU is not available yet, because the regulations are not in force yet. Secondary sources are used to provide comments on the developments that will follow form the three regulations.

Having clarified the criteria for the issuance of a SIS alert and the consequences of a SIS alert, and the changes in the future thereto following from three recently adopted regulations, Chapter 5 provides an in-depth discussion on the Zh and O case. The Zh and O case establishes criteria for the imposition of an entry-ban as defined in the Return Directive (and thus a SIS alert based on Article 24(3) SIS II Regulation). This Chapter answers the question whether the scope of Zh and O should be extended to Article 24(2) SIS II Regulation as well. As to the methodology and sources of this Chapter, the approach differs from the approach of the Chapters 2, 3 and 4. Whereas Chapters 2, 3 and 4 mainly focus on the legislative texts of the relevant frameworks, Chapter 5 mainly focusses on the case law of the CJEU. Secondary sources are used to discuss the interpretation of the case law. Using this method, all relevant circumstances in answering the research questions will be considered.

Having assessed whether the public order requirements following from the Zh and O case should apply to Article 24(2) SIS II Regulation, Chapter 6 provides an overview of the possibilities and obligations for Member States to refrain from the enforcement of a SIS alert. In order to fully and completely understand the consequences of a SIS alert, it is important to discuss the discretion of Member States regarding the enforcement of SIS alerts. The Chapter first discusses the exceptions to the enforcement of SIS alerts based on law. Further, the possibilities/obligations to rebut the principle of mutual trust in the context of a SIS alert that follow from the case law of CJEU in the AFSJ are discussed. Hereby, the case law that is discussed is limited to the case law on the Dublin III Regulation and EAW’s, as I do not see a useful purpose in comparing the case law of other fields within the AFSJ with the enforcement of SIS alerts. As to the methodology and sources of this Chapter, this Chapter mainly focusses on the legislative texts of different EU legal frameworks and the case law of the CJEU thereto. Further, secondary sources are used to provide comments on the applicable legislation and case law.
Chapter 2 | The Schengen Information System

2.1 Introduction
This Chapter gives a short overview of the history and structure of the SIS database. The provisions related to Schengen and SIS will be discussed in detail in Chapter 3, 4 and 5. It is important to understand the general background and developments of the SIS in order to fully understand the complex legislative framework around the SIS database. A brief overview of the creation of the Schengen Area and the SIS will be given. Special attention will be given to transition of the Schengen cooperation from a multilateral agreement into EU law. Afterwards, the transition from the original SIS to the second generation of SIS will be discussed. The most important differences and improvements from the perspective of third-country nationals are set forth. Lastly, the architecture of SIS will be provided.

2.2 The creation of Schengen and SIS
According to international law, states are exclusively competent regarding their internal affairs. The requirements to enter the territory of a state are considered a matter of internal affairs, and do therefore fall within the competence of the states. This is affirmed by the case law of the European Court on Human Rights (ECtHR), which ruled that states are sovereign and have the right to control the entry of non-nationals into its territory. State sovereignty may be restricted by international treaties, for example the Refugee Convention, but international law is characterized by a wide margin of discretionary power for Member States regarding their immigration policies.

The Schengen Area was established in 1985, when Belgium, the Netherlands, Luxemburg, Germany and France signed the non-binding Schengen Agreement. These first Member States of the Schengen Area are considered to be the ‘pioneers’ in the area is intergovernmental cooperation in the area of immigration measures within the EU. In 1990, the CISA was signed (not yet operational). The CISA supplements the Schengen Agreement, it arranges the safeguards for implementing the abolition of internal borders. Article 2 was the most important provision of the CISA, which introduced that ‘Internal borders may be crossed at any point without any checks on persons being carried out.’ The other 141 provisions were adopted to ‘compensate’ the fact that the internal borders were abolished. The provisions included police cooperation in criminal matters, but also provisions in the field of migration control. The Member States adopted a system where asylum could be filed in only one of the Member States. Further, the Member States introduced a common short-stay Schengen visa. Furthermore the CISA of 1990 provided for the establishment of the SIS. The SIS enabled Member States to have access to alerts on persons and properties from other Member States for the

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44 Boeles et al 2014, p 15.
45 Ibid.
46 ECtHR 28 May 1985, nos 9214/80, 9473/81 and 9474/81 (Abdulaziz, Cabales and Balkandali).
47 Ibid., para 67.
48 Boeles et al 2014, p 33.
49 Ibid.
50 Ibid.
51 Article 2 CISA.
52 Boeles et al 2014, p 33.
53 Article 29(3) CISA. The provisions on the determination of the responsible Member State for an asylum application were removed when de Dublin Convention (OJ 97/C 254/01) was adopted in 1997.
54 Article 9 CISA.
55 Chapter IV CISA.
purposes of border checks and police and customs checks.\textsuperscript{56} Because of the abolishment of internal borders in the Schengen Area, the refusal of entrance/visa to third-country nationals who Member States considered to be a threat to public policy and national security was considered as effective only if they were refused entrance or stay in the entire Schengen Area. Subsequently, Member States got the opportunity to issue an alert on a third-country national for the purposes of refusing entry or stay.\textsuperscript{57} In 1995, the SIS became operational and hence the CISA entered into force.\textsuperscript{58}

2.3 The incorporation of Schengen in EU law

After the creation of Schengen, Portugal and Spain joined the Schengen cooperation in 1994. In 1996, the Nordic countries (Denmark, Finland, Sweden, Iceland and Norway) became Member States of Schengen, shortly followed by Italy, Austria and Greece in 1997 (see Appendix I).\textsuperscript{59} The expansion of the Schengen Area in the 1990’s is connected with the increasing importance of immigration law in the European Union.\textsuperscript{60} When the Treaty on the European Union (TEU) was signed in 1992, immigration and asylum were pointed out as areas of common interest. Later, as a result of the 1997 Treaty of Amsterdam,\textsuperscript{61} the Area of Freedom, Security and Justice (AFSJ) was codified in the TEU.\textsuperscript{62} Hereby the Schengen \textit{acquis} was incorporated into EU law.\textsuperscript{63} The incorporation in EU law was an important milestone for the development of the Schengen Area: the CJEU became competent to rule on the implementation and application of the Schengen rules, and the Schengen provisions had to be accepted by candidate Member States of the EU.\textsuperscript{64} Further, the Schengen Executive Committee was replaced by the Justice and Home Affairs (JHA) Council of the EU.\textsuperscript{65} However, the Schengen provisions were not fully absorbed in the EU framework. The United Kingdom, Ireland and Denmark have the possibility to abstain from the harmonization of immigration and asylum law.\textsuperscript{66} The United Kingdom and Ireland have an ‘opt-in opt-out’ position regarding the AFSJ. They have the possibility to opt out of AFSJ provisions.\textsuperscript{67} This means they have to decide for each EU measure in the AFSJ whether they join this provision or not. If they decide not to participate in a specific provision, they can decide to ‘opt-in’ later. They opted in on majority of the Schengen provisions.\textsuperscript{68} However, they opted-out of the Schengen provisions related to Article 96 CISA, which addresses data on aliens against whom an alert has been issued for the purposes of refusing entry.\textsuperscript{69} Article 96 CISA is replaced by Article 24 SIS II Regulation and will be discussed in detail in Chapter 3.

\textsuperscript{56} Article 91(1) CISA.
\textsuperscript{57} Article 96 CISA.
\textsuperscript{58} Brouwer 2008, p 1.
\textsuperscript{59} Appendix I shows the accession of the Member States to the \textit{SIS database}, not all states who have (limited) access to SIS are considered to be a ‘full’ member of the Schengen Area. As explained in Chapter 1.2, Bulgaria, Croatia, Cyprus, Ireland, Romania and the United Kingdom are not considered to be part of the Schengen Area. However, as Appendix I illustrates, Bulgaria, Croatia, Ireland, Romania and the United Kingdom do participate in the SIS for the purpose.
\textsuperscript{60} Boeles et al 2014, p 34.
\textsuperscript{61} Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, signed at Amsterdam, (2 October 1997).
\textsuperscript{62} Brouwer 2008, p 29.
\textsuperscript{63} Boeles et al 2014, p 34.
\textsuperscript{64} OJ 04/C 310/348.
\textsuperscript{65} Brouwer 2008, p 43.
\textsuperscript{66} Boeles et al 2014, p 35.
\textsuperscript{67} Herlin-Karnell, \textit{Amsterdam Law Forum} 2013, vol 5, no 1, p 101.
\textsuperscript{68} \textit{Ibid}.
\textsuperscript{69} \textit{Ibid}.
After a referendum, Denmark took a distant position regarding the AFSJ. In principle, they are excluded from all provisions adopted in the AFSJ. However, if a provision is adopted based on the AFSJ and the Schengen *acquis*, they can decide to apply this measure in their national law within six months.\(^{70}\) In practice, all provisions of the Schengen *acquis* have been applied consistently in Denmark.\(^{71}\) This is not the case for EU asylum provisions adopted in the AFSJ. Denmark does not have the possibility to opt-in after the first six months on provisions in the AFSJ.\(^{72}\) They can decide to apply all relevant measures – unlike the United Kingdom and Ireland, who can opt-in on single provisions – within the framework of the AFSJ.\(^{73}\) Denmark opted-in on the SIS provisions, including the provisions about third-country nationals to be refused entry (Article 96 CISA).\(^{74}\)

The Schengen *acquis* and the special ‘Europe à la carte’ position of the United Kingdom, Ireland and Denmark have been criticized because it affects the uniformity and equality of the application of EU law.\(^{75}\) After the Schengen *acquis* into EU law, new EU Member States had to accept all Schengen provisions. It further led to an ‘extremely ambiguous legal construction’,\(^{76}\) the provisions of the Common European Asylum System (CEAS) – the Schengen provisions included – have a different character in the different national legal orders of the Member States.\(^{77}\)

### 2.4 The second generation of the Schengen Information System

The discussions on the technical and functional improvements to the SIS started just after the system became operational in 1995.\(^{78}\) The increasing number of Schengen states and the Schengen *acquis* required a system suitable for large-scale application. Between 2002 and 2005, before nine new Member States obtained access to SIS (see Appendix I), several regulations and decisions extending the scope of SIS were adopted. Europol obtained access to the SIS.\(^{79}\) However, this access was limited to information provided on ground of Article 95 (data on persons wanted for arrest for extradition purpose), Article 99 (data on stolen vehicles) and Article 100 CISA (data on objects for the purposes of seizure or as evidence in criminal proceedings).\(^{80}\) Europol did not obtain access to data based on Article 96 (alerts on third-country nationals for the purposes of refusing entry or stay) and Article 97 CISA (data on missing persons). Further, the authorities responsible for examining visa applications and for issuing residence permits were permitted access to the data in SIS entered in accordance with Article 96 CISA.\(^{81}\) Likewise, national authorities got the opportunity to issue an alert for requested persons in the context of the European Arrest Warrant (EAW) in the SIS.\(^{82}\)

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\(^{71}\) Ibid.

\(^{72}\) Ibid.

\(^{73}\) Ibid.


\(^{75}\) Brouwer 2008, p 44.

\(^{76}\) Boeles et al 2014, p 35.

\(^{77}\) This was due to the special positions Member States took regarding the Treaty of Amsterdam. The Treaty of Amsterdam incorporated Schengen under Title IV TEC: ‘for Norway, Iceland and Denmark, the Schengen Implementing Convention had kept its character of a Treaty, but for the Member States united under Title IV TEC, the Convention had partly changed into something equivalent to an EC Regulation, and partly remained Convention under Article 34(2)(d) TEU.’ See Boeles et al 2014, p 35.

\(^{78}\) Brouwer 2008, p 71.

\(^{79}\) Council Decision 2005/211/JHA.

\(^{80}\) Ibid.

\(^{81}\) Council Regulation 871/2004/EC.

\(^{82}\) Article 9(2) Council Framework Decision 2002/584/JHA.
In December 2006 Regulation 1987/2006/EC on the establishment, operation and use of the second generation Schengen Information System (SIS II Regulation) was adopted.\(^83\) The SIS II Regulation amends the CISA and replaces its provisions regarding data protection and the establishment and operation of SIS.\(^84\) The purpose of the second generation of SIS is more broad than the purpose of the first generation of SIS.\(^85\) The purpose of the first generation of SIS was to ‘to maintain public policy and public security, including national security, in the territories of the Contracting Parties and to apply the provisions of this Convention relating to the movement of persons in those territories, using information communicated via this system.’\(^86\) The purpose of the second generation of SIS is to ensure a high level of security in the AFSJ of the EU, which includes the maintenance public security and public policy and safeguarding of security in the territories of the Member States.\(^87\) Thus, the purpose of the first generation of SIS has been incorporated in the general and more broad purpose of a high level of security within the AFSJ of the second generation of SIS.

The grounds for the issuance of a SIS alert against a third-country national to be refused entry or stay remained the same. Article 24 SIS II Regulation includes the same grounds for SIS alerts as its predecessor (Article 96 CISA). Further, Article 25 CISA remained applicable for the second generation of SIS. Article 25 CISA poses an obligation on Member States to consult another Member State if it intends to issue a SIS alert against a third-country national who holds a residence permit of another Member State, or when a Member State wishes to issue a residence permit to a third-country national against whom a SIS alert has been issued by another Member State.\(^88\) New for the second generation of SIS was that the new SIS II Regulation contained improvements related to the legal protection of third-country nationals. First, a SIS alert against a third-country national who is a beneficiary of the EU free movement rights (for example, the spouse of a EU citizen) cannot be executed without a further assessment of the circumstances of the case.\(^89\) Further, the decision on which the alert is issued has to be taken on the basis of an individual assessment.\(^90\) This requirement should be read in conjunction with the requirement of a proportionality assessment of Article 21 SIS II Regulation. The requirements of an individual assessment and a proportionality assessment are important limitations on the possibilities for Member States to issue an alert in comparison to the first generation of SIS.\(^91\) Lastly, an alert on a third-country national has to be erased if the person in question has acquired EU citizenship.\(^92\)

In addition, the use of biometrics has been added in the SIS II Regulation. Photographs and fingerprints may be used to confirm the identity of a third-country national who has been located.\(^93\) The SIS II Regulation provides for an opportunity to use fingerprints as a sole identifier in the future.\(^94\)

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\(^83\) SIS II Regulation.
\(^84\) Article 52 SIS II Regulation.
\(^85\) The ‘first generation’ of SIS refers to SIS as it was laid down in the CISA before the SIS II Regulation was adopted.
\(^86\) Article 93 CISA.
\(^87\) Article 1(1) SIS II Regulation.
\(^88\) Article 25 CISA.
\(^89\) Article 25(2) SIS II Regulation. This Article is the implementation of the Commission v Spain case (CJEU 31 January 2006, C-553/03 (Commission v Spain), paras 53-59) into EU legislation. For further information, see Chapter 6.2.4.
\(^90\) Article 24(1) SIS II Regulation.
\(^91\) Brouwer 2008, p 95.
\(^92\) Article 30 SIS II Regulation.
\(^93\) Article 22(b) SIS II Regulation.
\(^94\) Article 22(c) SIS II Regulation.
Also, the scope of the authorities who have access to SIS alerts had been extended. Like under the first generation of SIS, border control authorities, police, authorities responsible for customer checks, and authorities responsible for issuing visas, examining visa applications and issuing residence permits have access to the SIS. In addition, national judicial authorities and authorities responsible for the examination of applications in the context of EU free movement law obtained access to SIS.

Lastly, since the adoption of the SIS II Regulation, Member States have the possibility to link alerts in order to establish the relationship between two or more alerts. For example, a SIS alert on a person for extradition can be linked to a SIS alert on a stolen vehicle. The combination of these factors has changed the original function of SIS, the databank is used as general search tool instead of hit/no hit tool.

2.5 Architecture of SIS II
SIS II consists of a central system (Central SIS II) and national systems (N.SIS II). The Central SIS II is composed of a technical support function (CS-SIS) and a uniform national interface (NI-SIS). The CS-SIS performs technical supervision and administration functions and is located in Strasbourg. It is possible for Member States to store information in their N-SIS II system, which is not transmitted to the CS-SIS. Member States can only search in data files of the CS-SIS and their national N-SIS II. It is not possible to search the data files in N-SIS II systems of other Member States.

The Management Authority monitors the CS-SIS. It keeps – among others – record of the history of the alerts and the name of the competent authority responsible for processing the data. Further, all Member States have a SIRENE Bureau. A SIRENE Bureau is the national authority responsible for the N-SIS II. SIRENE Bureaus are also the responsible authorities for the exchange of supplementary information on alerts. The SIRENE Manual provides guidelines for Member States on how to fulfil this task.

2.6 Sub-conclusions
This Chapter provided a short overview of the history and structure of Schengen and the SIS. The SIS evolved from an instrument designed by a five-party multilateral agreement to one of the most important and biggest databases on EU level. Shortly after the SIS became operational, more Member States joined the Schengen Area and/or started to use the SIS (see Appendix I). After the incorporation of the Schengen acquis into EU law, the number of participating Member States in SIS grew exponential. In 2006, the second generation of SIS was established with the adoption of the SIS II Regulation. The second generation of SIS improved the rights of third-country nationals against whom a SIS alert has been issued. The SIS II Regulation states that SIS alerts can be entered only if there has been an individual assessment and a proportionality assessment. It further strengthens the position of...
third-country nationals who are beneficiaries of EU free movement rights. A SIS alert against a third-country national who is a beneficiary of EU free movement rights cannot be enforced automatically without further examination of the circumstances of the case.
Chapter 3 | SIS Alerts: Criteria and Consequences

3.1 Introduction

SIS alerts on third-country nationals to be refused entry or stay can be imposed on two grounds: Article 24(2) SIS II Regulation and Article 24(3) SIS II Regulation. This Chapter provides a detailed explanation of the two grounds, the relationship between Article 24(3) SIS II Regulation and entry-bans, the grounds on which entry-bans can be issued and the effects of SIS alerts. This Chapter provides the basic knowledge on the issuance of SIS alerts and the consequences of SIS alerts, which is necessary in order to answer the research questions. First, it is discussed who can issue a SIS alert. Afterwards, the relationship between Article 24(3) SIS II Regulation and the Return Directive is explained. Subsequently, the criteria to impose an entry-ban and the discretion Member States have in imposing entry-bans are discussed. Lastly, the effects of SIS alerts are discussed. This Chapter concludes with an overview of the criteria discussed in this Chapter.

3.2 Who can issue a SIS alert?

SIS alerts based on Article 24(2) SIS II Regulation can be issued by the competent administrative authorities or courts of any of the Member States.\(^\text{107}\) SIS alerts based on Article 24(3) SIS II Regulation can be issued by the Member State where the third-country national resides illegally.\(^\text{108}\) It could be that the third-country national against whom a Member State wishes to issue a SIS alert is in the possession of a valid residence permit from another Member State. If this situation occurs, the issuing Member State has to consult the Member State of which the third-country national concerned holds a residence permit, in order to establish whether there are sufficient reasons to withdraw the residence permit.\(^\text{109}\) If the residence permit has not been withdrawn, a SIS alert cannot be issued.\(^\text{110}\) However, the CJEU ruled that a SIS alert can be imposed ‘even though the consultation procedure laid down in that provision is ongoing, if that third-country national is regarded by the Contracting State issuing the alert as representing a threat to public order or national security’.\(^\text{111}\) It could be that an alert has to be deleted after the consultation period ends.\(^\text{112}\) If the residence permit will not be withdrawn after the consultation procedure, Member States retain the possibility to file a national alert (see Chapter 2.5).\(^\text{113}\)

3.3 The SIS II Regulation and the Return Directive

The conditions for issuing a SIS alert are laid down in Article 24 SIS II Regulation. According to Article 24(1) SIS II Regulation, SIS alerts have to result from a decision taken by a competent administrative authority or court, appeals against such a decision have to be accordance with national law. Paragraphs (2) and (3) determine the specific conditions for a SIS alert:

“2. An alert shall be entered were the decision referred to in paragraph 1 is based on a threat to public policy or public security or to national security which the presence of the third-country national in

\(^{107}\) Article 24(1) SIS II Regulation.

\(^{108}\) Article 24(3) SIS II Regulation and Article 2 Return Directive.

\(^{109}\) Article 25(2) CISA.

\(^{110}\) Ibid.

\(^{111}\) CJEU 16 January 2018, C-240/17 (E.), para 50.

\(^{112}\) Ibid.

\(^{113}\) Ibid.
question in the territory of a Member State may pose. This situation shall arise in particular in the case of:

a) a third-country national who has been convicted in a Member State of an offence carrying a penalty involving deprivation of liberty of at least one year;

b) 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.

3. An alert may also be entered when the decision referred to in paragraph 1 is based on the fact that the third-country national has been subject to a measure involving expulsion, refusal of entry or removal which has not been rescinded or suspended, that includes or is 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 third-country nationals.\textsuperscript{114}

In short there are two grounds for the issuance of a SIS alert: (1) a third country national poses a threat to public policy, public security or national security, or (2) a third-country national is subjected to a prohibition of entry/residence based on a failure to comply with migration law. The first ground is compulsory, Member States shall enter an alert if a third country national is considered to be a threat to public security or national security. The conditions listed in Article 24(2)(a-b) SIS II Regulation are non-exhaustive, those are the conditions in which Member States shall enter a SIS alert, but Member States may decide to apply a broader range of conditions in which a SIS alert can be issued. The CJEU did not (yet) set requirements for the public order assessment under Article 24(2) SIS II Regulation. Member States thus enjoy a wide margin of discretion in issuing SIS alerts based on Article 24(2) SIS II Regulation. There is no obligation for Member States to publish the criteria on which they issue SIS alerts based on Article 24(2) SIS II Regulation, which makes it difficult for an individual to know whether a SIS alert based on Article 24(2) SIS II Regulation has been issued correctly or lawfully.\textsuperscript{115} In Chapter 5, it will be examined whether the requirements established by the CJEU for the imposition of an entry-ban based on the public order as defined in the Return Directive concept apply – or could be applied – to Article 24(2) SIS II Regulation as well.

