



**COUNCIL OF  
THE EUROPEAN UNION**

**Brussels, 16 May 2014**

**9868/14**

**LIMITE**

**PROAPP 4**

**JAI 313**

**CATS 70**

**SCHENGEN 8**

**NOTE**

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from:	Presidency
to:	Coreper
Subject:	Application of Article 10 of Protocol 36 - Work of the Friends of Presidency Group - Report on the state of play and follow up

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**I. BACKGROUND**

1. On 20 February 2014, COREPER took note of the activation of the Friends of Presidency Group (FoP) for the purpose of reflecting and providing guidance and input on the application of Article 10 of Protocol 36 annexed to the Treaties.

According to its terms of reference<sup>1</sup>, the FoP is to examine "*all the issues linked to the end of the 5 year transitional period set out in Article 10 of Protocol 36 to the Treaties, and in full compatibility with the Treaties*", and will report to Coreper.

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<sup>1</sup> Doc. 6527/1/14. See also general introductory note to the work of the FoP in doc. 7519/14.

2. More specifically, the FoP was to scrutinise the list of measures covered by the application of Article 10(1) to (3) of the Protocol, i.e. acts of the Union in the field of police cooperation and judicial cooperation in criminal matters adopted before the entry into force of the Lisbon Treaty (ex-third pillar *acquis*), and examine issues linked to the end of applicability of the relevant acts to the UK as a consequence of the so-called block opt-out and the possibility for the UK to notify its wish to re-participate in such acts, in accordance with Article 10(5) of the Protocol, including the avoidance of any legal and operational gap in the application of key Union instruments in the area. It is foreseen that the FoP may work until the end of 2014, if necessary.

3. As indicated in the general introductory note to the FoP (point 13 of doc. 7519/14), a way to avoid a legal and operational gap is to proceed with technical work so as to allow both for the formal re-opting in notification by the UK and the formal adoption of the relevant decisions authorising the UK re-opting in (by the Commission for the non-Schengen *acquis* and by the Council for the Schengen *acquis*) to take place on 1 December 2014, while fully respecting each institution's respective role in the procedure. This requires preparing all texts needed in advance. In addition, due to internal procedures in the UK, it would be desirable that the list of acts which will be subject to re-opting in be "politically" agreed in June.

## **II. DISCUSSIONS**

4. The FoP has met on five occasions: 18 March, 31 March, 15 April, 30 April and 15 May 2014. The meetings have each time been split into two parts, i.e. first the Schengen-related issues (in a mixed committee composition) and then the non-Schengen issues.

The Presidency also regularly invited delegations to provide written comments and observations. Twelve Member States did so on various aspects of the matters dealt with by the FoP.

## **A. Non-Schengen related issues**

### **a) *General list of ex-third pillar measures***

5. The preliminary list of ex-third pillar *acquis* established by the Commission (doc.7793/14) has been scrutinised and the FoP suggested corrections by identifying measures which have been "lisbonised" (i.e. amended, replaced or repealed by an act adopted post-Lisbon)<sup>2</sup>, measures not belonging to the ex-third pillar *acquis*<sup>3</sup> or measures no longer in force, which could be removed from the list, as well as certain measures of ex-third pillar *acquis* which were to be moved from the non-Schengen section to the Schengen section. The revised preliminary list is in document 9883/14.

### **b) *Issues related to the general list of ex-third pillar measures and the wish of the UK to rejoin certain (non-Schengen) measures***

6. Given the fact that, by letter of 24 July 2013, the UK Permanent Representative notified the Council that the UK had made use of the possibility provided by Article 10(4) of Protocol 36, i.e. the so-called "block opt-out" concerning the ex-third pillar *acquis*, and that the UK has informally indicated its intention to seek to opt back into a number of instruments of the relevant *acquis*<sup>4</sup>, the FoP heard the views of delegations on this issue, with respect to the three tests foreseen by the last sentence of Article 10(5) of Protocol 36.<sup>5</sup>

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<sup>2</sup> See list of lisbonised acts in doc. 9930/14.

<sup>3</sup> Some delegations were of the opinion that the eight agreements between the Union and third countries on procedures for exchange of classified information do not belong to ex-third pillar *acquis* but to CFSP *acquis* and should therefore not be listed as ex-third pillar *acquis* on which the block opt-out would apply (see instruments No 56, 58, 64, 66, 74, 75, 81 and 113 in the Commission's preliminary list contained in doc. 7793/14). These were deleted in the revised list (doc. 9883/14).

<sup>4</sup> See list of 35 measures referred to in the letter dated 9 July 2013 addressed by the UK representatives in CATS to their colleagues Heads of Delegation of CATS.

<sup>5</sup> It is recalled that pursuant to the last sentence of Article 10(5), when considering the UK request to re-opt in, the Union institutions involved and the UK "*shall seek to re-establish the widest possible measure of participation of the United Kingdom