Article 24(3) SIS II Regulation should be read in conjunction with the Return Directive.\textsuperscript{116} The Return Directive poses an obligation on Member States to issue a return decision to any third-country national who resides illegally on their territory.\textsuperscript{117} In specific circumstances, Member States have to accompany the return decision with an entry-ban. An entry ban will be imposed in two situations, (1) if there is no period for voluntary departure granted or (2) the obligation to return has not been complied with.\textsuperscript{118} The two grounds for an entry ban are closely linked. Third-country nationals who reside illegally on the territory of a Member State receive a return decision.\textsuperscript{119} Normally a return decision provides for an

\textsuperscript{114} Article 24(2-3) SIS II Regulation.
\textsuperscript{116} Even though the Return Directive is EU law and not all the Schengen States are EU Member States, the Return Directive applies to all Schengen States because it replaces Article 23 and 24 of the Schengen Agreement (Article 21 Return Directive).
\textsuperscript{117} Article 6(1) Return Directive.
\textsuperscript{118} Article 11 Return Directive.
\textsuperscript{119} Article 6 Return Directive.
appropriate period for voluntary departure. If the period for voluntary departure has been exceeded and the third-country national is still residing on the territories of the Member States, the third-country national will receive an entry-ban based on the second ground. In specific circumstances Member States can refrain from granting a period for voluntary departure, an entry-ban will be issued immediately. Member States may refrain from a voluntary departure period if there is a risk of absconding, an application for a residence permit has been dismissed as manifestly ill-founded or fraudulent, or the third-country national poses a risk to public policy, public security or national security. In short, the grounds for issuing a SIS alert can be presented as follows:

![Diagram of SIS alert grounds](image)

**Figure 1 - Grounds for the issuance of SIS alerts**

The word ‘may’ in Article 24(3) SIS II Regulation seems to indicate that the Return Directive has an indirect effect to the SIS II Regulation, it appears the Member States may issue a SIS alert when there is an entry-ban, but do not have to. It seems like Member States have to take two decisions: the decision whether to impose an entry-ban based on the Return Directive and the decision whether to register the entry-ban as a SIS alert based on the SIS II Regulation. However, as follows from the Preamble of the Return Directive and the Return Handbook, de facto, entry-bans are automatically registered in SIS II. This is also emphasized by the case law of the CJEU, which presumes entry-bans are accompanied by a SIS alert. The direct effect of the Return Directive to the SIS II Regulation is implemented in the recast of the SIS II Regulation (the SIS III Regulation (not yet in force), see Chapter 4), which explicitly refers to an entry-ban based on the Return Directive as an obligatory ground for a

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120 Article 7(1) Return Directive.
121 Article 11(1)(b) Return Directive.
123 Article 7(4) Return Directive.
125 See also European Migration Network 2014, p 17.
126 For example see CJEU 16 January 2018, C-240/17 (E.), par 50. In the first sentence the Court talks about the Member State issuing an entry-ban. Later, the Court refers to the same Member State as the ‘State issuing the alert’.
SIS alert. For those reasons, it can be concluded that the criteria for entry-bans from the Return Directive directly apply for Article 24(3) SIS II Regulation.

3.4 Criteria for entry-bans

3.4.1 Article 11(1)(a) Return Directive

As mentioned in Chapter 3.3 and Figure 1, there are two grounds on which an entry-ban can be imposed under the Return Directive. The first ground for an entry-ban, Article 11(1)(a) in combination with Article 7(4) Return Directive, leaves discretion for Member States. Member States may refrain from granting a period for voluntary departure if (1) there is a risk of absconding, if (2) an application for legal stay has been found manifestly unfounded or fraudulent, or if (3) the person concerned poses a risk to public policy, public security or national security. Member States are not obliged to refrain from a period for voluntary departure in those situations. The purpose of Article 7(4) Return Directive is to promote voluntary departure, priority has to be given to voluntary departure.

The risk of absconding is defined in the Return Directive as ‘the existence of reasons in an individual case which are based on objective criteria defined by law to believe that a third-country national who is subject of return procedures may abscond.’ The text explicitly refers to an ‘individual case’, which requires an individual assessment of the risk of absconding. Further, the principle of proportionality has to be taken into account in the decision. Member States enjoy discretion in establishing the criteria to determine the risk of absconding, but illegally residing third-country nationals cannot be refrained in general from a period for voluntary departure.

The qualification of manifestly unfounded or fraudulent applications for legal stay depends to a great extent on the national legislation and interpretation and implementation of EU law by Member States. The Return Handbook states that Article 7(4) Return Directive should be interpreted as covering abusive applications as well, because ‘abusive applications normally involve a higher degree of reprehensible behaviour than manifestly unfounded applications’. The risk to public policy, public security or national security as defined in Article 7(4) Return Directive has been clarified by the CJEU in the Zh and O case. The Zh and O case is important in relation to the research question of this thesis and will be elaborated on in detail in Chapter 5.

3.4.2 Article 11(1)(b) Return Directive

The second ground on which an entry-ban can be imposed, Article 11(1)(b) Return Directive, speaks for itself. An entry-ban shall be imposed when the obligation to return has not been complied with. It

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127 Article 24(1)(b) SIS III Regulation.
128 CJEU 28 April 2011, C-61/11 PPU (El Dridi), para 36. In this context, note that the European Commission proposed in their proposal for the Recast of the Return Directive that the risk of absconding, a manifestly unfounded or fraudulent application for legal stay or a risk to public policy, public security or national become mandatory grounds not to grant a period for voluntary departure (European Commission 12 September 2018, COM(2018) 634 final, p 28). If the proposal of the European Commission will be adopted in the final Recast of the Return Directive, Member States do not have the possibility to grant a period for voluntary departure anymore if a third-country national falls within the scope of one of these categories.
129 Article 3(7) Return Directive.
130 Recital 10 Return Directive and para 6.3 Return Handbook. NB: the proportionality assessment and individual assessment for SIS alerts in general are embodied in Article 21 and 24(1) SIS II. Because entry-bans are accompanied with a SIS alert, those requirements should apply to entry-bans as well.
131 Para 6.3 Return Handbook.
132 Ibid.
133 CJEU 11 June 2015, C-554/13 (Zh and O).
should be noted that the period for voluntary departure has to be appropriate (an appropriate period shall be between seven and thirty days) \(^{134}\) and shall be extended in specific circumstances. Factors that can lead to the extension of the period for voluntary departure are the length of stay in the Member State, the existence of children attending school and the existence of family and social links. \(^{135}\) This approach of an individual assessment for determination of the period for voluntary departure can also be found in the general requirements for return decisions of Article 5 Return Directive, which states that Member States shall take into account the best interest of the child, family life and the state of health of the third-country national concerned while implementing the Return Directive. The necessity for an individual assessment is emphasized again in the Return Handbook by the Commission, which says that ‘each individual case should be treated on its own merits’. \(^{136}\)

### 3.4.3 Entry-bans in practice

In practice, the imposition of an entry-ban seems to appear more often than the situations described in Article 11 Return Directive. In 2013, thirteen Member States (Cyprus, Germany, Estonia, Greece, Spain, Iceland, Ireland, Italy, Lithuania, Malta, Poland, Portugal and the United Kingdom) automatically imposed entry-bans on all return decision cases, without an examination of the grounds for an entry-ban under the Return Directive. \(^{137}\) However, the Zh and O case (2015) precludes the practice of the automatic imposition of an entry-ban. It is not known whether these thirteen Member States have adjusted their policies on the imposition of entry-bans in the meantime.

### 3.5 Consequences of SIS alerts

#### 3.5.1 Exclusion Schengen territories

First and foremost, as a consequence of a SIS alert third-country nationals will be refused entry into the territories of the Member States \(^{138}\) and applications for a uniform short-stay Schengen visa will be refused. \(^{139}\) There are exceptional situations when SIS alerts will not be enforced (see Chapter 6), however, in principle, the consequence of a SIS alert is that the third-country national concerned will be denied access to all Schengen Member States and will be denied a visa or a residence permit, or in specific circumstances even expelled or detained. \(^{140}\) The duration of a SIS alert differs between SIS alerts based on Article 24(2) and 24(3) SIS II Regulation. The duration of SIS alerts issued based on Article 24(2) SIS II Regulation depends on the purpose for which the alert was entered. \(^{141}\) Within three years, the Member States who issued the alert has to review the necessity to keep the alert is SIS. \(^{142}\) Without a decision to prolong the duration of a SIS alert,

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\(^{134}\) CJEU 28 April 2011, C-61/11 PPU (*El Dridi*), para 36.  
\(^{135}\) Article 7(2) Return Directive.  
\(^{136}\) Para 6.1 Return Handbook.  
\(^{137}\) European Commission 2013, p 165. NB: Not all Member States who automatically impose entry-bans on all return decisions are (fully) participating in the Schengen cooperation. Cyprus does not participate in Schengen at all, Ireland and the United Kingdom do not participate in the provisions related to alerts on third-country nationals to be refused entry or stay (and opted out of the Return Directive). This means that entry-bans imposed by these Member States do not result in a SIS alert.  
\(^{138}\) Article 6(1)(d) Schengen Borders Code.  
\(^{139}\) Article 21(3)(c) Visa Code. NB: Long-stay visas do not fall within the scope of the Visa Code.  
\(^{140}\) Brouwer 2010, p 208.  
\(^{141}\) Article 14(1) SIS II Regulation.  
\(^{142}\) Article 14(2) SIS II Regulation.
it will be erased from the CS-SIS (see Chapter 2.5). The issuing Member State will be informed in advance when a SIS alert will be erased. SIS alerts based on Article 24(3) SIS II Regulation are subsidiary to the length of the entry-ban (see Chapter 3.3). The length of the entry-ban (and thus SIS alert) has to be determined based on an individual examination taking into account all the relevant circumstances. Normally an entry-ban does not exceed a period of five years, however, Member States may exceed the period of five years if the third-country national is considered to be a serious threat to public policy, public security or national security. Research shows that the lengths of the entry-bans vary among the Member States, especially regarding entry-bans based on the public order ground. In 2013, almost 20 percent of the Member States uphold an indefinite length of entry-bans imposed on public order grounds, 25 percent did not specify the maximum length for entry-bans imposed on public order grounds, 45 percent had a determined maximum period for entry-bans imposed on public order grounds. In this context it is important to note that the period of the entry-ban does not start at the moment the entry-ban is imposed, but at the moment the third-country national actually left the territories of the Member States. The CJEU stated that an entry-ban follows a return, which is formulated in the Return Directive as ‘the process of a third-country national going back’. Therefore, a third-country national must have left the territories of the Member States before an entry-ban comes into effect. The actual effect of an entry-ban may be longer than the period between the day the entry-ban is imposed plus the duration of the entry-ban. This approach is followed in the SIS III Regulation (see Chapter 4) and will apply to all SIS alerts for the refusal of entry or stay in the future.

3.5.2 Effects on derived rights other EU legal frameworks

Another important effect of a SIS alert is that it affects the derived rights of a third-country national from other EU legal frameworks, such as the Family Reunification Directive, the Citizenship Directive and the Long Term Residence Directive. The Family Reunification Directive and the Long Term Residence Directive contain public order grounds for the refusal of (the prolongation of) a residence permit under these directives. However, a SIS alert cannot be the sole reason for the refusal of an application on the public order ground under either of these directives. The Family Reunification Directive requires that Member States take the nature and solidity of the relationship of the third-country national concerned, the duration of his or her say in the Member State and the existence of family, cultural and social ties in the country of origin into account before an application is rejected for reasons of public order. The Long Term Residence Permit requires that Member States ‘consider the severity or type of offence against public policy or public security, or the danger that emanates from the person concerned, while also having proper regard to the duration of residence and the existence

\[143\] Article 14(4) SIS II Regulation.
\[144\] Ibid.
\[145\] Article 11(2) Return Directive.
\[146\] Ibid.
\[147\] European Commission 2013, p 167. NB: This research was conducted with the then 32 Schengen States. There was no information available of three Member States (Netherlands, Estonia and Sweden).
\[148\] CJEU 26 July 2017, C-225/16 (Ouhrami), para 58.
\[149\] Article 3(3) Return Directive.
\[150\] CJEU 26 July 2017, C-225/16 (Ouhrami), para 47.
\[151\] Article 24(3) SIS III Regulation.
\[152\] See Article 6(1) Family Reunification Directive and Article 6 Long Term Residence Directive.
\[153\] Article 17 Family Reunification Directive.
of links with the country of residence.'  

However, as the case of Mrs Kozlovska (see Chapter 1.1) illustrates for the Long Term Residence Directive, the existence of a SIS alert can play a decisive role in the rejection of an application for a residence permit. For the Citizenship Directive, the CJEU ruled that a third-country national who is a family member of an EU citizen cannot be refused a residence permit for the sole reason that a SIS alert has been imposed against the third-country national concerned. In this situation it has to be ‘apparent from a specific assessment of all the circumstances of the individual case, in the light of the principle of proportionality, the best interests of any child or children concerned and fundamental rights, that the person concerned represents a genuine, present, and sufficiently serious threat to public policy.’

This strict assessment entails strong protection for third-country nationals who are a beneficiary of the Citizenship Directive against whom a SIS alert has been issued.

**3.5.3 Right to appeal**

According to Article 111 CISA and Article 43 SIS II Regulation persons against whom a SIS alert has been issued have a right to request access, correction, deletion, information or compensation in any of the Member States, and final decisions in relation to these requests have to be mutually enforced by the Member States. Member States decide which national authority is competent to decide on requests concerning SIS alerts and the scope of the remedies provided, which leaves wide discretionary powers to Member States in relation to the remedies provided against SIS alerts.

Thus, in theory, individuals against whom a SIS alert has been issued (alerts based on Article 24 SIS II Regulation included) can start proceedings against this alert in each Member State. In practice, several obstacles arise in relation to the remedies against SIS alerts. First, research has shown significant shortcomings in providing access to SIS alerts, mainly because of the lack of efficient cooperation among the Member States. Also, reports have shown that national authorities are reluctant regarding the enforcement of foreign decisions on the deletion of correction of SIS alerts from other Member States. Further, as Brouwer argued:

‘the fact that SIS alerts are based on the discretionary power of the reporting states causes a problem for the national courts or authorities assessing the lawfulness of both the issuing of the SIS alert, and its execution. For example, a SIS alert based on the suspicion of a serious criminal offence opens the door for very wide application. Where third-country nationals may be declared inadmissible or “unwanted” on the basis of confidential reports from internal security agencies resulting in an alert in the SIS, this information cannot be effectively scrutinised by the individual or by the courts.’

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154 Article 6(1) Long Term Residence Directive.

155 In the context of the Citizenship Directive EU citizen means a citizen who ‘activated’ EU free movement law. Situations where the EU citizen never used EU free movement law are considered to be internal situations of a Member State and do therefore not fall within the scope of the Citizenship Directive.

156 CJEU 31 January 2006, C-503/03 (Commission v Spain), para 53 and CJEU 8 May 2018, C-82/16 (K.A. and Others), para 97.

157 CJEU 8 May 2018, C-82/16 (K.A. and Others), para 97.

158 Article 111 CISA and Article 43(1-2) SIS II Regulation.


160 SIS II Supervision Coordination Group 2016, p 9.


162 Brouwer 2011(1), p 27.
Thus, third-country nationals have the right to appeal against a SIS alert in any of the Member States. In practice, there are obstacles to the right of appeal. SIS alerts cannot be scrutinised effectively by national courts or other competent authorities when the SIS alert is based on confidential information, especially when the SIS alert is being reviewed in another Member State than the Member State who issued the alert. In addition, the only Member State that can delete a SIS alert is the Member State who issued the alert. The fact that Member States are reluctant to enforce decisions on the deletions of SIS alerts from other Member States, affects the effectiveness of the right to appeal.

3.6 Sub-conclusions

This Chapter explained the grounds on which a SIS alert for the purpose of refusal of entry or stay can be issued and the effects of such an alert. There are two grounds on which Member States can issue SIS alerts: Article 24(2) and 24(3) SIS II Regulation. An alert can be issued based on Article 24(2) SIS II Regulation if a third-country national is considered to be a threat to public policy or public security or national security. Article 24(3) SIS II Regulation should be read in conjunction with the Return Directive. In fact, the criteria for an entry-ban of Article 7(4) Return Directive apply as the criteria for an alert based on Article 24(3) SIS II Regulation. This follows from the practical implementation of the Return Directive of the Member States and the Recitals of the Return Directive. The direct relationship between the imposition of an entry-ban and the issuance of a SIS alert is embodied in the SIS III Regulation (not yet enforced, see Chapter 4).

Entry-bans (and thus SIS alerts based on Article 24(3) SIS II Regulation) can be imposed on two grounds, (1) no period for voluntary departure has been granted or (2) the obligation to return has not been complied with. Member States can refrain from a period for voluntary departure if there is a risk of absconding, if an application for legal residence has been dismissed as manifestly unfounded or fraudulent, or if a third-country national poses a risk to public policy, public security or national security. Member States have a wide margin of discretion regarding the application of the criteria to refrain from a period for voluntary departure. Though, an individual assessment of the circumstances of the case is required for all grounds. However, research showed that in almost half of the Member States an entry-ban is automatically imposed in the case of a return decision.

The effects of SIS alerts for the purpose of refusal of entrance or stay are far-reaching. First and foremost, the third-country national will be denied access to the territories of the Member States and cannot obtain a uniform short-stay Schengen visa. The duration of the SIS alert varies between alerts based on Article 24(2) and 24(3) SIS II Regulation. In addition, the residence rights third-country nationals obtain from EU legislation, such as the Family Reunification Directive and the Citizenship Directive, are affected. Under the Citizenship Directive, third-country nationals enjoy strong protection. In addition to a SIS alert, third-country nationals have to compose a genuine, present and sufficiently serious threat to the public order before residence rights can be denied based on the public order ground. Under the Family Reunification Directive and the Long Term Residence, a SIS alert cannot be the sole reason for the rejection of an application for a residence permit. However, as illustrated by the Kozlovskaja case, a SIS alert can be decisive in the rejection of (the prolongation of) a residence permit. Lastly, as a result of a SIS alert, third-country nationals have the opportunity to bring action before the courts of competent authorities against the SIS alert in any of the Member States. However, there practical are obstacles regarding the right of appeal. There is a lack of efficient cooperation between the Member States, Member States seem reluctant to enforce foreign decisions on the

163 Article 34(2) SIS II Regulation.
deletion of SIS alerts and SIS alerts cannot be scrutinized effectively by the authorities of foreign Member States if the SIS alert is based on confidential information.
Chapter 4 | The future generation of SIS

4.1 Introduction
In Chapter 2 the history, background and architecture of the SIS II was described. In Chapter 3, the different grounds for the issuance of a SIS alert under the SIS II Regulation and the consequences of a SIS alert were discussed. There are two important developments that will change the SIS in the future. In November 2018, the European Parliament and the Council adopted the SIS III Regulation (not yet into force).¹⁶⁴ In addition, on 20 May 2019, two regulations were adopted concerning the interoperability of SIS with other EU databases.¹⁶⁵ These three new regulations, which have consequences for the issuance and effects of SIS alerts in the future, will be discussed in this Chapter. This is relevant for the answer to the research questions, because the regulations will influence some of the issues discussed in this thesis when the regulations will become into force (in the near future).

4.2 Regulation 2018/1861: the SIS III Regulation
The purpose and the architecture of the SIS III Regulation are identical to the purpose of the SIS II Regulation.¹⁶⁶ Nevertheless, there are some substantial changes. The most important changes will be discussed in this paragraph.
First, the current Article 24(3) SIS II Regulation refers to a prohibition of entry, no explicit reference to the Return Directive has been made. Article 24(1)(b) SIS III Regulation explicitly refers to the Return Directive. The SIS II Regulation does not refer to the Return Directive because the SIS II Regulation was adopted in 2006, whereas the Return Directive was adopted in 2008. However, according to the preamble of the Return Directive, entry-bans have to be registered in the SIS.¹⁶⁷ De facto, since adoption of the Return Directive in 2008, the Return Directive determines the conditions of SIS alerts based on Article 24(3) SIS II Regulation (see Chapter 3.3). This explicit reference to the Return Directive in the SIS III Regulation affirms the existing interdependence between the SIS II Regulation and the Return Directive.
Second, whereas Article 24(1) SIS II Regulation requires an individual assessment for all SIS alerts based on Article 24(2) and 24(3) SIS II Regulation, the SIS III Regulation requires an individual assessment only for the SIS alerts based on Article 24(1)(a) SIS III Regulation (the successor of Article 24(2) SIS II Regulation). However, as mentioned before, Article 24(1)(b) (the successor of Article 24(3) SIS II Regulation) makes an explicit reference to the Return Directive. The Return Directive does not provide for a general requirement of an individual assessment, but several articles indicate an individual assessment.¹⁶⁸ Therefore, the fact that the SIS III Regulation does only require an individual assessment for SIS alerts based on Article 24(1)(a) SIS III Regulation (successor Article 24(2) SIS II Regulation), does not mean that SIS alerts based on Article 24(1)(b) do not require an individual assessment at all. However, the requirements following from the Return Directive are less strict than the general

¹⁶⁴ Regulation 2018/1861.
¹⁶⁶ See Article 1(2) SIS II Regulation and Article 1 SIS III Regulation.
¹⁶⁷ Return Directive, Recital 18.
¹⁶⁸ For example, see Article 3(7) Return Directive which defines the meaning of the risk of absconding: ‘the existence of reasons in an individual case which are based on objective criteria defined by law to believe that a third-country national who is subject of return procedures may abscond’, Article 5 Return Directive, which requires that the principle of non-refoulement, the best interests of the child, family life and the state of health shall be taken into account when the Return Directive is being implemented, and Article 12 Return Directive, which requires that return decisions are always reasoned on facts and law.
requirement of an individual assessment under the SIS II Regulation. Therefore, third-country nationals against whom a SIS alert will be issued based on Article 24(1)(b) SIS III Regulation, enjoy less safeguards than the third-country nationals against whom a SIS alert has been issued based on its predecessor, Article 24(3) SIS II Regulation.

Lastly, the proportionality assessment of Article 21 SIS II Regulation has been amended in the SIS III Regulation. The SIS III Regulation adds a second paragraph to Article 21 which states: ‘Where the decision to refuse entry and stay referred to in point (a) of Article 24(1) is related to terrorist offence, the case shall be considered adequate, relevant and important enough to warrant a SIS alert.’ The addition of this second paragraph will have far-reaching consequences. Article 24(1) SIS III Regulation includes the situation where a third-country national committed, or there are serious grounds for believing that a third-country national committed, a criminal offence. This means a SIS alert can be issued against third-country nationals who are suspected of having committed a terrorist offence without a proportionality assessment. For example, a SIS alert can be issued against a third-country national who has lived his entire life in a Member State and is suspected of a terrorist offence without a proportionality assessment. This seems to be at odds with several fundamental rights, such as the right to respect for private and family life (Article 7 Charter of the Fundamental Rights of the European Union, hereafter: Charter). In this regard, third-country nationals who are suspected of terrorist offences will enjoy less protection under the SIS III Regulation than they do under the current SIS II Regulation.

4.3 Regulations 2019/817 and 2019/818: Interoperability SIS and other EU databases

Another important change to SIS II is the interoperability of the SIS with other EU databases. Interoperability can be described as ‘the ability of different information systems to communicate, exchange data and use the information that has been exchanged.’ Already prior to the adoption of the SIS II Regulation, the Commission published several communications about the desirability and necessity of interoperability between the SIS and the Visa Information System (VIS, operable since 2004) and Eurodac (operable since 2003). On 20 May 2019, the European Council and European Parliament adopted two new regulations regarding the interoperability of the SIS with other EU databases: Regulation 2019/817 and Regulation 2019/818.

Regulation 2019/817 establishes the interoperability of the SIS, the Entry/Exit System (EES), the VIS and the European Travel Information System (ETIAS). The EES, was adopted in November 2017 (not yet operable). The EES will register the date, time and place of the entrance and exit of third-country national in the territories of the Member States. The VIS contains information on Schengen visas and allows border guards to verify the validity of Schengen visas. Biometric data (fingerprints and photographs) are used to confirm the identity of a person. The ETIAS was established in September 2016.

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169 Article 21(2) SIS III Regulation.
170 Article 24(1)(a) and 24(2) SIS III Regulation.
171 This is the definition of interoperability as used by the European Data Protection Supervisor. See European Commission 2017, p 49.
173 Article 3(1) Regulation 2019/817.
174 Article 1 Regulation 2017/2226.
175 Article 1(1)(a) Regulation 2017/2226.
176 Article 1 Regulation 767/2008 (VIS Regulation).
177 Article 5 VIS Regulation.
2018 (not yet operable).\(^{178}\) The ETIAS will storage data on third-country who are exempt from visa requirements (for example citizens from the USA) in order to enable Member States to consider ‘whether the presence of those third-country nationals in the territory of the Member States would pose a security, illegal immigration or high epidemic risk.’\(^{179}\) Regulation 2019/818 establishes the interoperability of the SIS, Eurodac and the European Criminal Records Information System on Third-Country Nationals and Stateless persons (ECRIS-TCN).\(^{180}\) Eurodac is a fingerprint database which is used for the determination of the responsible Member State for an asylum application under the Dublin III Regulation.\(^{181}\) ECRIS-TCN (not yet operable) will make it possible for Member States to exchange information on criminal convictions of third-country nationals. The ‘regular’ ECRIS is operable since 2012 and already provided for an opportunity to exchange information on third-country nationals.\(^{182}\) However, the current ECRIS system seemed inefficient regarding the exchange of information on third-country nationals, causing that courts, law enforcement authorities and other entitled authorities do not always have complete information about the criminal history of a third-country national.\(^{183}\) Therefore, in April 2019, a centralised system for the exchange of information regarding convictions of third-country nationals and stateless persons, ECRIS-TCN, was adopted.\(^{184}\)

Regulation 2019/817 and Regulation 2019/818 are regulations with a technical nature. They both establish new tools for the interoperability between the SIS, EES, VIS and ETIAS (Regulation 2019/817) and the SIS, Eurodac and ECRIS-TCN (Regulation 2019/818). The regulations both use four new components to establish interoperability between the different databases: a European search portal (ESP), a shared biometric matching service (shared BMS) a common identity repository (CIR) and a multiple-identity detector (MID).\(^{185}\) The relationship between these components and the databases can be illustrated with the infographic of the European Commission (see Appendix II). The most important improvement of the regulations will be that there is one search portal, the ESP, where entitled authorities can search for a ‘hit’ of a third-country national in any of the relevant databases.\(^{186}\) These regulations do not only increase the number of actors who have access to the data stored in the databases, the number of purposes for which data of the databases is used will grow as well.\(^{187}\) For example, authorities who only have access to the VIS will be able to see whether there is information available on this person in the SIS as well.

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\(^{178}\) Regulation 2018/1240.

\(^{179}\) Article 1(1) Regulation 2018/1240.

\(^{180}\) Article 3(1) Regulation 2019/818.

\(^{181}\) Article 1 and 3(1) Regulation 603/2013 (EURODAC Regulation). NB: Regulation 604/2013 (Dublin III Regulation) establishes criteria for the Member State who is responsible for the examination of an asylum application. In principle, this is the Member State where the applicant arrived first (Article 6 Dublin III Regulation). Eurodac facilitates the application of the Dublin system (Recital 30 Dublin III Regulation), an Eurodac hit means that the Member State which took the fingerprints is considered to be the first country of arrival and therefore responsible for the asylum application.

\(^{182}\) COM(2017) 344 final, p 2.

\(^{183}\) Ibid.

\(^{184}\) Regulation 2019/816.

\(^{185}\) Article 1(2) Regulation 2019/817 and Article 1(2) Regulation 2019/818.

\(^{186}\) Due to the limited scope of this thesis, an in-depth analyses of what information and which authorities are exactly allowed to access will not be provided.

The regulations have been subjected to criticism. The European Data Protection Supervisor (EDPS) expressed its concerns about the interoperability of EU databases, stressing that ‘interoperability of not primarily a technical choice but rather a political choice.’ The EDPS further stressed that there is a risk that the legal principles in the area of data protection will be affected to a ‘point of no return’. The European Union Agency for Fundamental Rights (FRA) emphasized in its opinion on the proposals of Regulation 2019/817 and Regulation 2019/818 that several fundamental rights of the Charter will be affected by the regulations. Among others Article 7 (respect for private and family life), Article 8 (protection of personal data), Article 18 (right to asylum), Article 19 (protection in the event of removal, expulsion or extradition) and Article 47 of the Charter (right to an effective remedy and to a fair trial) and the principle of non-discrimination will be affected by the regulations, according to the FRA. Even though the EDPS and FRA endorse the idea of a simplified and synchronized system of EU databases, they are concerned about the consequences of Regulation 2019/817 and Regulation 2019/818 on the data protection rights and fundamental rights (the right to an effective in particular) of the individuals concerned. As Galli formulated, the regulations constitute ‘an obvious challenge for data-protection principles, especially purpose limitation, data minimisation, data security and the clear allocation of data responsibilities.’

4.4 Sub-conclusions

In this Chapter, three regulations which have been adopted (but are not in force yet) were discussed: the SIS III Regulation, Regulation 2019/817 and Regulation 2019/818. The SIS III Regulation will change the position of third-country nationals against whom a SIS alert has been issued on two aspects. First, an individual assessment in required for Article 24(1)(a) SIS III Regulation (successor Article 24(2) SIS II Regulation), but not for Article 24(1)(b) SIS III Regulation (successor Article 24(3) SIS II Regulation). SIS alerts based on Article 24(1)(b) SIS III Regulation have to be issued in line with the Return Directive, which includes several articles that indicate an individual assessment. However, the Return Directive does not contain a general requirement of an individual assessment. Therefore, third-country nationals against whom a SIS alert will be issued based on Article 24(1)(b) SIS III Regulation enjoy less protection than third-country nationals against whom a SIS alert is issued on its predecessor, Article 24(3) SIS II Regulation. Secondly, under the SIS III Regulation, a proportionality assessment is no longer required for SIS alerts based on the conviction or suspicion of a terrorist offence. This has far-reaching consequences for the third-country nationals concerned and seems to be at odds with the fundamental rights of the third-country national concerned, such as the right of respect for private and family life (Article 7 Charter). Where the SIS II Regulation improved the rights of third-country nationals in comparison to the first generation of SIS (see Chapter 2.4), the SIS III Regulation seems to deteriorate the rights of third-country nationals against whom a SIS alert has been issued. Regulation 2019/817 and Regulation 2019/818 establish interoperability between the SIS, EES, VIS, and ETIAS, and between the SIS, Eurodac and ECRIS-TCN. They establish one search portal where authorities can search for a ‘hit’ in any of the databases, improving the effectiveness of the EU.

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188 For example, see European Data Protection Supervisor 2018, paras 142-152, European Agency for Fundamental Rights 2018, pp 55-57 and Meijers Committee 22 January 2019.
189 European Data Protection Supervisor 2018, p 3.
190 Ibid., para 25.
191 Fundamental Rights Agency 2018, paras 142-152.
192 Ibid.
databases. The regulations have been subjected to strong criticism. The EDPS and the FRA are concerned about the protection of data protection rights and fundamental rights, the right to an effective remedy in particular. The interoperability will increase the effects of a SIS alert. The number of actors and the number of purposes for which the databases might be used increase as a result of the regulations. This, in combination with the concerns about the protection of the rights of individuals expressed by the EDPS and FRA, will affect the rights of third-country nationals against whom a SIS alert has been issued negatively.
Chapter 5 | Zh and O and Article 24(2) SIS II Regulation

5.1 Introduction
As explained in Chapter 3, there are two grounds for the issuance of a SIS alert for the purpose of refusal of entry or stay: Article 24(2) and 24(3) SIS II Regulation. Article 24(3) SIS II Regulation should be read in conjunction with the Return Directive. In fact, the criteria for the imposition of an entry-ban in accordance with the Return Directive apply as the criteria for a SIS alert based on Article 24(3) SIS II Regulation. Article 24(2) SIS II Regulation requires the existence of a threat for public policy or public security or national security, the existence of such a threat is also one of the grounds for the imposition of an entry-ban as defined in the Return Directive. The Zh and O case was the first case in which the CJEU gave concrete criteria for the public order concept under the Return Directive. In this Chapter, an analysis of the Zh and O case will be given. The consequences and implications of the case will be debated. Afterwards, it will be discussed whether the Zh and O requirements for the public order assessment in the Return Directive (and thus Article 24(3) SIS II Regulation) can, or should, be applied to Article 24(2) SIS II Regulation as well.

5.2 The Zh and O case
5.2.1 Facts and circumstances
The Zh and O case concerns two third-country nationals, Mr Zh and Mr O, who received a return decision without a period for voluntary departure from the staatssecretaris (Secretary of State for Security and Justice) in the Netherlands. Mr Zh is a third-country national who entered the Netherlands on 8 June 2011 while he was in transit to Canada. He was travelling with a false travel document which he knew to be false. Therefore Mr Zh was detained on arrival. On 21 June 2011 he was given a custodial sentence by the politierechter (Magistrate’s Court) of two months for being in the possession of a travel document which he knew to be false. On 4 August 2011 the staatssecretaris issued a return decision against Mr Zh, he was ordered to leave the territory of the EU immediately (thus, no period for voluntary departure and therefore an entry-ban). On 5 August 2011, following the custodial sentence, Mr Zh was placed in pre-deportation detention. The staatssecretaris dismissed the complaint of Mr Zh against the return decision, because the offence Mr Zh committed made it necessary to refrain from a period for voluntary departure. On 8 November 2011 the court in first instance found the appeal of Mr Zh unfounded. The court found that the facts of Mr Zh’s case did not pose an obligation on the staatssecretaris to depart from the principle that a period for voluntary departure is not granted if there exists a risk to public policy. Mr Zh lodged an appeal against this decision before the Afdeling Bestuursrechtspraak Raad van State (Council of State). On 14 December 2011 Mr Zh was deported, therefore his detention measure was lifted.

Mr O is a third-country national who entered the Netherlands on 16 January 2011 on a 21-day short-stay visa. Mr O was detained on 23 November 2011 on grounds of the Dutch Criminal Code, he was

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195 CJEU 11 June 2015, C-554/13 (Zh and O), para 18.
196 Ibid.
197 Ibid.
198 Ibid.
199 Ibid., para 19.
200 Ibid., para 20.
201 Ibid., para 21.
202 Ibid., para 22.
suspected of domestic abuse against a woman. On 24 November 2011, the staatssecretaris issued a return decision against Mr O without a period for voluntary departure (and thus an entry-ban). On 17 January 2012, the staatssecretaris found the complaint of Mr O against the return decision inadmissible and unfounded. The detention measure imposed on Mr O on 23 November 2011 for the suspicion of domestic abuse established a risk to public policy which made in necessary to refrain from a period for voluntary departure, according to the staatssecretaris. De voorzieningenrechter of the court in first instance (the court hearing the application for interim measures of the court of first instance) ruled that the complaint of Mr O against the decision of the staatssecretaris was well-founded on 1 February 2012. The court argued that the staatssecretaris should have motivated the decision better because there was a lack of policy guidelines regarding the shortening of the period for voluntary departure based on the existence of a risk to public policy. The staatssecretaris lodged an appeal before the Council of State. On 23 February 2012 Mr O was deported, therefore his detention measure was lifted.

The cases of Mr Zh and Mr O both required an assessment of the public order ground for refraining from a period for voluntary departure when issuing a return decision (Article 7(4) Return Directive) from the Council of State. Therefore, the Council of State treated the cases together on 23 October 2013. The Council of State observed that ‘public policy’ is not determined in the Return Directive, neither does Article 7(4) Return Directive refer to national legislation. This means – according to settled case law of the CJEU – that an autonomous and uniform explanation on EU level is required. The Council of State stated that the interpretation of the public order concept cannot be based solely on national legislation. It further stated that the interpretation of the public order concept cannot be derived from the Citizenship Directive, the Long Term Residence Directive or the Family Reunification Directive, because the purpose and context of those directives significantly differ from the Return Directive. According to the Council of State, the public order concept of the Return Directive seems to deserve a broader interpretation than the public order concept of the Citizenship Directive, the Long Term Residence Permit and the Family Reunification Directive. Not only a criminal conviction would result in the existence of a risk to public policy, but also the suspicion of a criminal offence. However, concrete guidelines about how much broader the public order concept can be interpreted in the light of the Return Directive do not exist. Therefore, the Council of State found reasons to refer the following preliminary questions about the public order concept of Article 7(4) Return Directive to the CJEU:

203 Ibid., para 23.
204 Ibid., para 23.
205 Ibid., para 24.
206 Ibid., para 24.
207 Ibid., para 25.
208 Afdeling Bestuursrechtspraak Raad van State (Council of State) 23 October 2013, joint cases 2011112799/1/V3 and 201202062/1/V3, para 12.
209 CJEU 11 June 2015, C-554/13 (Zh and O), para 27.
210 Afdeling Bestuursrechtspraak Raad van State (Council of State) 23 October 2013, joint cases 2011112799/1/V3 and 201202062/1/V3, para 17.
211 Ibid.
212 Ibid., para 18.
213 Ibid.
214 Ibid., para 19.
1. Does a third-country national who is staying illegally within the territory of a Member State pose a risk to public policy, within the meaning of Article 7(4) of Directive 2008/115 ..., merely because he is suspected of having committed a criminal offence under national law, or is it necessary that he should have been convicted in a criminal court for the commission of that offence and, in the latter case, must that conviction have become final and absolute?

2. In the assessment as to whether a third-country national who is staying illegally within the territory of a Member State poses a risk to public policy within the meaning of Article 7(4) of [Directive 2008/115], do other facts and circumstances of the case, in addition to a suspicion or a conviction, also play a role, such as the severity or type of criminal offence under national law, the time that has elapsed and the intention of the person concerned?

3. Do the facts and circumstances of the case which are relevant to the assessment referred to in [the second question] also have a role to play in the option provided for in Article 7(4) of [Directive 2008/115], in a case where the person concerned poses a risk to public policy within the meaning of that provision, of being able to choose between, on the one hand, refraining from granting a period for voluntary departure and, on the other hand, granting a period for voluntary departure which is shorter than seven days?215

5.2.2 CJEU judgment

The CJEU answered the first preliminary question negatively. A third-country national cannot be considered to be a risk to public policy on the sole ground that he or she is suspected or convicted for a criminal offence.216 The CJEU followed the argumentation of Advocate-General Sharpston that ‘to be able to rely [...] on the ground that there is a risk to public policy, a Member State must be able to prove that the person concerned in fact constitutes such a risk.’217 The CJEU stated that it is important that the fundamental rights of third-country nationals, their right to liberty in particular, are being respected when they are removed from EU territory.218 A case-by-case assessment is necessary, automatic refrain from a period for voluntary departure in case of (the suspicion of) a criminal offence is not justified.219 A criminal conviction may justify the qualification of a risk to public policy, but other circumstances related to the situation of the third-country national have to be taken into account.220 In conclusion, Article 7(4) Return Directive precludes national practice whereby an illegally residing third-country national ‘is deemed to pose a risk to public policy within the meaning of [Article 7(4) Return Directive] on the sole ground that he is suspected, or has been criminally convicted, of an act punishable as a criminal offence under national law.’221

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215 CJEU 11 June 2015, C-554/13 (Zh and O), para 38. NB: The questions as quoted are the revised version of the CJEU of the questions. The formulation of the Council of State differs. However, the core of the questions is the same.
216 Ibid., para 54.
217 Ibid., para 46 and CJEU 12 February 2015, Opinion of AG Sharpston in C-554/13 (Zh and O), para 43.
218 Ibid., para 47. NB: The CJEU does not explicitly refer to the right to liberty in the Zh and O judgment. However, the CJEU refers to the Mahdi case (CJEU 5 June 2014, C-146/14 PPU) in paragraph 47 of the Zh and O judgment. In the Mahdi case, the CJEU elaborates further on the fundamental rights at stake of third-country nationals who fall within the scope of the Return Directive. Hereby, the right to liberty is cited as one of the fundamental rights at stake (CJEU 5 June 2014, C-146/14 PPU (Mahti), paras 38-44).
219 Ibid., para 50.
220 Ibid., para 51.
221 Ibid., para 54.
Regarding the second preliminary question – whether there are factors other than the circumstances of the case which have to be taken into account to determine the existence of a risk to public policy other than the suspicion or conviction of a criminal offence – the CJEU set out criteria in the Zh and O judgment. The CJEU ruled that in order for a third-country national who committed a criminal offence to pose a risk for public policy, there has to be ‘a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.’ Factors such as the nature and seriousness of the offence and the time between the offence was committed and the process of leaving the territory of the Member State are relevant in determining the existence of a risk to public policy. The third question asks in essence whether a return decision and the decision not to grant a period for voluntary departure require two separate assessments of the circumstances of the case. The CJEU answered this question negatively. Third-country nationals have a right to be heard during the procedure of the return decision. This is a possibility to express themselves in a detailed manner, which would include circumstances relevant for the determination of the period for voluntary departure. The CJEU ruled that no fresh assessment has to take place in the decision to refrain from a period for voluntary departure if the existence of a risk to public policy has already been established in the return decision. Though, a case-by-case assessment has to be ensured and the refusal of a period for voluntary departure has to be compatible with the fundamental rights of the third-country national concerned.

In sum, the CJEU ruled on three important issues in the Zh and O case. First, the mere suspicion or conviction of a criminal offence does not establish the existence of a risk to public order as defined in Article 7(4) Return Directive. Secondly, in addition to the suspicion or conviction of a criminal offence, Member States have to assess whether there is a genuine, present and sufficiently serious threat affecting one of the fundamental interests of the Member State concerned in order to impose an entry-ban on a third-country national for reasons of public order. Lastly, if the risk to public order has been established in the return decision, in which third-country nationals are assumed to have been heard, Member States do not have to conduct a ‘fresh’ examination in the decision to refrain from a period for voluntary departure.

5.3 Comments on the Zh and O case

The Zh and O case was a landmark case in 2015. In 2013, twelve Member States (Cyprus, Germany, Estonia, Greece, Spain, Ireland, Italy, Lithuania, Malta, Poland, Portugal and the United Kingdom) automatically imposed an entry-ban on all return decisions (see Chapter 3.4). Only three Member States (France, Slovenia and Liechtenstein) issued entry-bans based on a case-by-case assessment. This practice had to change substantially after the Zh and O case, which requires a case-by-case assessment when an entry-ban is imposed on a third-country national based on the public order ground. In the Netherlands (the Member State of the referring court) the policy guidelines have been changed significantly after the Zh and O judgment. It does not explicitly follow from the judgment

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222 Ibid., para 60, see also CJEU 17 November 2011, C-430/10 (Gaydarov), para 33.
223 Ibid., para 65.
224 Ibid., para 69.
225 Ibid., para 75.
226 Ibid.
227 European Commission 2013, p 165.
228 Ibid.
229 Cornelisse stressed the need for substantial changes in the policy regarding the imposition of entry-bans in the Netherlands after the Zh and O judgment (see Cornelisse, JV 2015/209, paras 9-11). In January 2016, the
whether the assessment of Zh and O applies to other categories of aliens as well. As the CJEU reiterated in the Zh and O judgment, it is settled case law that the public order concept has to be determined in its context. In principle, the public order assessment under the Return Directive does not automatically apply to public order assessment under the SIS II Regulation as well. However, scholars argue that the scope of Zh and O should be expanded and read as a more general obligation of a case-by-case assessment in EU migration law.

5.3.1 Zh and O and H.T.: one public order assessment for all EU migration instruments?
Boeles and Terlouw interpreted the Zh and O case in combination with the H.T. case. The H.T. case concerned Mr T, a Turkish national from Kurdish origin who lived in Germany with his wife since 1989. They have eight children together, five of whom are German nationals. In 1993, Mr T. obtained a refugee status because of his political activities for the ‘Kurdistan Workers’ Party’ (PKK) and the risk of political persecution he would face because of these activities if returned to Turkey. Later in 1993, activities for the PKK became prohibited in Germany. Criminal sanctions (EUR 3 000 fine) were imposed against Mr T in 2008. In 2012, an expulsion decision was imposed on Mr T. because of his (continued) activities for PKK in 2011, which qualified Mr T. as a ‘present danger’ within the meaning of the applicable German legislation. The German Verwaltungsgerichtshof Baden-Württemberg (Higher Administrative Court, Baden-Württemberg) asked, among others things, whether ‘support provided by a refugee to a terrorist organisation may constitute one of the ‘compelling reasons of national security or public order’ within the meaning of Article 24(1) [Asylum Qualification Directive], even if that refugee does not fall within the scope of Article 21(2) of that directive.

The CJEU compared the public order concept of Article 24 Asylum Qualification Directive with Article 27 and 28 Citizenship Directive. Hereby, the CJEU considers the following:

‘While that directive [Citizenship Directive] pursues different objectives to those pursued by [the Asylum Qualification Directive] and Member States retain the freedom to determine the requirements of public policy and public security in accordance with their national needs, which can vary from one Member State to another and from one era to another [...], the extent of the protection a society intends to afford...

staatssecretaris changed its policy guidelines regarding the period for voluntary departure in the situation of a return decision. The criteria following from the Zh and O judgment were implemented in the guidelines (see Staatscourant 2016/4145 and Article A3/3 Vreemdelingencirculaire 2000).

CJEU 11 June 2015, C-554/13 (Zh and O), para 42.
CJEU 24 June 2015, C-373/13 (H.T.), para 27.
Ibid., para 28.
Ibid., paras 33-35.
Ibid., para 36.
Ibid., para 56. NB: Article 24(2) Asylum Qualification Directive states that Member States can refrain from issuing a residence permit to a person with a refugee status if there are ‘compelling reasons of national security or public order’. Prior to the preliminary question discussed in the text, the CJEU ruled that the revocation of a residence permit falls within the scope of Article 24 Asylum Qualification Directive, even though it is not explicitly mentioned in Article 24 Asylum Qualification Directive (paras 53-55). Article 24(2) Asylum Qualification Directive contains grounds on which Member States may deviate from the principle of non-refoulement. According to Article 24(2) Asylum Qualification Directive, Member States may refoule a refugee if: (a) there are reasonable grounds for considering him or her as a danger to the security of the Member State in which he or she is present; or (b) he or she, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that Member State.’

CJEU 24 June 2015, C-373/13 (H.T.), para 77.
to its fundamental interests cannot vary depending on the legal status of the person that undermines those interests.\textsuperscript{238}

Boeles argued that, because the CJEU stated that the protection of the fundamental interests of a Member State cannot depend on the legal status of the person who endangers those interests, the public order assessment of the Zh and O case should be applied to all EU provisions in the field of migration law.\textsuperscript{239} Likewise, Terlouw argued that whenever the public policy exception of one of the EU migration law provisions is invoked against a third-country national, ‘an individual assessment must be made and there must be a real, actual and sufficient threat.’\textsuperscript{240} Like Boeles, she based her approach on the CJEU H.T judgment.\textsuperscript{241}

In my opinion, this interpretation would be too broad. The application of an EU legal instrument (and its public order exception) depends on a broader range of factors than the legal status of a person. First of all, aside from the legal status of a person, the factual circumstances and rights of third parties involved play an important role in determining the applicable EU legal instrument. For example, the application of the Family Reunification Directive means the third-country national concerned has family who legally resides in the Member States, the application of the Citizenship Directive means the third-country national concerned has the strong right to free movement and residence as a family member of an EU citizen, and the application of the Long Term Residence Directive means the third-country national has had legal residence for a period of at least five years.\textsuperscript{242} It is justifiable that a third-country national who is married to an EU citizen and has had legal residence in a Member State for several years (and thus the Citizenship Directive could apply) is subjected to removal after a different public assessment than a third-country national who illegally enters the territory of a Member State during a transfer (like Mr Zh in the Zh and O case, where the Return Directive applied).

Secondly, the fundamental rights which are at stake for the individuals can have a different nature under the different EU legal frameworks. The importance the CJEU attaches to the fundamental rights which are at stake under a specific EU legal instrument can be illustrated with the Ziebell case.\textsuperscript{243} The Ziebell case concerned a Turkish national, Mr Ziebell, who was born in Germany (1973) and had always lived in Germany.\textsuperscript{244} Mr Ziebell developed a drugs addiction and had been convicted on several occasions between 1993 and 2006, among others for gang-related robbery and aggravated theft.\textsuperscript{245} In March 2007, the Regierungspräsidium Stuttgart (Stuttgart Regional Administration) ordered immediate expulsion of Mr Ziebell, because Mr Ziebell was considered to be a serious disturbance of the social order and the authorities believed there was a specific and high risk that Mr Ziebell would re-offend.\textsuperscript{246} In assessing the public order concept under the Long Term Residence Directive, the CJEU emphasized the importance of the fundamental rights of individuals who fall within the scope of the Long Term Residence Directive. The CJEU considered the following:

\textsuperscript{238} Ibid.
\textsuperscript{239} Boeles, EHRC 2015/186, para 15.
\textsuperscript{240} Terlouw, European Journal of Migration and Law 2016/18, p 134.
\textsuperscript{241} Ibid., pp 133-134.
\textsuperscript{242} See Article 1 Family Reunification Directive, Article 3 Citizenship Directive and Article 4 Long Term Residence Directive.
\textsuperscript{243} CJEU 12 December 2011, C-371/08 (Ziebell).
\textsuperscript{244} Ibid., para 32.
\textsuperscript{245} Ibid., paras 36-37.
\textsuperscript{246} Ibid., paras 41-42.
That framework, in the case of a foreign national such as Mr Ziebell, who has been residing lawfully and continuously in the host Member State for more than 10 years, consists of Article 12 of [Long Term Residence Directive], which, in the absence of more favourable rules in the law under the EEC-Turkey Association, is a rule of minimum protection against expulsion for any national of a non-member State who holds the status of long-term lawful resident in the territory of a Member State.

It is apparent from that provision, first, that the long-term resident concerned can be expelled solely where he/she constitutes a genuine and sufficiently serious threat to public policy or public security. Next, the expulsion decision cannot be founded on economic considerations. Lastly, before adopting such a decision, the competent authorities of the host Member State are required to take account of the duration of residence in their territory, the age of the person concerned, the consequences of expulsion for the person concerned and family members, links with the country of residence or the absence of links with the country of origin.247

The abovementioned paragraphs show that the fundamental rights that are typically involved in situations where third-country nationals fall within the scope of the Long Term Residence Directive, are an important consideration for the CJEU in determining the requirements for the public order assessment under this directive. This approach can be found in the Zh and O case as well. The right to liberty of third-country nationals who fall within the scope of the Return Directive was an important factor in establishing the criteria for the public order concept under the Return Directive.248 A different public order assessment can be justified by the different nature of the fundamental rights that are at stake for individuals under different EU legal instruments. The H.T. judgment does not preclude different public order assessments under different EU legal instruments, it precludes a different level of protection of fundamental rights because of the legal status of a person. In addition to the legal status of a person, there are two other characteristics that persons who fall within the scope of a specific EU legal instruments often share (to a certain extent): (1) the circumstances of the case and the rights of third parties involved and (2) the nature of the fundamental rights that are at stake for the individual concerned. For these reasons – in contrast to the approach of Boeles and Terlouw – a different public order assessment under different EU migration instruments can be justified, an extension of the scope from Zh and O to all EU migration provisions would be too broad.

5.3.2 Zh and O and Fahimian
Peers argued that the public policy exceptions of the EU provisions in the field of migration have to be interpreted similarly.249 This approach slightly differs from the approach of Boeles. Peers does not focus on one interpretation of the public order exceptions within the different EU legal frameworks when he discusses the Zh and O case, but stresses that ‘its [the CJEU’s] judgment does not limit the underlying obligation for irregular migrants to leave the European Union. But it rightly tempers that obligation with a consideration for the basic humanity of the people being removed.’250 This means that in case of expulsion – which can be the result of the application of different EU legal frameworks – fundamental rights have to be respected. However, this does not mean that under each legal instrument the same requirements for the public order assessment apply.

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247 Ibid., paras 79-80.
248 CJEU 11 June 2015, C-554/13 (Zh and O), para 47.
250 Ibid.
In my opinion, the approach of Peers is more convincing and more consistent with the case law of the CJEU. The CJEU seems to follow the approach of Peers, leaving a significantly wider margin of appreciation to Member States in cases of first admittance. This can be illustrated with the *Fahimian* case.\(^\text{251}\) The *Fahimian* case concerned Mrs Fahimian, an Iranian national who applied for a visa to conduct research in the field of trusted embedded and mobile systems in Germany.\(^\text{252}\) Mrs Fahimian obtained her master’s degree at the Sharif University of Technology (Iran), a university which was placed on an EU list of entities subject to restrictive measures because of its involvement in the field of research for military purposes in Iran.\(^\text{253}\) The German authorities rejected Mrs Fahimian’s visa application because they feared the information Mrs Fahimian obtained during her studies would later be misused for pursuing military objectives in Iran.\(^\text{254}\) The CJEU ruled that Member States:

> 'have a wide discretion in ascertaining, in the light of all the relevant elements of the situation of that national, whether he represents a threat, if only potential, to public security. That provision must also be interpreted as not precluding the competent national authorities from refusing to admit to the territory of the Member State concerned [...] if the elements available to those authorities give reason to fear that the knowledge acquired by that person during his research may subsequently be used for purposes contrary to public security. It is for the national court hearing an action brought against the decision of the competent national authorities to refuse to grant the visa sought to ascertain whether that decision is based on sufficient grounds and a sufficiently solid factual basis.'\(^\text{255}\)

The *Fahimian* judgment and the *Zh and O* judgment were ruled within a period of two months difference, but demonstrate a different approach of the CJEU concerning the discretion of Member States regarding the public order concept. The *Fahimian* case allows for the existence of a potential threat in the context of Directive 2004/114 (Students Directive), leaving a wide margin of discretion for the Member States.\(^\text{256}\) The *Zh and O* case on the other hand requires the existence of a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society in the context of the Return Directive, which limits the discretion of the Member States.\(^\text{257}\) The different approaches are justified by the nature of the fundamental rights which are at stake for the individuals under the different frameworks. Member States can detain third-country nationals against whom an entry-ban has been issued and who are subjected to return procedures.\(^\text{258}\) The fundamental right to liberty plays an important role for third-country nationals under the Return Directive. In cases of first admittance, the right to liberty is not at stake.

The *Zh and O* case and the *Fahimian* case affirm the existing different approaches of the CJEU regarding the discretion of Member States and the public order concepts. On the one hand, the public order requirements have to be interpreted strictly if it concerns the effective removal of a third-country national from the territories of the Member States.\(^\text{259}\) On the other hand, Member States enjoy a wide...
margin of appreciation regarding the public order concept in the context of first admittance cases. The extension of the scope from Zh and O to all fields of EU migration law, cases of first admittance included, would mean a restriction of the margin of discretion of the Member States.

5.4 Zh and O and Article 24(2) SIS II Regulation

As explained in Chapter 5.3, a different public order assessment under different EU instruments can be justified. However, the relationship between the Return Directive and the SIS II Regulation is exceptionally. As mentioned in Chapter 3.3, there are two grounds for the issuance of an SIS alert, Article 24(2) SIS II Regulation and Article 24(3) SIS II Regulation. In both Article 24(2) SIS II Regulation and 24(3) SIS II Regulation, a SIS alert can be issued after a public order assessment. Article 24(3) SIS II Regulation depends on the Return Directive (see Chapter 3.3). Therefore, the public risk assessment of Article 24(3) SIS II Regulation has to be in line with Article 7(4) Return Directive. For entry-bans (and thus SIS alerts) based on Article 7(4) Return Directive the CJEU set important requirements for Member States in the Zh and O case. Because of the interdependence between Article 24(3) SIS II Regulation and Article 7(4) Return Directive, the Zh and O judgment can be considered as establishing the public order assessment for Article 24(3) SIS II Regulation. For Article 24(2) SIS II Regulation on the other hand, the CJEU did not establish requirements for the public order assessment. In those specific circumstances, do or should the criteria for Article 24(3) SIS II Regulation apply to Article 24(2) SIS II Regulation as well?

5.4.1 SIS II System: open for harmonisation?

First of all, Recital 10 of SIS II Regulation states that ‘it is necessary to further consider and harmonising the provisions on the grounds for issuing alerts concerning third-country nationals for the purpose of refusing entry or stay and to clarifying their use in the framework of asylum, immigration and return policies.

It is the purpose of the SIS II Regulation to obtain harmonized standards for the issuance of SIS alerts, which is in line with the general need for an uniform interpretation of EU law. An uniform interpretation of EU law should be given when there is no explicit reference to national legislation in the provision. Article 24(2) SIS II Regulation nor Article 7(4) Return Directive refer to national legislation. It is settled case law that Member States do have discretion in determining the requirements for public policy in line with their national needs. Member States do have to ensure fundamental rights to third-country nationals, in particular when they are being removed from EU territory, as is the case in the situation of a SIS alert. The return of a person has to be ‘in a humane manner and with full respect for their fundamental rights and dignity.’ Even though the criteria for the issuance of alerts on third-country nationals to be refused entry or stay are sharpened, the margin of discretion Member States enjoy to issue an alert is still wide.

This is remarkable, since the Joint Supervisory Authority of Schengen explicitly stated in their inspection report on Article 96 CISA (of which Article 24 SIS II Regulation descends, see Chapter 2.4)

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260 CJEU 19 December 2013, C-84/12 (Koushkaki), para 60.
261 Recital 10 SIS II Regulation, also expressed in Article 24(5) SIS II Regulation.
262 CJEU 18 January 1984, C-327/82 (Ekro), para 11.
263 CJEU 17 November 2011, C-430/10 (Gaydarov), para 32.
264 CJEU 11 June 2015, C-554/13 (Zh and O), para 48.
265 CJEU 5 June 2014, C-146/14 PPU (Mahdi), para 38.
266 The Schengen Joint Supervisory Authority (JSA) coordinated the supervision on SIS before the SIS II Regulation was adopted. After the adoption of the SIS II Regulation, the JSA was replaced by the Schengen Information System II Supervision Coordination Group (SIS II SCG). See European Data Protection Supervisor, ‘Schengen
that ‘Policy makers should consider harmonising the reasons for creating an alert in the different Schengen States.’ According to Brouwer, the lack of harmonisation can be explained by the fact that ‘Member States were reluctant to amend their national rules with regard to criteria on listing third-country nationals as inadmissible persons.’ The system of SIS is open for – and even encouraging – limitation of discretion of Member States regarding the grounds for issuing SIS alert. However, harmonised criteria for the issuance of SIS alerts are yet to be established.

### 5.4.2 Return Directive and SIS II Regulation: common public order assessment possible?

The public order assessment under the SIS II Regulation could be derived from the public order assessment under Article 7(4) Return Directive. Advocate-General Sharpston stated the following in her opinion on the Zh and O case about deriving the interpretation of the public order exception of the Return Directive from the Citizenship Directive, Long Term Residence Directive or Family Reunification Directive:

‘No useful purpose is served by comparing Article 7(4) of the Returns Directive to provisions in any of the three directives containing a [public order] exception. Just as those directives do not apply by analogy, so whether the threshold for triggering the application of the [public order] derogation in the Returns Directive is higher or lower is both unascertainable and irrelevant. The Returns Directive differs from those three directives in fundamental respects.’

Contrary, in the case of the SIS II Regulation and the Return Directive, there is a useful purpose in comparing the public order exception from the Return Directive to the SIS II Regulation. As was described in Chapter 3.5, the consequences of an entry-ban (public order exception Return Directive) and a SIS alert (public order exception SIS II Regulation) are the same. Moreover, the consequence of an entry-ban is a SIS alert (see Chapter 3.3).

Advocate-General Sharpston did agree with the written observations of the parties that a comparison between the Return Directive and the Citizenship Directive, Long Term Residence Directive and Family Reunification Directive would lead to the conclusion that the public order concepts of those three directives cannot be applied by analogy to the Return Directive because ‘each of the three directives differs from the Return Directive as regards its wording, scope and aims.’ Following this approach, the public order concept of the Return Directive can be applied to the SIS II Regulation. The (1) wording, (2) aims and (3) scope are similar, and moreover suitable, for a mutual interpretation of the public order concept.

First, both the Return Directive and the SIS II Regulation formulate the public order concept as ‘a threat to public order or public security or to national security.’ One difference in wording is that Article 24(2) SIS II Regulation sets out two situations in which there shall be a risk to public policy or public security or national security, whereas a similar provision is missing in the Return Directive. However, it is highly unlikely that a person who falls within the scope of Article 24(2)(a) or (b) SIS II Regulation

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267 Joint Supervisory Authority of Schengen 20 June 2005.

268 Brouwer 2008, p 94.

269 CJEU 12 February 2015, Opinion of AG Sharpston in C-554/13 (Zh and O), para 57.

270 Ibid., para 49.

271 Article 24(2) SIS II Regulation and Article 7(4) Return Directive.

272 Article 24(2)(a) and (b) SIS II Regulation.
would not qualify as a threat to public policy, public security or national security within the meaning of the Return Directive. The wording of the public order concept in the Return Directive and the SIS II Regulation allow for a mutual interpretation of concept.

The aims of the SIS II Regulation and the Return Directive are different. The aim of the Return Directive is ‘to establish common rules concerning return, removal, use of coercive measures, detention and entry bans.’ The SIS II Regulation is established 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 safeguarding of the territories of the Member States.’ However, the practical underlying thought of the SIS II Regulation and the Return Directive is that third-country nationals who do not legally reside or who Member States do not desire to reside on their territory have to be removed (or prevented from entering) the territories of the Member States. In addition, attention should be given to the fact that the public order exception of the Return Directive, Article 7(4) Return Directive, applies as the assessment for a SIS alert under Article 24(3) SIS II Regulation. Naturally, the objectives for Article 24(2) and 24(3) SIS II Regulation are the same. This makes the Return Directive and the SIS II Regulation suitable for a common public order assessment.

As to the scope, entry-bans based on the Return Directive (and thus SIS alerts based on Article 24(3) SIS II Regulation) can be issued against third-country nationals who illegally reside on the territories of the Member States only. SIS alerts based on Article 24(2) SIS II Regulation can be issued against all third-country nationals, regardless their residence status or place of residence. De facto, SIS alerts based on Article 24(2) SIS II Regulation can be issued against three groups of third-country nationals who do not fall within the scope of Article 24(3) SIS II Regulation: (1) third-country nationals who illegally reside on the territories of the Member States but do not fulfil the criteria for an entry-ban, (2) third-country nationals who have a residence permit in one of the Member States and (3) third-country nationals who reside outside the territories of the Member States.

For the first group, it is problematic if the public order concept of the SIS II Regulation differs from the public order concept of the Return Directive, it would result in an ambiguous legal situation. Member States could impose a SIS alert against illegally residing third-country nationals who do not fulfil the criteria of the mandatory grounds for an entry-ban (and thus SIS alert based on Article 24(3) SIS II Regulation) based on public order grounds. There is a risk that Member States ‘avoid’ the criteria deriving from the public order concept of the Return Directive by applying Article 24(2) SIS II Regulation when the criteria of Article 24(3) SIS II Regulation are not met. For this reason alone, the public order concept of the Return Directive and the SIS II Regulation should be uniform.

For the second group of third-country nationals who fall within the scope of Article 24(2) SIS II Regulation – third-country nationals who have a residence permit in one of the Member States – there exists a similar risk of Member States avoiding their obligations under other EU legal instruments. All EU regulations and directives provide for a public order exception for the withdrawal or refusal of prolongation of a residence permit issued under this regulation or directive. When a third-country national holds a residence permit of another Member State than the Member State who wants to issue

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273 Recital 20 Return Directive.
274 Article 1(2) SIS II Regulation.
275 Article 2(1) Return Directive.
276 Article 2(1) SIS II Regulation.
277 Member States are obliged to impose an entry-ban on illegally residing third-country nationals if they qualify for an entry-ban (see Chapter 3.3).
278 For example, see Article 9(3) Long Term Residence Directive, Article 27 Citizenship Directive and Article 24(2) Asylum Qualification Directive.
a SIS alert, the issuing Member State has to consult the Member State of which the third-country national holds a residence permit. The SIS alert can be issued only if, after consultation, it is determined that there are sufficient reasons to withdraw the residence permit. The public order exception of the applicable legislation regarding the residence permit has to be examined before a SIS alert can be issued. The residence permit precludes a SIS alert.

The CISA nor the SIS II Regulation provide for a similar provision if the Member State who wishes to issue a SIS alert is the Member State of which the third-country national holds a residence permit. This was the situation in the case of Mrs Kozlovska (see Chapter 1.1). A SIS alert was issued against Mrs Kozlovska by the Polish authorities while her Polish residence permit was still valid. When she applied for prolongation of her residence permit, the Polish authorities rejected her application because of the SIS alert. The authorities still had to carry out the public order assessment under the legislation which regulated the residence permit of Mrs Kozlovska (which was the Long Term Residence Directive), but de facto, as a result of the SIS alert, Mrs Kozlovska was already effectively banned from the territories of the Member States. Eventually, the SIS alert was the sole reason the Polish authorities refused the prolongation of Mrs Kozlovska’s residence permit. This case shows two pressing issues of SIS alerts against legally residing third-country nationals: (1) the SIS alert makes the existing residence permit practically meaningless, as its consequence is that the third-country national is effectively banned from the territories of the Member States and (2) the public order assessment under the SIS II Regulation actually replaces the public order assessment of the applicable directive of the residence permit, as a SIS alert can constitute the main reason for the withdrawal or refusal of prolongation of a residence permit.

In my opinion, it should not be possible to issue a SIS alert against a third-country national who is in the possession of a residence permit. After all, Member States can withdraw the residence permit of a third-country national based on the public order exception under the applicable legislation of the residence permit, and afterwards issue a SIS alert. The third-country national then becomes an illegally residing third-country national and Member States are obliged to issue a return decision, whereby an assessment for the imposition of an entry-ban (and thus SIS alert based on Article 24(3) SIS II Regulation) is required (see Chapter 3.4). As explained before, the public order concepts under different EU legal frameworks differ. The difference in public order assessments can be seen in the public order assessments for the withdrawal or refusal to prolongation of residence permits under different EU legal instruments as well. Therefore, whichever public order concept will be applied to

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279 Article 25(2) CISA.
280 Ibid.
282 As was explained in Chapter 1.1, when Mrs Kozlovska returned to Belgium in August 2018 after a visit to her country of origin Ukraine, she was stopped and deported by the Belgian border authorities because of the SIS alert issued against her. The application for prolongation of her EU-long term residence permit was rejected afterwards, in October 2018.
284 For example, when a Member State wishes to withdraw a long-term residence permit for public order reasons, it has to take the duration of residence in its territory, the age of the person concerned, the consequences for the person concerned, the family members and links with the country of residence or the absence of links with the country of origin into consideration (Article 12(3) Long Term Residence Directive). Whereas international protection can be withdrawn only if the person concerned has committed a crime against peace, a war crime, or a crime against humanity, has committed a serious non-political crime outside the country of refuge, or he or she has been guilty of acts contrary to the purposes and principles of the United Nations (Article 44 Asylum Procedures Directive and Article 12(2) Asylum Qualification Directive).
Article 24(2) SIS II Regulation, it will not be able to guarantee the different safeguards for withdrawal/refusal of prolongation of residence permits under different EU legal frameworks, as long as a SIS alert can be issued before it is assessed whether the residence permit can be withdrawn/refused to be prolonged based on the public order exception under the applicable EU legal framework.

However, as it is still possible to issue SIS alerts against third-country nationals who have a residence permit in the issuing Member State (and will be in the future under the SIS III Regulation), it is necessary that the discretion of Member States in defining the public order concept under the SIS II Regulation will be restricted. The restriction of the discretion of Member States minimalizes the risk that a SIS alert is issued after a public order assessment under Article 24(2) SIS II Regulation, when the public order concept of the withdrawal/refusal of prolongation ground under applicable EU legislation of the residence permit offers significantly more protection. The higher the threshold to issue a SIS alert based on Article 24(2) SIS II Regulation, the lower the risk that this threshold will be lower than the threshold for the public order exception under the applicable legislation of the residence permit.

For the third and last group of third-country nationals who fall within the scope of Article 24(2) SIS II Regulation, the third-country nationals who reside outside the territories of the Member States, a mutual interpretation of the public order concept under the Return Directive and the SIS II Regulation is not really necessary. However, it would not restrict the discretion of Member States in a disproportionate manner either. These third-country nationals reside outside the territories of the Member States and have to apply for a visa before they enter the territories of the Member States.285 Even if the application of the public order concept of the Return Directive to Article 24(2) SIS II Regulation would lead to the conclusion that a SIS alert would not be appropriate, Member States can still reject a visa application for reasons of public order and/or put the third-country concerned in their N-SIS.286 As was shown by the Fahimian case (see Chapter 5.3), Member States enjoy a wide margin of appreciation in defining a threat to public policy, public security or national security in the context of first admittance cases.287

To conclude, the differences between the scope of the Return Directive and the SIS II Regulation do not preclude a mutual public order assessment. Moreover, the differences regarding the scope between the Return Directive and the SIS II Regulation do not justify a different public order assessment under Article 24(2) and 24(3) SIS II Regulation. However, this will be the situation if the scope of Zh and O will not be extended to Article 24(2) SIS II Regulation.

5.5 Sub-conclusions

In this Chapter, the Zh and O case was discussed and it was elaborated whether the criteria following from the Zh and O judgment should be applied to Article 24(2) SIS II Regulation. In the Zh and O case the CJEU established the criteria for the imposition of an entry-ban (and thus SIS alerts based on Article 24(3) SIS II Regulation) on public order grounds. It ruled that a criminal conviction cannot be the sole reason for the imposition of an entry-ban. In addition, the third-country national has to pose a ‘genuine, present and sufficiently serious threat affecting one of the fundamental interests of society’. The public order exception has different interpretations under different EU legal instruments. Boeles and Terlouw argue that the requirements for the public order exception following from the Zh and O judgment should be extended to all EU migration instruments. In my opinion, this approach is too

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285 Article 6 Schengen Border Code.
286 Article 21(3)(d) Visa Code.
287 CJEU 4 April 2017, C-544/15 (Fahimian), para 51.
broad. There are more characteristics than the legal status of a person that the persons under an EU legal instruments share (to a certain extent). The circumstances of the case and the rights of a (possible) third-party involved are an important factor which justifies a different public order concept under different EU legal instruments. Also, different public order assessments can be justified by the nature of the rights at stake for the individuals under a certain EU legal instrument. More convincing is the approach of Peers, who argued that the Zh and O judgment serves as a general (reminder of the) principle that fundamental rights always have to be respected regarding third-country nationals who are subjected to expulsion. The specific requirements of the public order assessment may however vary among the different EU legal instruments in the field of migration. This approach seems to correspond with the approach of the CJEU. In the Fahimian case, published within a period of two months difference from the Zh and O case, shows a significant wider margin of discretion for Member States in cases of first admittance. It is therefore not likely that the scope of Zh and O will be extended to all EU migration provisions.

Even though the case law of the CJEU does not seem to provide for an opportunity to extend the scope of Zh and O to all EU migration provisions, an exception should be made for Article 24(2) SIS II Regulation. At this moment, third-country nationals whose alert is based on Article 24(2) SIS II Regulation enjoy less protection than third-country nationals whose alert is based on Article 24(3) SIS II Regulation. Public order interpretations differ among different EU legal instruments, therefore, the Zh and O case does not automatically apply to the SIS II Regulation. However, there are good reasons to extend the scope of the Zh and O case to Article 24(2) SIS II Regulation. First of all because the SIS II Regulation is open for harmonisation, the text of the regulation even encourages further harmonisation regarding the grounds for the issuance of a SIS alert. Further, in analogy to Advocate-General Sharpston’s opinion in the Zh and O case, it is useful to compare the Return Directive and the SIS II Regulation regarding the wording, scope and objectives in order to assess whether a mutual interpretation of the public order concept would be justified. After all, the Return Directive already sets the requirements for a SIS alert based on Article 24(3) SIS II Regulation.

Following the wording, scope and objectives of the SIS II Regulation and the Return Directive, the criteria of Zh and O are suitable for a mutual application of the public order concept. The wording of the Return Directive and the SIS II Regulation are similar. The objectives of the Return Directive and the SIS II Regulation differ, but serve a common practical underlying thought: third-country nationals who do not legally reside or who Member States do not desire to reside on their territories have to be removed (or prevented from entering) the territories of the Member States. Also, the criteria for an entry-ban under the Return Directive are the criteria for a SIS alert based on Article 24(2) SIS II Regulation, which, naturally, serves the objectives of the SIS II Regulation. The scope of application of the Return Directive and the SIS II Regulation differs. However, the differences regarding the scope would not justify a different interpretation of the public order concept. There are three groups of third-country nationals who fall within the scope of Article 24(2) SIS II Regulation and not within the scope of the Return Directive: (1) illegally residing third-country nationals who do not fulfil the requirements of an entry-ban (and thus SIS alert based on Article 24(3) SIS II Regulation) under the Return Directive, (2) legally residing third-country nationals and (3) third-country nationals who do not reside within the territories of the Member States.

For the first group, a mutual interpretation of the public order concept is of importance. If the public order concept of Article 24(2) SIS II Regulation is different from the public order concept of the Return Directive (and thus Article 24(3) SIS II Regulation), there is a serious risk the objective of the Return Directive will be undermined. The possibility that Member States misuse or abuse Article 24(2) SIS II
Regulation to surpass the requirements of Article 24(3) SIS II Regulation is not precluded if there requirements for the public order assessment under Article 24(3) SIS II Regulation do not apply to Article 24(2) SIS II Regulation. This affects the credibility and effectiveness of the Return Directive. For the second group, legally residing third-country nationals, it would not be necessary to have the same public order concept under the SIS II Regulation as under Return Directive. However, the extension of the scope of Zh and O to the SIS II Regulation would be a positive step towards a better protection of third-country nationals who holds a residence permit and against whom Member States have the intention to issue a SIS alert. Whereas Member States cannot issue a SIS alert against a third-country national as long the third-country national holds a residence permit of another Member State, Member States can issue a SIS alert against third-country nationals who hold a residence permit of this Member State. This entails two risks: (1) a third-country national who is still in the possession of a valid residence permit is effectively banned from the territories of the Member States and (2) the SIS alert will be used a reason to withdraw or not prolong a residence permit, surpassing the public order requirements of the legislation applicable to the residence permit. These risks will be reduced if the scope of the Zh and O judgment will be extended to Article 24(2) SIS II Regulation. Lastly, regarding the third-country national who reside outside the territories of the Member States, the consequences for the Member States would not be disproportionate if the scope of Zh and O would be extended to Article 24(2) SIS II Regulation. If the Zh and O requirements would lead to the conclusion that a SIS alert based on Article 24(2) SIS II Regulation would not be justified, Member States enjoy a wide margin of appreciation in defining the public order concept in the visa application process and can register the third-country national concerned in their N-SIS. In conclusion, the differences between the scope of the Return Directive and the SIS II Regulation do not preclude a mutual interpretation of the public order concept. Moreover, the differences regarding the scope between the Return Directive and the SIS II Regulation do not justify a different public order assessment under Article 24(2) and 24(3) SIS II Regulation. However, at this moment different public order assessments apply to Article 24(2) and 24(3) SIS II Regulation, since the scope of Zh and O does not automatically apply to the SIS II Regulation and the CJEU did not (yet) decided to extend the scope of Zh and O. Thus, the extension of the scope from Zh and O case to all EU migration instruments would be too broad and not in line with the case law of the CJEU. However, the scope of Zh and O should be extended to Article 24(2) SIS II Regulation. Otherwise, for abovementioned reasons, an ambiguous legal situation occurs, affecting the credibility and effectiveness of the Return Directive and the SIS II Regulation.
Chapter 6 | Exceptions to enforcement of SIS alerts

6.1 Introduction

The SIS contains, among others, alerts on third-country nationals to be refused entry and/or visa. Third-country nationals against whom a SIS alert has been issued are effectively prevented from entering the territories of the Member States and obtaining residence in the territories of the Member States. Visa authorities have to consult SIS and must deny entry or stay if a SIS alert has been issued against the third-country national who applies for a visa or who wants to enter the Schengen territory. In Chapter 3, the grounds for the issuance of a SIS alert were discussed. It followed that Member States enjoy discretion in the issuance of a SIS alert. The CJEU established criteria which have to be met for the imposition of an entry-ban (and thus a SIS alert based on Article 24(3) SIS II Regulation) in the Zh and O judgment. In Chapter 5 it is argued that the scope of the Zh and O judgment should be expanded to Article 24(2) SIS II Regulation as well. This is however not yet determined by the CJEU. In this Chapter, it will be examined in which situations Member States may, or must, refrain from the enforcement of a SIS alert. First, an overview of the exceptions to the enforcement of SIS alerts provided by EU legislation will be given. Secondly, the duty of investigation and/or consultation by the enforcement of SIS alerts will be discussed in the context of the principle of mutual trust. Hereby, the principle of mutual trust, its relation to the SIS, and the role of the principle of mutual trust in the AFSJ will be discussed briefly. Afterwards, the case law of the CJEU concerning two important areas of the AFSJ will be discussed: the Dublin III Regulation and the European Arrest Warrant (EAW). Lastly, the consequences of the CJEU case law on the principle of mutual trust for the enforcement of SIS alerts will be debated.

6.2 Exceptions enforcement SIS alerts provided by law

6.2.1 Visas with limited territorial validity

Regulation 810/2009 (Visa Code) regulates the issuance of short-stay (not exceeding 90-days within six months) Schengen visas. In principle, the issuance of long-stay visas remains within the exclusive competence of the Member States. The Visa Code further provides an opportunity to issue visas with limited territorial validity. A visa with limited territorial validity is a visa only valid for the territory of one of the Member States. Visas with limited territorial validity can be issued on humanitarian grounds, for reasons of national interest or because of international obligations. When a visa with limited territorial validity has been issued, a SIS alert cannot be enforced against the third-country national concerned. Article 25(1) Visa Code states that a visa with limited territorial validity shall be issued when a Member State considers this to be necessary for humanitarian reasons, reasons of national interest or international obligations to derogate from entry conditions of the Schengen Borders Code. The word ‘shall’ in Article 25(1) Visa Code refers to the obligation to issue a visa with

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288 Article 6(1)(d) Schengen Borders Code and Article 21(3)(c) Visa Code.
289 Article 1(1) Visa Code.
291 Article 2(4) Visa Code.
292 Article 25(1) Visa Code.
293 Article 25(1)(a)(i) Visa Code. NB: Article 25(1)(a)(i) states: ‘to derogate from the principle that the entry conditions laid down in Article 5(1)(a), (c), (d) and (e) of the Schengen Borders Code must be fulfilled’. When the Schengen Borders Code was renumbered to Regulation 2016/399 (the current Schengen Borders Code), Article 5 became Article 6. As was mentioned in Chapter 1.2. Article 6(1)(d) Schengen Borders Code entails that a short-stay visa cannot be issues if a SIS alert has been issued against the third-country national concerned.
limited territorial validity, instead of the usual short-stay Schengen visa. Member States can decide in which situations they wish to issue this visa. The discretion for Member States in issuing visas with limited territorial validity is wide. Statistics show that 176,948 visas with limited territorial validity were issued by the Member States in 2013. Detailed information and specific reasons for the issuance of those visas are not available, neither does the CJEU give guidelines for the issuance of visas with limited territorial validity. The CJEU only ruled in one case on Article 25 Visa Code, the X and X case, where it ruled that applicants for a visa with limited territorial validity did not fall within the scope of the Visa Code if the applicants have the intention to stay for a period longer than 90 days (because, as a principle, long-stay visas do not fall within the scope of the Visa Code).

6.2.2 Applicants of international protection at the border
Article 14(1) Schengen Borders Code states that the entry-conditions of Article 6 Schengen Borders Code (the absence of a SIS alert included) cannot be opposed against a third-country national in two situations: (1) if provisions related to the right of asylum and the right to international protection are applicable or (2) if the Member State issued a long-stay visa to the third-country national (see Chapter 6.2.3). In principle, if a third-country national applies for international protection, explicitly or implicitly, at the borders of a Member State, the third-country national falls within the scope of Article 14(1) Schengen Borders Code and a SIS alert cannot be enforced against this third-country national. However, this does not mean a SIS alert against a third-country national is of no influence once the third-country national concerned applies for asylum or international protection. There is a ‘loop’ which could make the existence of a SIS alert relevant when a third-country national applies for international protection. Member States have the possibility to apply the so-called border procedure on an applicant for international protection. The border procedure is an accelerated procedure. In specified circumstances only, Member States may decide on the substance of an application for international protection in a border procedure. Circumstances in which Member States may decide to decide on the substance of an application in a border procedure include the situation where the applicant may for serious reasons be considered as a danger to national security or public order of the Member State, or has been forcibly expelled for those reasons in the past, Member States can take a decision on the substance of an application for international protection. Both grounds could be applicable if a SIS alert has been issued against the third-country national who applies for international protection. A SIS alert might give reasons to believe that there are serious grounds for believing that a third-country national is a danger to national security or public security. This is however not necessarily the case. A danger to national security or public security seems to set a higher threshold than the public order ground for the imposition of a SIS alert, where the threshold is a risk to public order (see Chapter 3.3). Likewise, third-country nationals who have been expelled in the past (and thus an entry-ban and SIS alert has been issued against them, see Chapter 3) can only be subjected to the border procedure if there are serious reasons of public security or public order under

295 Ibid.
296 CJEU 7 March 2017, C-638/16 PPU (X and X), paras 40-44.
297 Article 14(1) Schengen Borders Code in combination with Article 2(b) and 3(1) Asylum Procedures Directive.
298 Article 43(1) Asylum Procedures Directive.
299 Ibid.
300 Article 31(8) Asylum Procedures Directive.
national law. The existence of a SIS alert would not automatically justify the imposition of a border procedure on either of those grounds. However, it is possible that a SIS alert leads to a border procedure and refusal of entry. Subsequently, if the application for international protection has been rejected on the substance during a border procedure, the third-country national falls outside the scope of the provisions related to asylum and international protection and therefore the SIS alert has to be enforced. However, even if the border procedure has been applied, the principle of non-refoulement is absolute and the enforcement of a SIS alert cannot lead to a situation contrary to the principle of non-refoulement.\textsuperscript{301}

6.2.3 Long-stay visas
The second ground of Article 14(1) Schengen Borders Code not to impose the entry-requirements of Article 6 Schengen Borders Code, the absence of a SIS alert included, is the issuance of a long-stay visa.\textsuperscript{302} The issuance of long-stay visas (more than 90 days) is within the exclusive competence of the Member States.\textsuperscript{303} the grounds for the issuance of long-stay visas depend on the national legislation of the Member States.

Article 25(2) CISA explicitly states that Member States can issue a residence permit to a third-country national against whom a SIS alert has been issued if there are substantive reasons to do so. If a long-stay visa is granted, the Member State who issued the SIS alert has to withdraw the SIS alert from the central SIS database (C-SIS), the Member State can choose to keep the SIS alert in its national database (N-SIS).\textsuperscript{304} Important to remark is that only the Member State who issued the SIS alert can actually delete the SIS alert.\textsuperscript{305} Member States who have good reasons to believe a SIS alert is factually incorrect or unlawfully stored have to send supplementary information to the Member State who issued the SIS alert.\textsuperscript{306} However, it remains the Member State who issued the SIS alert to decide whether to delete the alert.\textsuperscript{307} In the case of Mrs Kozlovska, her SIS alert was finally deleted by the Polish authorities because she obtained a long-stay visa in Belgium (see Chapter 1.1).

6.2.4 Special position beneficiaries of the Citizenship Directive
Third-country nationals who are beneficiaries of the Citizenship Directive enjoy special protection regarding the enforcement of SIS alerts. If a Member State wishes to enforce a SIS alert issued by another Member State against a third-country national who is a beneficiary of the Citizenship Directive (for example a third-country national who is married to a EU citizen), the Member State executing the SIS alert has to consult the Member State who issued the SIS alert.\textsuperscript{308} The issuing Member State has to

\textsuperscript{301} Article 4(4)(b) Return Directive.
\textsuperscript{302} See also Article 6(5)(a) Schengen Borders Codes, which states that the entry-requirements of Article 6(1) Schengen Borders Codes, the absence of a SIS alert included, do not apply if the third-country national concerned holds a long-stay residence permit.
\textsuperscript{303} Boeles et al 2014, p 38.
\textsuperscript{304} Article 25(1) para 2 CISA.
\textsuperscript{305} Article 106(1) CISA and Articles 4(2) and 34(2) SIS II Regulation.
\textsuperscript{306} Article 34(3) SIS II Regulation.
\textsuperscript{307} Note that the order of the issuance of the SIS alert and the residence permit is of crucial importance. When a third-country national holds a residence permit of a Member State and another Member State wants to issue a SIS alert based on Article 24(3) SIS II Regulation, the SIS alert cannot be issued unless the residence permit is withdrawn (see Chapter 3.2). The decisive power lies with the Member State who issued the residence permit. If a residence permit has been issued after a SIS alert has been issued, the decisive power lies with the Member State who issued the SIS alert.
\textsuperscript{308} Article 25(2) SIS II Regulation.
comply with the request for information ‘as soon as possible’. From a precise reading of Article 25(2) SIS II Regulation it follows that it is the Member State who wishes to enforce the SIS alert who decides, after consultation, what is the action to be taken. In other words, the final decision whether the SIS alert will be enforced or not is up to the executing Member State.

In the case of Commission v Spain, the CJEU assessed the refusal of the visa applications of two third-country nationals who were beneficiaries of the Citizenship Directive. Mr Farid was a third-country national married to a Spanish national, they lived together in Dublin. When he entered Barcelona after a visit to Algeria, he was refused entry to the Schengen Area because a SIS alert was issued against him by Germany. Mr Bouchair was a third-country national married to a Spanish national, the couple lived in London. When Mr Bouchair applied for a visa at the Spanish Consulate in London in order to visit his in-laws, his visa application was rejected too because of a German SIS alert.

The CJEU first reiterated the Bouchereau case, were the it ruled that a conviction cannot be the sole ground for an infringement of EU free movement rights. In addition, beneficiaries of EU free movement law have to pose a ‘genuine, present and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society.’ In the Commission v Spain case, the CJEU ruled that the Bouchereau criteria applied to third-country nationals against whom a SIS alert has been issued as well. A SIS alert cannot be the sole ground for the refusal of a visa to spouses of EU Citizens. In addition to a SIS alert, there must be information that the third-country national concerned constitutes a ‘genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.’ The additional information has to be obtained through SIRENE (see Chapter 2.5). The enforcing Member State can request the additional information from the Member State who issued the SIS alert. The issuing Member State has to respond within twelve hours. Based on Article 30 (notification of decisions) and Article 31 (procedural safeguards) of the Citizenship Directive, it can be concluded that Member States may grant temporary access to a third-country national against whom a SIS alert has been issued if the issuing Member State fails to provide additional information.

Thus, based on the Article 25(2) SIS II Regulation, in combination with the Citizenship Directive and the CJEU case law, there is an obligation for Member States not to enforce a SIS alert of a third-country national who is a beneficiary of the Citizenship Directive without assessing whether the third-country national concerned composes a ‘genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.’ In this assessment, all circumstances of the case have to be examined and the assessment has to be in line with the principle of proportionality. The criteria of the assessment are the same as the criteria following from the Zh and O case (see Chapter 5.2).

However, the Commission v Spain case poses an obligation on the executing Member State, the Zh and

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309 Article 8(3) SIS II Regulation.
310 CJEU 31 January 2006, C-503/03 (Commission v Spain), para 23.
311 Ibid., para 24.
312 Ibid., para 46.
313 See CJEU 31 January 2006, C-503/03 (Commission v Spain), para 46 and CJEU 27 October 1977, C-30/77 (Bouchereau), paras 34-35.
314 CJEU 31 January 2006, C-503/03 (Commission v Spain), para 59.
315 Ibid., para 53.
316 Ibid., para 57.
317 Bulterman, JV 2006/123, para 8.
318 See CJEU 4 October 2011, C-249/11 (Byankov), para 43, CJEU 10 July 2010, C-33/07 (Jipa), para 29 and CJEU 17 November 2011, C-430/10 (Gaydarov), para 40.
Even though the criteria for the public order assessment following from the Zh and O judgment and the Commission v Spain judgment are the same, the protection for the third-country nationals who are beneficiaries of the Citizenship Directive is significantly stronger. For third-country nationals who fall within the scope of the Zh and O judgment (at this moment, third-country nationals against whom a SIS alert has been issued based on Article 24(3) SIS II Regulation, see Chapter 5), the public order assessment of Zh and O has to be conducted before the SIS alert is issued. The Zh and O requirements do not have to be assessed when a SIS alert in enforced. Besides, Member States enjoy a wide margin of discretion in defining the public order assessment in cases of first admittance, as can be illustrated by the Fahimian case (see Chapter 5.3). As mentioned before, the CJEU considered the fundamental rights of the third-country nationals concerned, the right to liberty in particular, of importance in the Zh and O judgment. It is therefore not surprising that the Zh and O requirements do not apply to cases of first admittance, since third-country nationals do not reside within the territories of the Member States in cases of first admittance, the right of liberty is not at stake.

For the beneficiaries of the Citizenship Directive on the other hand, the criteria of the Commission v Spain apply to cases of first admittance as well. Whereas the CJEU focusses on the fundamental right of freedom of liberty in the Zh and O case, in Commission v Spain it emphasizes the fundamental freedoms following from EU free movement law. Third-country nationals who are beneficiaries of EU free movement rights fall within the scope of the protection of those rights in cases of first admittance. It is settled case law of the CJEU that the right of residence and movement of beneficiaries of EU free movement law, and the public order exception thereto, cannot be interpreted restrictively. The Citizenship Directive provides for an opportunity to refuse entry to third-country nationals who are beneficiaries of the Citizenship Directive on grounds of public order in Article 27(2) Citizenship Directive. The criteria for the public order assessment of the Bouchereau case are directly implemented in Article 27(2) Citizenship Directive, and, since the Commission v Spain case, apply in the situation of a SIS alert as well. The CJEU consistently ruled in its case law concerning Article 27(2) Citizenship Directive that ‘justifications of an infringement of EU free movement law that are isolated from the particulars of the case in question or that rely on considerations of general prevention cannot be accepted.’ Furthermore, Article 27(2) Citizenship Directive has to be applied in line with the

319 CJEU 31 January 2006, C-503/03 (Commission v Spain), para 42.
321 See CJEU 17 September 2002, C-413/99 (Baumbast), para 57, CJEU 7 June 2007, C-50/06 (Commission v the Netherlands), para 42, CJEU 31 January 2006, C-503/03 (Commission v Spain), para 45 CJEU 27 April 2006, C-441/02 (Commission v Germany), para 43.
322 Article 27(2) Citizenship Directive states: ‘Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures. The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted.’
323 The Commission v Spain case was ruled on the predecessor of the Citizenship Directive: Directive 64/221. The Citizenship Directive was adopted already at the time of the Commission v Spain case, but not implemented by Spain, causing that CJEU could not rely on the Citizenship Directive in its judgment.
324 See CJEU 4 October 2011, C-249/11 (Byankov), para 41, CJEU 10 July 2010, C-33/07 (Jipa), para 24 and CJEU 17 November 2011, C-430/10 (Gaydarov), para 40.
principle of proportionality. Therefore, third-country nationals who are beneficiaries of the Citizenship Directive enjoy more protection than third-country nationals against whom a SIS alert has been issued based on Article 23(3) SIS II Regulation, especially in cases of first admittance.

Finally, it is important to note that SIS alerts can be of long duration. The fact that a third-country national poses ‘genuine, present and sufficiently serious threat to one of the fundamental interests of society’ at the moment of the issuance of the SIS alert, does not necessarily mean the third-country national still poses such a threat when the SIS alert is being enforced. For example, a SIS alert can be enforced several years after it was issued. After all, some Member States maintain an unlimited duration entry-bans (and thus SIS alerts, see Chapter 3.4.3). This is problematic for third-country nationals who are not beneficiaries of the Citizenship Directive, because the public order assessment will not be conducted again when the SIS alerts is enforced, unless the exceptional circumstances discussed in this Chapter are applicable.

In sum, on the one hand, Member States do not have to assess whether a third-country national who does not fall within the scope of the Citizenship Directive poses a ‘genuine, present and sufficiently serious threat affecting one of the fundamental interests of society’ when it wishes to enforce a SIS alert. Member States do have to assess these requirements when a SIS alert is issued based on Article 24(3) SIS II Regulation. Third-country nationals against whom a SIS alert has been issued based on Article 24(2) SIS II Regulation are not subjected to this assessment at all (see Chapter 5). Third-country nationals who fall within the scope of the Citizenship Directive are subjected to the assessment of these criteria when Member States enforce a SIS alert, even in cases of first admittance. This is remarkable, since Member States enjoy a wide margin of appreciation regarding the public order and first admittance cases regarding third-country nationals who are not a beneficiary of the Citizenship Directive. As Besters and Macenaite argued:

‘In a sense, the integration of the Schengen Convention into the EU framework illustrates the paradigm shift implied by the two criteria: One limiting the discretion of the Member States for the purpose of ensuring the unity of the internal market in a direct way, the other indirectly by means of protecting individuals who are potentially exposed to public policy and public security measures.’

6.3 Enforcement of SIS alerts and mutual trust

6.3.1 Mutual trust and the Area of Freedom Security and Justice

In Chapter 6.2, the exceptions to the enforcement of SIS alerts provided by law were discussed. In this Chapter, the exceptions to automatic enforcement of SIS alerts based on the case law of the CJEU regarding the principle of mutual trust in the AFSJ will be discussed. The AFSJ was established in 1997 when the Member States signed Treaty of Amsterdam. Inter-state cooperation in the area of criminal law, civil law and migration law was necessary after the abolition of internal borders. The SIS is an important tool for inter-state cooperation in the AFSJ. Mutual recognition is a key factor for

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325 See CJEU 4 October 2011, C-249/11 (Byankov), para 43, CJEU 10 July 2010, C-33/07 (Jipa), para 29 and CJEU 17 November 2011, C-430/10 (Gaydarov), para 40.
326 Besters & Macenaite, German Law Journal 2013/14, p 2082.
327 Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, signed at Amsterdam, (2 October 1997).
328 Mitsilegas, Yearbook of European Law 2012, vol 31 no 1, p 319.
inter-state cooperation in the AFSJ.\textsuperscript{329} Mutual recognition presupposes mutual trust.\textsuperscript{330} Mutual trust is justified with the presumption that all Member States fully respect fundamental rights.\textsuperscript{331} The CJEU repeatedly stated that the principle of mutual trust is fundamental in the AFSJ and that deviation from the principle of mutual trust should be kept to the minimum required.\textsuperscript{332} In the context of the Dublin II Regulation (now replaced by the Dublin III Regulation), the CJEU stated in the case of \textit{N.S. and others} that ‘At issue here is the \textit{raison d’être} of the European Union and the creation of an area of freedom, security and justice and, in particular, the Common European Asylum System (CEAS), based on mutual confidence and a presumption of compliance, by other Member States, with European Union law and, in particular, fundamental rights.’\textsuperscript{333} However, the presumption that all Member States fully respect fundamental rights has been challenged. As Mitsilegas noticed:

‘There has been a gradual shift from automaticity based on the interests of the State and blind mutual trust to the examination of the impact of cooperative systems on the fundamental rights and the specific situation of the individuals affected. This shift has been reflected in the interventions by both the European judiciary (in rejecting the conclusive presumption that fundamental rights are respected across the EU and establishing the requirement for courts asked to participate in inter-state cooperation systems to examine the situation of the affected individual on a case-by-case basis), and the EU legislator (in accepting the need for the adoption of specific fundamental rights standards in EU secondary law to address the issues arising from inter-state cooperation).’\textsuperscript{334}

The case of Mrs Kozlovska (see Chapter 1.1) raised questions in the light of the principle of mutual trust and SIS. Even though the principle of mutual trust as such is not mentioned in the CISA nor the SIS II Regulation, different reports from European institutions illustrate the importance of the principle of mutual trust for the functioning of the SIS.\textsuperscript{335} If there are reasons to believe that the issuance of a SIS alert contravenes with fundamental rights of a third-country national, can Member States decide not to enforce a SIS alert based on the CJEU case law on mutual trust in the AFSJ? The CJEU did not yet rule on the principle of mutual trust and the SIS. In the following paragraphs, the case law of the CJEU on the principle of mutual trust under the Dublin III Regulation and the European Arrest Warrant (EAW) will be discussed. Afterwards, the significance of this case law for the enforcement of SIS alerts will be discussed.

6.3.2 Mutual trust and Dublin III

The Dublin III Regulation determines the Member State who is responsible for the examination of an asylum application, which is – in principle – the Member State in which the applicant arrives first.\textsuperscript{336} Besides the fact that the system puts an excessive burden on the southern EU Member States,\textsuperscript{337} the

\begin{itemize}
\item \textsuperscript{329} Lenaerts 2015, p 2.
\item \textsuperscript{330} Battjes et al 2011, p 5.
\item \textsuperscript{331} Boeles et al 2014, p 29.
\item \textsuperscript{332} See CJEU 11 July 2008, C-195/08 PPU (Rinau), para 50 and CJEU 11 February 2003, Joined cases C-187/01 and C-385/01 (Brügge), para 33.
\item \textsuperscript{333} CJEU 21 December 2011, Joined cases C-411/10 and C-493/10 (N.S. and others), para 83.
\item \textsuperscript{334} Mitsilegas, \textit{Yearbook of European Law} 2012, vol 31 no 1, p 371.
\item \textsuperscript{336} Article 3 Dublin III Regulation.
\item \textsuperscript{337} Roots, \textit{Athens Journal of Law} 2017/3, p 10.
\end{itemize}
system is criticised in the light of the reception conditions in certain Member States, especially since the migration crisis of 2015.\(^{338}\)

The case of \textit{N.S. and others}\(^{339}\) concerned – among others – Mr N.S., an Afghan national who applied for asylum in the United Kingdom. During his journey to the United Kingdom he travelled through other countries, among others Greece, where he was arrested. Greece was therefore appointed as the Member State responsible for the asylum application.\(^{340}\) The applicant argued that there were serious reasons to believe that he would be subjected to treatment contrary to the principle of \textit{non-refoulement} if he would be returned to Greece.\(^{341}\) Even though the CJEU considered mutual trust as \textit{‘raison d’être’} for the AFSJ, and more in particular the CEAS, it ruled that mutual trust cannot result in ‘blind trust’.\(^{342}\) Member States must refrain from transfer to the responsible Member State if ‘they [Member States and their national courts] cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter.’\(^{343}\) In the case of \textit{Abdullahi}, the CJEU emphasized that pleading for systemic deficiencies is the \textit{only} way to challenge a transfer decision in the context of the Dublin system.\(^{344}\)

Later, after the adoption of the Dublin III Regulation, the CJEU departed from the approach of the \textit{Abdullahi} judgment in the case of \textit{Ghezelbash}. It ruled that third-country nationals had the right to call into question the responsibility of a Member State, ‘even where there are no systemic deficiencies in the asylum process or in the reception conditions for asylum applicants in that Member State, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union.’\(^{345}\) Thus, third-country nationals have the opportunity to question the correct application criteria for determining the responsible Member State in an appeal to the transfer decision.\(^{346}\)

In sum, the case law on the rebuttal of the principle of mutual trust in the context of Dublin III transfers evolved from the ‘systemic deficiencies’ assessment of the \textit{Abdullah} judgment to an individual assessment of the circumstances in the light of Article 4 Charter.

\subsection*{6.3.3 Mutual trust and the European Arrest Warrant}

The EAW is an arrest warrant issued by the judicial authorities of one Member State, with the purpose that another Member State surrenders and arrests the person concerned in order to conduct criminal prosecution or the execution of a custodial sentence or detention order.\(^{347}\) The EAW is embodied in the Council Framework Decision 2002/584/JHA (Framework Decision). Following the Framework Decision, Member States are obliged not to execute an arrest warrant if the offence on which the

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\begin{itemize}
\item \textsuperscript{339} CJEU 21 December 2011, Joined cases C-411/10 and C-493/10 \textit{(N.S. and others)}.\(^{340}\)
\item \textit{Ibid.}, para 36.
\item \textit{Ibid.}, para 40.
\item \textit{Ibid.}, para 83.
\item \textit{Ibid.}, para 94.
\item \textsuperscript{344} CJEU 10 December 2013, C-394/12 (\textit{Abdullahi}), para 60.
\item \textsuperscript{345} CJEU 7 June 2016, C-155/15 (\textit{Karim}), para 22. This passage is based on CJEU 7 June 2016, C-63/15 (\textit{Ghezelbash}), paras 30-61, which was delivered on the same day.
\item \textsuperscript{346} CJEU 7 June 2016, C-63/15 (\textit{Ghezelbash}), para 61.
\item \textsuperscript{347} Article 1(1) Council Framework Decision 2002/584/JHA (Framework Decision).
\end{itemize}
}
warrant is based is covered by amnesty in the executing the Member State, the person concerned has been convicted for the same acts in the executing Member State or the person concerned cannot be held responsible for his crime due to his or her age in the executing Member State.\textsuperscript{348}

The CJEU ruled on the principle of mutual trust in the context of the execution of an EAW in the \textit{Aranyosi} case.\textsuperscript{349} The German court referred preliminary questions to the CJEU about the detention conditions in Bulgaria, which the executing authorities of the EAW ought to be contrary to the prohibition of inhuman or degrading treatment (Article 4 Charter).\textsuperscript{350} The German court referred to the ECtHR case of \textit{Varga and other v Hungary},\textsuperscript{351} in which the ECtHR found conditions of detention in violation of Article 3 ECHR (equivalent to Article 4 Charter), mainly due to overcrowding prisons.\textsuperscript{352} The CJEU first reiterated the principle of mutual trust as a precondition for the existence of the EAW.\textsuperscript{353} However, as the CJEU previously ruled in the context of the Dublin III Regulation, Article 4 of the Charter is absolute, and the provisions of the Framework Decision have to be interpreted in line with Article 4 of the Charter.\textsuperscript{354} The CJEU ruled that if there is evidence that there is a risk of inhuman or degrading treatment when an EAW is executed, Member States have to refrain from the execution of an EAW.\textsuperscript{355} However, the general detention conditions in itself are not enough to refuse an EAW.\textsuperscript{356}

The executing Member State has to request supplementary information about the ‘conditions in which it is envisaged that the individual concerned will be detained in that [the issuing] Member State.’\textsuperscript{357} If the supplementary information of the issuing Member State does not discount that there is a risk of inhuman or degrading treatment if the EAW would be executed, the executing Member State has to postpone the execution of the EAW until the risk is discounted.\textsuperscript{358}

In the \textit{Celmer} judgment,\textsuperscript{359} the CJEU further elaborated on the \textit{Aranyosi} case, ruling in essence on ‘whether and to what extent the joined cases of \textit{Aranyosi and Căldăraru}, which carved out exceptions for surrender on human rights grounds, should be followed.’\textsuperscript{360} The case concerned a Polish EAW, which raised questions in relation to the right of a fair trial at executing Member State Ireland.\textsuperscript{361} The Irish authorities were especially concerned about the Article 7 TEU procedure the European Commission started against Poland.\textsuperscript{362} The European Commission proposed for a ‘Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law.’\textsuperscript{363}

\begin{footnotesize}
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\item \textsuperscript{348} Article 3 Framework Decision.
\item \textsuperscript{349} CJEU 5 April 2016, Joined cases C-404/15 and C-659/15 PPU (Aranyosi).
\item \textsuperscript{350} \textit{Ibid.}, para 42.
\item \textsuperscript{351} ECtHR 10 March 2015, application nos. 14097/12, 45135/12, 73712/12, 34001/13, 44055/13, and 64586/13 (\textit{Varga and other v Hungary}), para 103.
\item \textsuperscript{352} \textit{Aranyosi}, paras 43-44. NB: Article 3 ECHR is the ECHR equivalent for Article 4 Charter.
\item \textsuperscript{353} \textit{Ibid.}, paras 75-78.
\item \textsuperscript{354} \textit{Ibid.}, paras 84-87.
\item \textsuperscript{355} \textit{Ibid.}, para 88.
\item \textsuperscript{356} \textit{Ibid.}, para 91.
\item \textsuperscript{357} \textit{Ibid.}, para 95.
\item \textsuperscript{358} \textit{Ibid.}, para 104.
\item \textsuperscript{359} CJEU 25 July 2018, C-216/18 PPU (\textit{Celmer}).
\item \textsuperscript{360} Van Ballegooi\textsc{j} & Bård, \textit{Verfassungsblog} 29 July 2018.
\item \textsuperscript{361} \textit{Ibid.}, para 24.
\item \textsuperscript{362} Article 7 TEU provides the opportunity for Member States to determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2 TEU, which include human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. As a result, the Member State concerned can be deprived of certain rights, such as voting rights in the European Council (see Articles 2 and 7 TEU).
\item \textsuperscript{363} COM 2017 (385) final.
\end{itemize}
\end{footnotesize}
The CJEU ruled that the fact that the European Commission started an Article 7 TEU procedure in itself cannot lead to non-enforcement of an EAW. However, this procedure indicates that there is a risk of a breach of Article 47 Charter and imposes two obligations on the executing Member State. First, the executing Member State has to assess whether there is a ‘a real risk of breach of the fundamental right of the individual concerned to an independent tribunal and, therefore, of his fundamental right to a fair trial as laid down in the second paragraph of Article 47 of the Charter.’ Secondly, the executing Member State has to establish that the person against whom an EAW has been issued runs a real risk not to have access to an independent judicial authority in the Member State who issued the EAW. The CJEU further specified that:

‘In the course of such an assessment, the executing judicial authority must, in particular, examine to what extent the systemic or generalised deficiencies, as regards the independence of the issuing Member State’s courts, to which the material available to it attests are liable to have an impact at the level of that State’s courts with jurisdiction over the proceedings to which the requested person will be subject.’

The examination has to be conducted in cooperation with the Member State who issued the EAW. There has to be a dialogue between the judicial authorities of the issuing Member State and the executing Member State. Dölle and Nijland rightfully observed that this is a remarkable approach, since it is unlikely that the judicial authorities of an issuing Member State will argue about themselves that they are not independent. However, the executing Member State must refrain from executing the EAW if ‘the individual concerned will suffer in the issuing Member State a breach of his fundamental right to an independent tribunal.’ The final decision has to be taken by the executing Member State.

6.3.4 Mutual trust, the Schengen Information System and Article 4 Charter
In discussing the CJEU case law in the context of the Dublin III Regulation and the EAW, a distinction has to be made between the case law on Article 4 Charter and Article 47 Charter. Article 4 (prohibition of torture and inhuman or degrading treatment) is an absolute right, under no circumstances individuals may be subjected to treatment contrary to Article 4 Charter. The prohibition of torture and inhuman or degrading treatment entails the principle of non-refoulement, which is the prohibition to return an individual to a country where he or she runs a real risk to be subjected to torture or inhuman or degrading treatment for reasons of race, religion, nationality, membership of a particular social group or political opinion. The case law of the CJEU concerning the principle of mutual trust

364 CJEU 25 July 2018, C-216/18 PPU (Celmer), para 34.
365 Ibid., para 47.
366 Ibid., para 72.
367 Ibid., para 73.
368 Ibid., para 75.
370 CJEU 25 July 2018, C-216/18 PPU (Celmer), para 78.
371 Article 4 Charter in confirmed by Article 3 ECHR, which is absolute according to Article 15(2) ECHR. The CJEU stresses this in its case law as well, see, among others, CJEU 5 April 2016, Joined cases C-404/15 and C-659/15 PPU (Aranyosi) paras 85-87.
372 This is the definition of the principle of non-refoulement as defined by the United Nations in Article 33(1) of the 1951 Refugee Convention. This definition of the principle of non-refoulement is adopted by the EU. For example, see Recital 3 of the Asylum Qualification Directive.
and Article 4 Charter in the context of the Dublin III Regulation and the EAW shows that a risk of treatment contrary to Article 4 Charter can rebut the principle of mutual trust.

An assessment of the individual circumstances of the case could lead to the conclusion that a Dublin transfer would not be in line with Article 4 Charter (see Chapter 6.3.2). Regarding EAW’s, if the issuing Member States cannot assure that the individual concerned will not be subjected to treatment contrary to Article 4 Charter, the execution of the EAW has to be postponed until the issuing Member State can make an individual assurance of such (see Chapter 6.3.3). For the Dublin III and EAW cases, there is a clear link between the principle of mutual trust and the consequences of the execution of a Dublin transfer or EAW. The principle of mutual trust can be rebutted, because the reception conditions in the Member State of destination (in the case of a Dublin transfer) or the detention conditions in the issuing Member State (in the case of an EAW), result in treatment contrary to Article 4 Charter.

With the execution of SIS alerts on the other hand, the principle of mutual trust does not relate to the conditions in the state where the third-country national is to be returned to as a consequence of the enforcement of a SIS alert. The execution of a SIS alert could lead to a violation of the principle of non-refoulement, if the third-country national is returned to a country where he or she runs a real risk to be subjected to treatment contrary to Article 4 Charter for reasons of race, religion, nationality, membership of a particular social group or political opinion. Executing Member States have an obligation towards third-country nationals not to return a third-country national to a country where he or she would be subjected to treatment contrary to Article 4 Charter because of his or her race, religion, nationality, membership of a particular social group or political opinion. If a third-country national believes the enforcement of a SIS alert against him or her would not be in line with the principle of non-refoulement, he or she can apply for international protection in the Member State based on Article 14(1) Schengen Borders Code. In this situation, the SIS alert cannot be imposed against the third-country national (see Chapter 6.2.2).

The case law of the CJEU does not seem to provide an opportunity for the executing Member State of a SIS alert to rebut the principle of mutual trust based on Article 4 Charter. The mutual trust between the issuing and executing Member State of a SIS alert does not relate to the circumstances in the country of origin of a third-country national, but relates to the presumption that the SIS alert has been issued in line with EU law. If there is a risk that the return of a third-country national violates the principle of non-refoulement, the third-country national concerned is eligible for international protection. The Schengen Borders Code obliges Member States not to enforce a SIS alert in this situation (see Chapter 6.2.2)."
mutual trust for executing Member States of an EAW if there is a real risk the individual concerned will not have access to an independent judicial authority, which constitutes a breach of Article 47 Charter (see Chapter 6.3.3).\textsuperscript{375} In her blog about the Kozlovska case (see Chapter 1.1), Brouwer stated the following about the \textit{Celmer} case (in combination with the Commission v Spain case (see Chapter 6.2.4)), about mutual trust and SIS alerts:

‘It seems arguable to claim that before expelling Mrs Kozlovska to Kiev, the Belgian authorities should have checked first whether this expulsion would not violate her rights to freedom of expression, family life, or effective judicial protection, but certainly her right to residence as a family member of a EU citizen.’\textsuperscript{376}

To a certain extent I agree with this view. In analogy to the \textit{Celmer} case, Member States do have to refrain from the execution of a SIS alert if there are serious reasons to believe that the enforcement of the SIS alert would violate the right to a fair trial and an effective remedy of the third-country national concerned (Article 47 Charter). However, in my opinion, the \textit{Celmer} case does not provide an opportunity for executing Member States to assess other fundamental rights that could be affected by the execution of the SIS alert, such as the right to family life and the freedom of expression.

In essence, the CJEU ruled in the \textit{Celmer} case that the principle of mutual trust has to be rebutted if execution of an EAW would result in a violation of Article 47 Charter of the individual concerned. Applying this approach to SIS alerts, this would mean that Member States have to refrain from the enforcement of a SIS alerts, if the enforcement would mean that the third-country national’s right to a fair trial and an effective remedy would be violated. The \textit{Celmer} case concerned EAW’s for the for the purpose of conducting criminal prosecutions.\textsuperscript{377} In its judgment the CJEU states that Member States must refrain from executing the EAW if it would lead to a violation of Article 47 Charter,\textsuperscript{378} however, it does not provide a ground for the executing Member State to assess the EAW to other fundamental rights than Article 47 Charter of the individual concerned. Subsequently, the \textit{Celmer} judgment does not provide an opportunity for the enforcing Member State of a SIS alert to assess other fundamental rights than the right to a fair trial and an effective remedy. Neither does this follow from the Commission v Spain case, where the CJEU based its judgment on the special position of beneficiaries of the Citizenship Directive, not on the principle of mutual trust (see Chapter 6.2.4).\textsuperscript{379} Third-country nationals against whom a SIS alert has been issued can bring action before courts or competent authorities against a SIS alert in \textit{any} of the Member States.\textsuperscript{380} It would be extremely hard,

\textsuperscript{375} CJEU 28 July 2018, C-216/18 PPU (Celmer).
\textsuperscript{376} Brouwer, \textit{Verfassungsblog} 30 Augustus 2018.
\textsuperscript{377} CJEU 28 July 2018, C-216/18 PPU (Celmer), para 14.
\textsuperscript{378} Ibid., para 78.
\textsuperscript{379} In the Commission v Spain judgment, the CJEU ruled that Member States have to assess whether a third-country national who is a beneficiary of the Citizenship Directive constitutes a ‘genuine, present and sufficiently serious threat affecting one of the fundamental interests of society’. The CJEU does not question the legality or rightfulness of the SIS alert in itself, but required an additional assessment for the enforcement of SIS alerts against third-country nationals who are a beneficiary of the Citizenship Directive. This additional assessment is not a rebuttal of the principle of mutual trust, but an effect of the special position of third-country nationals who are beneficiaries of the Citizenship Directive (see also Bulterman, JV 2006/123, para 4, who argued that the CJEU does explicitly not answer the question in the Commission v Spain case whether the alert justifies the refusal of entrance, but focuses on the fact that the threat following from the SIS alert could not be considered ‘present’ anymore at the time of enforcement, because of the special position of third-country nationals who are beneficiaries of the Citizenship Directive.).
\textsuperscript{380} Article 43(1) SIS II Regulation.
if not impossible, to argue that a third-country national does not have access to independent judicial authorities in any of the Member States. Though, as explained in Chapter 3.5.3, in practice, third-country nationals will face obstacles that affect the effectiveness of the remedy provided in the SIS II Regulation: (1) if SIS alerts are based on confidential information, this is often not disclosed to the authorities of other Member States than the issuing Member State, which makes them unable to scrutinize SIS alerts and (2) Member States seem reluctant in deleting SIS alerts based on the enforcement of a final decision from another Member State. If a third-country national has a final decision of a Member State that his or her SIS alert has to be deleted, but the issuing Member State – who is the only Member State that can actually delete the alert – fails to comply with this obligation, the Celmer case seems to oblige Member States not to enforce the SIS alert. After all, the remedy provided would not be effective if the result of a final decision to delete a SIS alert is that the SIS alert will still be enforced.

As to the enforcement of SIS alerts based on confidential information, the rebuttal of mutual trust based on the Celmer case is more complicated. If the confidential information is not being disclosed to the Member State whose authorities review the SIS alert, the authorities cannot scrutinize the SIS alert and are therefore not able to provide an effective remedy. In this situation, the possibility to bring action against a SIS alert in any of the Member States is, de facto, decreased to the possibility to bring action in only one Member State: the Member State who issued the SIS alert. In this context, it is problematic if there exists a real risk that the third-country national against whom a SIS alert has been issued does not to have access to an independent judicial authority in the issuing Member State. In this situation, the Celmer case obliges Member States to assess whether the third-country national concerned has access to an independent judicial authority in the issuing Member State, and, if not, rebut the principle of mutual trust and refrain from the enforcement of a SIS alert.

Thus, the Celmer case entails two obligations for enforcing Member States of SIS alerts in the context of the principle of mutual trust and Article 47 Charter. First, when a Member State ordered the deletion of a SIS alert with a final decision – and the issuing Member State fails to comply with its obligation to delete the SIS alert – the enforcing Member State must refrain from enforcement. After all, the remedy against a SIS alert would not be effective if its result is that a SIS alert will be enforced after a final decision of deletion. Secondly, in specific circumstances, Member States must refrain from the enforcement of SIS alerts when the SIS alert is based on confidential information. If the confidential information is not disclosed to other Member States if the third-country national concerned brings action before the courts or competent authorities of another Member State, the third-country national can only have an effective remedy before the court or competent authorities of the issuing Member State. In these circumstances, Member States have to assess whether there are serious reasons to believe third-country nationals against whom a SIS alert has been issued are at real risk not to have access to an independent judicial authority in the issuing Member States. If this is the case, Member States must refrain from the enforcement of a SIS alert based on the Celmer case.

6.4 Sub-conclusions
In this Chapter, the exceptions to the (automatic) enforcement of SIS alert were discussed. The exceptions to enforcement can be divided in three groups: (1) obligations not to enforce a SIS alert based on EU law, (2) prohibition of automatic enforcement of SIS alerts in specific circumstances, and

382 Article 34(2) SIS II Regulation.
383 In analogy to CJEU 28 July 2018, C-216/18 PPU (Celmer), para 75.
(3) obligations to refrain from the enforcement of a SIS alert based on the case law of the CJEU on the principle of mutual trust.

EU legislation provides for exceptions to the enforcement of SIS alerts. There are three situations in which Member States cannot invoke the entry-conditions of Article 6 Schengen Borders Code, the absence of a SIS alert included. First, according to Article 25 Visa Code, the entry conditions of Article 6 Schengen Borders Code cannot be invoked against a third-country national who has a visa with limited territorial validity. A visa with limited territorial validity, the so-called humanitarian visa, will be issued when Member States consider it necessary for humanitarian grounds, national interest or because of international obligations. Member States enjoy a wide margin of discretion in issuing visas with limited territorial validity. It is known that Member States use the opportunity to issue visas with limited territorial validity, but the grounds for the issuance of these visas are not known, neither does the case law of the CJEU provides guidelines on the issuance of visas with limited territorial validity. Secondly, the entry-conditions of Article 6 Schengen Borders Code cannot be invoked against a third-country national who applies for international protection at the borders of a Member State. Member States have the possibility to apply an accelerated procedure on applications for international protection at the border: the border procedure. In specific circumstances, Member States can decide in a border procedure on the substance of an application for international protection. One of these circumstances is if the applicant may for serious reasons be considered as a danger to national security or public order of the Member State, or has been forcibly expelled for those reasons in the past. The threshold for the application of this ground seems higher than the threshold for the issuance of a SIS alert, but a SIS alert could give reasons to decide on the substance of the application for international protection in a border procedure. If a negative decision on the application for international protection has been made at the border, the SIS alert will be enforced and the third-country national will be refused entry and stay in the Member States. Thirdly, according to Article 14(1) Schengen Borders Code, the entry-conditions of Article 6 Schengen Borders Code cannot be invoked against third-country nationals who are in possession of a long-stay visa. According to Article 25(2) CISA, the issuing Member State has to erase the SIS alert if a long-stay visa has been issued. Further, the Citizenship Directive opposes automatic enforcement of SIS alerts for third-country nationals who are beneficiaries of the Citizenship Directive. In the Bouchereau judgment, the CJEU ruled that beneficiaries of the Citizenship Directive have to pose a ‘genuine, present and sufficiently serious threat affecting one of the fundamental interests of society’ if public order measures are imposed against them. This judgment is implemented in Article 27(2) Citizenship Directive. In the Commission v Spain judgment, the CJEU ruled that this obligation precludes the automatic enforcement of SIS alerts against third-country nationals who are beneficiaries of the Citizenship Directive. SIS alerts of third-country nationals who are beneficiaries of the Citizenship Directive cannot be enforced automatically, Member States have to assess whether the third-country national concerned poses a ‘genuine, present and sufficiently serious threat affecting one of the fundamental interests of society’ before they enforce the alert. Because of the Commission v Spain judgment, third-country nationals who are beneficiaries of the Citizenship Directive enjoy more protection than third-country nationals who are not beneficiaries of the Citizenship Directive. Even the requirements of Zh and O (who in fact entail the same assessment as the Commission v Spain case) do not offer as much protection as the Commission v Spain case. This can be explained by the situations in which the assessment has to be applied. Whereas the Zh and O assessment poses an obligation on issuing Member State who issue a SIS alert based on Article 24(3)
SIS II Regulation, the *Commission v Spain* case poses an obligation on the executing Member State of a SIS alert. Because of this, SIS alerts of third-country nationals who are beneficiaries of the Citizenship Directive will be enforced only if the third-country national concerned is still considered to be a ‘present’ threat at the time of enforcement. This is a guarantee third-country nationals who are not beneficiaries of the Citizenship Directive do not have. This difference is especially significant in cases of first admittance, which can only be denied to third-country nationals who are beneficiaries of the Citizenship Directive if they fulfil the criteria of the *Bouchereau* and *Commission v Spain* case, whereas Member States enjoy a wide margin is discretion in first admittance cases of third-country nationals who are not beneficiaries of the Citizenship Directive.

In the second part of this Chapter, the possibilities for Member States not to enforce a SIS alert based on the case law of the CJEU in the AFSJ were discussed. The principle of mutual is of fundamental importance for the EU and the AFSJ, the CJEU referred to the principle of mutual trust as the ‘*raison d’être*’ of the EU and the creation of the AFSJ. Also in the context of the SIS, the principle of mutual trust is fundamental for the functioning of the system. The CJEU did not rule on the principle of mutual trust and the SIS. An analysis of the case law of the CJEU on the principle of mutual trust in the context of Dublin III transfers and EAW’s was given to determine whether this case law established opportunities or obligations for Member States to rebut the principle of mutual trust when they enforce SIS alerts.

Regarding the case law of the CJEU on mutual trust and Dublin III transfers, the case law has evolved from a strict interpretation of the principle of mutual trust to a less strict interpretation of the principle of mutual trust. In the *Abdullah* case, the CJEU ruled that in the situation of a Dublin transfer the principle of mutual trust could be rebutted only if there were ‘systemic deficiencies’ in the reception conditions in the Member State of destination, resulting in a risk that the individual concerned would face treatment contrary to Article 4 Charter. Later, in the *Ghezelbash* case, the CJEU departed from this approach. In *Ghezelbash*, the CJEU ruled that the principle of mutual trust could be rebutted if the individual concerned questioned the transfer, arguing that his or her individual circumstances lead to the conclusion that a transfer would result in treatment contrary to Article 4 Charter.

The case law of the CJEU in the context of EAW’s and mutual trust in relation to Article 4 Charter differs from the case law in the context of Dublin III transfers. The case law of the CJEU on mutual trust and Article 4 Charter does not pose an obligation on the executing Member State to refrain from the execution of an EAW when the reception conditions in the issuing Member States are not in line with Article 4 Charter. In this situation the execution of the EAW has to be postponed, until the issuing Member State can guarantee that the individual concerned will not be subjected to treatment contrary to Article 4 Charter. Remarkable in the context of the case law on mutual trust and EAW’s is that the CJEU ruled in the *Celmer* case that the principle of mutual trust can be rebutted if there is a real risk Article 47 Charter (right to a fair trial and an effective remedy) will be violated if an EAW would be executed. In the *Celmer* case, there was a real risk that the fundamental right of the individual concerned to an independent tribunal would be violated if the EAW would be executed.

The case law of the CJEU does not seem to provide an opportunity for the executing Member State of a SIS alert to rebut the principle of mutual trust based on Article 4 Charter. The mutual trust between the issuing and executing Member State of a SIS alert does not relate to the circumstances in the country of origin of a third-country national, but relates to the presumption that the SIS alert has been issued in line with EU law. If there is a risk that the return of a third-country national would constitute a violation of the principle of *non-refoulement*, the third-country national concerned is eligible for
international protection. The Schengen Borders Code obliges Member States not to enforce a SIS alert if a third-country national (explicitly or implicitly) applies for international protection. Member States have to assess the application for international protection before they can enforce a SIS alert. The exception to the enforcement of SIS alerts based on the principle of non-refoulement does not follow from the CJEU case law on mutual trust in relation to Article 4 Charter, but is embodied in Article 14(1) Schengen Borders Code.

The case law of the CJEU in relation to Article 47 Charter and the principle of mutual trust provides two obligations for Member States to rebut the principle of mutual trust in the situation of SIS alerts. First, when a Member State ordered the deletion of a SIS alert with a final decision – and the issuing Member State fails to comply with its obligation to delete the SIS alert – the enforcing Member State must refrain from enforcement. After all, the remedy against a SIS alert would not be effective if its result is that a SIS alert will be enforced after a final decision of deletion. Secondly, in specific circumstances, Member States must refrain from the enforcement of SIS alerts when the SIS alert is based on confidential information. If the confidential information is not disclosed to the courts or competent authorities of other Member States, the third-country national can only obtain an effective remedy before the court or competent authority of the issuing Member State. In these circumstances, Member States have to assess whether there are serious reasons to believe third-country national against whom a SIS alert has been issued is at real risk not to have access to an independent judicial authority in the issuing Member State. If this is the situation, Member States must refrain from the enforcement of a SIS alert based on the Celmer case.
Chapter 7 | Conclusions

7.1 Findings

This thesis started with the introduction of the case of Mrs Kozlovska, a Ukrainian national who is married to a Polish national. The couple lived together in Poland for almost ten years. In 2017, a SIS alert was issued against Mrs Kozlovska by the Polish authorities. When Mrs Kozlovska arrived at Brussels airport after a visit to her native country Ukraine in August 2018, she was stopped by the Belgian border authorities because of the SIS alert. After fifteen hours, she was deported to Kiev. In addition, Mrs Kozlovska’s application for prolongation of her EU long term residence permit was rejected because of the SIS alert. According to Mrs Kozlovska, the SIS alert was issued for political reasons. The SIS alert and deportation of Mrs Kozlovska drew international attention, resulting in several Member States who granted her access despite the SIS alert. Mrs Kozlovska requested deletion of her SIS alert at the Belgian data protection authorities in December 2018. However, before the Belgian authorities were able to decide on Mrs Kozlovska’s request for deletion, she obtained a long-term residence permit in Belgium in March 2019. Subsequently, the Polish authorities were forced to delete the SIS alert, which they did in June 2019. The case of Mrs Kozlovska raises questions regarding the grounds on which SIS alerts can be issued and the grounds on which Member States can decide not to enforce a SIS alert which was issued by another Member State. This research worked towards an answer to the following questions:

1. Taking into account the discretionary power of Member States to issue SIS alerts for the purpose of refusal of entry or stay on the basis of Article 24 (2) SIS II Regulation, which limitations can be derived from the case-law of the CJEU addressing the use of public policy or national security grounds to issue a SIS alert based on Article 24(3) SIS II Regulation following the Return Directive?

2. Taking into account the principle of mutual trust and mutual recognition underlying the Schengen system, on the basis of which rights or legal obligations are Member States allowed or even obliged not to enforce a SIS alert?

The first step in answering these questions was to provide a description of the history and general developments of SIS, in order to understand the complex legislative framework around the SIS database (Chapter 2). The original 1985 non-binding Schengen Agreement was an intergovernmental agreement between five states. In 1990, the CISA was adopted, which established the SIS. In 1997, the Schengen acquis was incorporated into EU law, a milestone for the development of the Schengen system. When the SIS II Regulation was adopted in 2006, the protection of the rights of third-country nationals against whom a SIS alert had been issued improved in comparison to the protection of third-country nationals under the ‘first generation’ of Schengen. SIS alerts could be entered only after an individual assessment and a proportionality assessment have been conducted.

The second step in answering the research questions was to explain the grounds on which SIS alerts can be issued under the SIS II Regulation and the consequences of a SIS alert (Chapter 3). First, it is not possible to issue a SIS alert against third-country nationals who is in the possession of a valid residence permit from another Member State. If a Member State wishes to issue a SIS alert against a third-country national who possesses are residence permit from another Member State, the issuing Member
State has to consult the Member State of which the third-country national holds a residence permit. Only if the residence permit is withdrawn, a SIS alert can be issued. There are two grounds on which a SIS alert can be issued: Article 24(2) and Article 24(3) SIS II Regulation. Member States shall issue a SIS alert based on Article 24(2) SIS II Regulation if a third-country national poses a threat to public policy, public security or national security. The CJEU did not (yet) set further requirements for issuance of a SIS alert based on Article 24(2) SIS II Regulation. Member States enjoy a wide margin of discretion in issuing SIS alerts based on Article 24(2) SIS II Regulation. SIS alerts based on Article 24(3) SIS II Regulation can be issued if a third-country national has been subjected to measures based on migration law that include an entry-ban. The Return Directive sets the requirements for the imposition of an entry-ban. Member States are obliged to issue a return decision to illegally residing third-country nationals, which in specific circumstances will be accompanied with an entry-ban. An entry-ban will be issued if no period for voluntary departure has been granted, or the period for voluntary departure has expired and the third-country national concerned still resides on the territory of the Member State. Member States may refrain from a period for voluntary departure, among others, when the third-country national concerned poses a risk to public policy, public security or national security.

The consequences of a SIS alert are far-reaching. First and foremost, a SIS alert has to be enforced by all Member States, resulting in the fact that third-country nationals will be refused entry and stay in the territories of the Member States. Further, SIS alerts may affect the derived rights of third-country nationals from other EU legal frameworks, such as the Family Reunification Directive and the Long Term Residence Directive. A SIS alert cannot be the sole reason for the rejection of a residence permit under the Family Reunification Directive or the Long Term Residence Directive. However, as the case of Mrs Kozlovska illustrates, it can play a decisive role in the rejection of a residence permit. Lastly, third-country nationals against whom a SIS alert has been issued have the right to bring action against this alert in any of the Member States. However, research shows that third-country nationals against whom a SIS alert has been issued experience practical obstacles when they bring action against a SIS alert, mainly due to two factors: (1) Member States seem reluctant to execute a final decision taken by another Member State which orders the deletion of a SIS alert, and (2) Member States who are not the issuing Member State of a SIS alert are not able to scrutinize a SIS alert which is based on confidential information due to the lack of cooperation between the Member States.

In the context of the grounds for the issuance of SIS alerts and their consequences, it has to be noted that three regulations have been adopted (but not yet in force) that will affect the grounds for the issuance of SIS alerts and their consequences in the near future. In Chapter 4, these regulations were discussed.

First, the SIS III Regulation, contains two provisions that will affect the protection of the rights of third-country nationals against whom a SIS alert has been issued. First, Member States are no longer obliged to conduct an individual assessment for SIS alerts based on Article 24(1)(b) SIS III Regulation (the successor of Article 24(3) SIS II Regulation). SIS alerts based on Article 24(1)(b) SIS III Regulation will be issued in line with the Return Directive. The Return Directive sets requirements that indicate an individual assessment, but these requirements are less strict than the general requirement of an individual assessment that third-country nationals against whom a SIS alert has been issued based on the predecessor of Article 24(1)(b) SIS III Regulation (Article 24(3) SIS II Regulation) enjoy. Secondly, the proportionality assessment – which was a general requirement under the SIS II Regulation – does
not have to be conducted if Member States issue a SIS alert against third-country nationals who are suspected of or convicted for a terrorist offence under the SIS III Regulation.

Further, Regulation 2019/817 and Regulation 2019/818 were adopted in the context of the interoperability of SIS with other EU databases. As a result of these regulations, the SIS will be operable with the EES, VIS, ETIAS, Eurodac and ECRIS-TCN. As a result of the regulations, the number of actors and the number of purposes for which each of the databases might be used will increase. Subsequently, the effects of a SIS alert will increase. The EDPS and FRA expressed their concerns about the protection of data protection rights and fundamental rights under the regulations, the right to an effective remedy and non-discrimination in particular.

The third step in answering the research question was to describe the limitation the CJEU set for the imposition of an entry-ban (and thus SIS alert based on Article 24(3) SIS II Regulation) and assess whether this limitation applies, or should apply, to Article 24(2) SIS II Regulation as well (Chapter 5). In the Zh and O case the CJEU ruled that a criminal conviction can never be the sole reason for an entry-ban, in addition to a criminal conviction, Member States have to assess whether a third-country national is a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. In principle, these requirements apply to the public order concept under the Return Directive only, it is settled case law of the CJEU that public order concepts have to be determined in their context. The public order concept of the Return Directive does not automatically apply to the SIS II Regulation as well.

In assessing the scope of Zh and O, it appeared that it would not be in line with the case law of the CJEU to expand the scope of Zh and O to all EU migration provisions. The CJEU ruled in H.T. that the protection of the fundamental interests of a third-country national cannot depend on the legal status of the third-country national concerned. However, this does not mean that no distinction in protection can be made under different EU legal instruments in the field of migration law. Other circumstances than the legal status of the third-country national concerned, such as the existence of family ties, prior legal residence in the Member States and the nature of the fundamental rights at stake, can justify a different public order assessment under different EU legal instruments. Furthermore, the CJEU does not seem to tend towards an extension of the scope from Zh and O to all EU migration provisions. In Fahimian, which was ruled two months apart from the Zh and O case, the CJEU ruled that Member States had a significant wider margin of discretion regarding the definition of the public order concept in cases of first admittance. The approach of Peers, who argued that the Zh and O case entails a requirement to respect fundamental rights in cases of expulsion, seems to be more in line with the case law of the CJEU.

Even though the requirements for the public order exception following from Zh and O case should not be applied to all migration cases, the requirements should be applied to the public order concept of Article 24(2) SIS Regulation. First of all, the text of the SIS II Regulation encourages further harmonisation regarding the grounds for the issuance of a SIS alert. In analogy to Advocate-General Sharpston’s opinion in the Zh and O case, a useful purpose is served by comparing the public order concept of the Return Directive and the SIS II Regulation. After all, the public order concept of the Return Directive is decisive for the application of Article 24(3) SIS II Regulation. A comparison of the wording, aim and scope of application of the Return Directive and the SIS II Regulation demonstrates that the Return Directive and the SIS II Regulation allow for a mutual interpretation of the public order exception. Moreover, a different interpretation of the public order exception entails a risk that the effectiveness of the Return Directive and the SIS II Regulation is undermined.
The only fundamental differences the comparison illustrated between the SIS II Regulation and the Return Directive, concerned the scope of application. Article 24(2) SIS II Regulation applies to three groups of third-country nationals who do not fall within the scope of the Return Directive (and thus Article 24(3) SIS II Regulation): (1) illegally residing third-country nationals who do not qualify for an entry-ban (and thus SIS alert based on Article 24(3) SIS II Regulation) under the Return Directive, (2) third-country nationals who are in the possession of a residence permit and (3) third-country nationals who reside outside the territories of the Member States.

For the first group, it is important that the public order exception under Article 24(2) SIS II Regulation is the same as the public order exception under the Return Directive, to preclude situations where Article 24(2) SIS II Regulation is misused or abused to ‘avoid’ the requirements under the Return Directive (and thus Article 24(3) SIS II Regulation). For the second group, an uniform interpretation is not necessarily required. However, a limitation of the discretion of Member States regarding the public order concept under Article 24(2) SIS II Regulation would be a good development in order to avoid the risk that Article 24(2) SIS II Regulation is used to ‘avoid’ the requirements of the public order exception under the applicable legal framework of the residence permit of third-country national concerned. The higher the threshold for a SIS alert based on Article 24(2) SIS II Regulation, the lower the risk that this threshold is lower than the requirements following from the legal framework applicable on the residence permit. For the third group, the third-country nationals who reside outside the territories of the Member States, the extension of the scope of Zh and O to Article 24(2) SIS II Regulation is not necessarily required. However, it would not disproportionately limit the discretion of the Member States either. Even if a third-country national would not qualify for a SIS alert under the requirements following from the Zh and O judgment, Member States still have the opportunity to reject a visa application and Member States can still issue an alert in their N-SIS.

Altogether, it appeared that the scope of Zh and O should be extended to Article 24(2) SIS II Regulation. In the current situation, the risk of misuse and abuse of Article 24(2) SIS II Regulation to avoid obligations following from other EU legal frameworks is not precluded. This affects the credibility and the effectiveness of the Return Directive and the SIS II Regulation.

The last step in answering the research questions was to analyse the situations in which Member States have the opportunity, or obligation, to refrain from the enforcement of SIS alerts (Chapter 6). It appeared that the exceptions to the enforcement of SIS alerts can be divided in three groups: (1) the obligation to refrain from the enforcement is SIS alerts based on law, (2) the prohibition to automatic enforcement of SIS alerts against third-country nationals who are beneficiaries of the Citizenship Directive, and (3) the obligations not to enforce a SIS alert following the case law of the CJEU regarding mutual trust in the AFSJ.

EU legislation entails three situations in which Member States are obliged not to invoke the entry-requirements of Article 6 Schengen Borders Code, the requirement of the absence of a SIS alert included. First, the Visa Code obliges Member States not to invoke a SIS alert against a third-country national who has been granted a visa with limited territorial validity. Member States enjoy a wide margin of discretion in defining situations in which it issues these so-called humanitarian visas. Secondly, Member States cannot invoke a SIS alert if a third-country national applies for international protection. However, a SIS alert can still be of importance in situations where third-country nationals apply for international protection. Member States can decide on applications for international protection in an accelerated procedure if the third-country national concerned composes a danger to public security. This is not necessarily the case for every third-country national against whom a SIS alert
has been issued, but a SIS alert could lead to application of an accelerated procedure. Thirdly, the issuance of a long-stay visa opposes the existence of a SIS alert. The issuing Member State of the SIS alert has to erase the SIS alert if a long-stay visa has been granted by another Member State.

Further, following the text of the Citizenship Directive and the case law thereto, the automatic enforcement of SIS alerts against third-country nationals who are beneficiaries of the Citizenship Directive is not allowed. In the Commission v Spain judgment, the CJEU ruled that in addition to a SIS alert, a third-country national who is a beneficiary of the Citizenship has to pose a ‘genuine, present and sufficiently serious threat affecting one of the fundamental interests of society’ before the third-country national may be deprived from his or her fundamental free movement rights of entry and residence. This emphasizes the strong protection of third-country nationals who are beneficiaries of the Citizenship Directive. If a SIS alert is issued against them, the ‘genuine, present and sufficiently serious threat affecting one of the fundamental interests of society’-assessment will not only be conducted when the SIS alert is issued (as is the case for third-country nationals who are not a beneficiary of the Citizenship Directive and against whom a SIS alert is issued based on Article 24(3) SIS II Regulation), but also when the SIS alert is executed.

Lastly, it appeared that the case law of the CJEU concerning the principle of mutual trust in the AFSJ poses two obligations on Member States to rebut the principle of mutual trust in the context of SIS alerts. In the Celmer judgment, the CJEU ruled that the principle of mutual trust can be rebutted if there is a real risk that the execution of an EAW results in a violation of Article 47 Charter (right to a fair trial and to an effective remedy) in the issuing Member State of the EAW. Likewise, the enforcement of a SIS alert shall not result in a violation of Article 47 Charter. Third-country nationals against whom a SIS alert has been issued have the right to bring action against the SIS alert in any of the Member States. However, third-country nationals experience practical obstacles which, in specific circumstances, can lead to the rebuttal of the principle of mutual trust. First, Member States seem to be reluctant in executing final decisions of other Member States that order the deletion of a SIS alert. Therefore, Member States have to refrain from the execution of a SIS alert when there is a final decision that the alert has to be executed, otherwise the remedy provided cannot be considered to be effective. Secondly, Member States seem to be unable to scrutinize SIS alerts issued by another Member State if the SIS alert is based on confidential information, because they lack the information to do so. In this situation, the Member States in which the third-country national concerned could obtain an effective remedy is, de facto, reduced to one Member State: the Member State who issued the alert. Under these circumstance a SIS alert cannot be enforced automatically, enforcing Member States have to assess whether there are serious reasons to believe that third-country nationals against whom a SIS alert has been issued are at real risk not to have access to an independent judicial authority in the issuing Member State (as was the situation in the Celmer case). If this is the case, Member States must rebut the principle of mutual and refrain from the execution of a SIS alert.

Applying the findings of this thesis to the case of Mrs Kozlovska, the following issues contributed to the pressing situation of Mrs Kozlovska:

- **The fact that Member States have a wide margin of appreciation regarding the issuance of SIS alerts based on Article 24(2) SIS II Regulation:** under the current system, the risk that Article 24(2) SIS II Regulation is used to issue a SIS alert against a third-country national who does not qualify for an entry-ban is not precluded.
- **The fact that Member States have the possibility to issue a SIS alert against third-country nationals who have a residence permit in the same Member State**: in the case of Mrs Kozlovska, the fact that the SIS alert was issued while she was still in the possession of a valid EU long term residence permit resulted in two pressing issues: (1) the SIS alert made the existing residence permit practically meaningless, as its consequence was that the Mrs Kozlovska was effectively banned from the territories of the Member States, and (2) in the case of Mrs Kozlovska, the public order assessment under the SIS II Regulation actually replaced the public order assessment for the refusal of prolongation of a residence permit under the Long Term Residence Directive, as the SIS alert constituted the main reason for the refusal of prolongation of her residence permit.

- **The fact that the Belgian authorities deported Mrs to Kiev because of the SIS alert without assessing whether the principle of mutual trust had to be rebutted**: based on the *Celmer* case, the Belgian authorities should have assessed whether there were reasons to rebut the principle of mutual trust and refrain from the execution of the SIS alert against Mrs Kozlovska. After all, her SIS alert was based on confidential information, resulting in the fact that she could only obtain an effective remedy in Poland. Following from the *Celmer* case, the Article 7 TEU procedure that has been started against Poland indicates that there is a risk of a breach of Article 47 Charter. The Belgian authorities should have assessed whether there was a real risk Mrs Kozlovska would not have access to an independent tribunal.

- **The fact that Member States seem to be reluctant towards cooperation for the purpose of deleting a SIS alert**: Belgium granted a long-stay residence permit to Mrs Kozlovska in March 2019. From this moment, Poland was obliged to delete the SIS alert of Mrs Kozlovska. However, the SIS alert was removed only after three months. This could be a practical hurdle for individuals like Mrs Kozlovska, whose husband lives in Poland, has a second home in Brussels and often works in the United Kingdom.

### 7.2 Answer to the research questions

The first research question reads: **Taking into account the discretionary power of Member States to issue SIS alerts for the purpose of the refusal of entrance or stay on the basis of Article 24(2) SIS II Regulation, which limitations can be derived from the case law of the CJEU addressing the use of public policy or national security grounds to issue a SIS alert based on Article 24(3) SIS II Regulation following the Return Directive?**

For the imposition of an entry-ban as defined in the Return Directive (and thus a SIS alert based on Article 24(3) SIS II Regulation), the CJEU established requirements for the use of public policy or national security grounds to issue a SIS alerts in the *Zh and O* case. The CJEU ruled that a criminal conviction can never be the sole reason for an entry-ban, in addition to a criminal conviction, Member States have to assess whether a third-country national is a ‘genuine, present and sufficiently serious threat affecting one of the fundamental interests of society’. The interpretation of the public order exception under the Return Directive does not automatically apply to the public order exception of the SIS II Regulation.

However, it useful to assess whether the Return Directive and the SIS II Regulation allow for a mutual interpretation of the public order exception, since the Return Directive *de facto* sets the requirements for the public order exception under Article 24(3) SIS II Regulation. First of all because the text of the SIS II Regulation encourages harmonisation of the grounds for the issuance of SIS alerts. The recently adopted SIS III Regulations and the regulations on the interoperability of the SIS with other EU
databases, increase the need for harmonisation of the grounds for the issuance of SIS alerts. While the protection of third-country nationals against whom a SIS alert has been issued will derogate under the SIS III Regulation, the interoperability of the SIS with other EU databases increases the consequences of a SIS alert.

Further, a comparison of the wording, aims and scope of the SIS II Regulation and the Return Directive show the desirability of a mutual interpretation of the public order exceptions. The wording of the public order exception under the Return Directive and the SIS II Regulation are similar. The objectives of the return Directive and the SIS II Regulation are different, but serve a common practical underlying thought: to remove, or prevent from entering, third-country nationals who Member States do not desire to reside on their territories. There are substantive differences regarding the scope of the directives. These call however for a mutual interpretation. There are three groups of third-country nationals who fall within the scope of Article 24(2) SIS II Regulation and not within the scope of the Return Directive (and thus Article 24(3) SIS II Regulation): (1) illegally residing third-country nationals who do not qualify for an entry-ban (and thus SIS alert based on Article 24(3) SIS II Regulation) under the Return Directive, (2) third-country nationals who are in the possession of a residence permit and (3) third-country nationals who reside outside the territories of the Member States. For the first group, mutual interpretation of public order is required to preclude the risk of the misuse or abuse of Article 24(2) SIS II Regulation to avoid the requirements under the Return Directive (and thus Article 24(3) SIS II Regulation). For the second group, the restriction of the discretion of Member States in defining public order under Article 24(2) SIS II Regulation reduces the risk that Member States use SIS alerts based on Article 24(2) SIS II Regulation in order to ‘avoid’ the criteria for the withdrawal or refusal of prolongation of a residence permit under the applicable EU legal framework. The existence of a SIS alert could make it easier to withdraw or not prolong residence permits of third-country nationals. For the last group, the extension of the scope from Zh and O is not really necessary. However, it does not restrict the Member States in a disproportionate manner either. Member States can still refuse to issue a visa or issue an alert in their national systems.

In short, the scope of Zh and O should be extended to Article 24(2) SIS II Regulation. In the current situation the risk that Article 24(2) SIS II Regulation will be misused or abused to avoid obligations following from other EU legal frameworks is not precluded. This affects the credibility and the effectiveness of the Return Directive and the SIS II Regulation.

The second research question reads: Taking into account the principle of mutual trust and mutual recognition underlying the Schengen system, on the basis of which rights or legal obligations are Member States allowed or even obliged not to enforce a SIS alert?

Article 6 Schengen Borders Code states the entry-conditions for the Schengen Area, one of the entry-conditions if the absence of a SIS alert. The entry-conditions of Article 6 Schengen Borders Code cannot be invoked by Member States against a third-country nationals on the following grounds: (1) a visa with limited territorial validity (humanitarian visa) has been issued to the third-country national concerned, (2) the third-country national concerned applies for international protection at the border or (3) a long-stay visa has been issued to the third-country national concerned. Concerning the second ground, it has to be noted that a SIS alert can be of influence on the decision to apply a border procedure. A border procedure is an accelerated procedure in which Member States can, for reasons of public order, decide on the substance of an application for international protection. If the application for international protection has been rejected, the SIS alert will be enforced after all.
Further, SIS alerts cannot be enforced automatically if the third-country national concerned is a beneficiary of the Citizenship Directive. Following from the Commission v Spain case, in additional to the existence of a SIS alert, Member States have to assess whether a third-country national poses a ‘genuine, present and sufficiently serious threat affecting one of the fundamental interests of society’ before a SIS alert will be enforced against third-country nationals who are beneficiaries of the Citizenship Directive.

Lastly, two obligations follow from the case law of CJEU on the principle of mutual trust and Article 47 Charter (right to a fair trial and to an effective remedy). First, Member States have to refrain from the execution of a SIS alert if there is final decision from a Member State that the alert has to be deleted. After all, the remedy provided would not be effective if its effect is that the alert will be enforced despite a final decision to delete the alert. Secondly, if the SIS alert is based on confidential information and Member States other than the issuing Member State cannot scrutinize the SIS alert, it could be that, in specific circumstances, Member States have to rebut the principle of mutual trust and refrain from the enforcement of a SIS alert. In this situation, third-country nationals can obtain an effective remedy only in the issuing Member State. If there are real reasons to believe the third-country national concerned is at real risk not to have access to an independent judicial authority, Member States have to assess whether this risk indeed exists for the third-country national against whom the SIS alert had been issued. If this is the situation, the principle of mutual trust has to be rebutted and Member States have to refrain from the execution of a SIS alert. As a concluding remark, it should be noted that the exceptions to the enforcement of SIS alerts based on the principle of mutual trust and the AFSJ relate to the risk of a breach of Article 47 Charter in the future, not the rightfulness of the SIS alert in itself.
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**Remaining Sources**

**Lenaerts 2015**

**Verhofstadt, Twitter 17 August 2018**
G. Verhofstadt, Twitter (verified account) 17 Augustus 2018, accessible through: [https://twitter.com/guyverhofstadt/status/1030390217902051329](https://twitter.com/guyverhofstadt/status/1030390217902051329).
<table>
<thead>
<tr>
<th>Date</th>
<th>State(s)</th>
<th>Remarks</th>
</tr>
</thead>
<tbody>
<tr>
<td>01-09-1993</td>
<td>Belgium, Germany, France, Luxemburg, the Netherlands (founding Schengen states), Portugal and Spain</td>
<td>The SIS did not become effective until 26 March 1995. Full access to SIS.</td>
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<tr>
<td>01-03-1994</td>
<td>Portugal and Spain</td>
<td>Admitted into Schengen through an agreement between the Nordic countries and the Schengen states. Full access to SIS. Norway and Iceland, as non-EU Member States, could not formally be admitted to Schengen, they signed an Association Agreement. Denmark has a special position regarding provisions adopted in the AFSJ, but de facto participates in all provisions related to Schengen (and thus full access to SIS).</td>
</tr>
<tr>
<td>19-12-1996</td>
<td>Denmark, Finland, Sweden, Iceland and Norway</td>
<td></td>
</tr>
<tr>
<td>26-10-1997</td>
<td>Italy</td>
<td>Full access to SIS.</td>
</tr>
<tr>
<td>01-12-1997</td>
<td>Austria</td>
<td></td>
</tr>
<tr>
<td>08-12-1997</td>
<td>Greece</td>
<td></td>
</tr>
<tr>
<td>29-05-2000</td>
<td>United Kingdom and Ireland</td>
<td>They participate in SIS only regarding some of the provisions of the CISA, they do not participate in the Schengen provisions related to article 96 CISA.</td>
</tr>
<tr>
<td>07-07-2007</td>
<td>Czech Republic, Estonia, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and the Slovak Republic</td>
<td>Partially access to SIS for law enforcement cooperation, they obtained full access to SIS on 21 December 2007.</td>
</tr>
<tr>
<td>08-12-2008</td>
<td>Switzerland</td>
<td>Full access to SIS.387</td>
</tr>
<tr>
<td>15-10-2010</td>
<td>Bulgaria and Romania</td>
<td>Partially access to SIS for law enforcement cooperation, they obtained full access to SIS on 1 August 2018.</td>
</tr>
<tr>
<td>29-07-2011</td>
<td>Liechtenstein</td>
<td>Partially access to SIS for law enforcement cooperation.390</td>
</tr>
<tr>
<td>27-06-2017</td>
<td>Croatia</td>
<td></td>
</tr>
</tbody>
</table>

384 Besides the Council Decisions referred to below, information is obtained from Brouwer 2008, pp 38-41.
Appendix II | Infographic Interoperability EU databases European Commission

Databases used to control borders and fight crime are not talking to each other.

The EU is developing 4 new tools so that authorities can better access and share information across the EU.

- **EUROPEAN SEARCH PORTAL**: Simultaneous search in all relevant EU databases.
- **MULTIPLE IDENTITY DETECTOR**: Creates an alert when it detects a risk of identity fraud.
- **COMMON IDENTITY REPOSITORY**: Streamlines access to data on non-EU citizens.
- **BIOMETRIC MATCHING SERVICE**: Cross-checks biometric data in relevant databases.

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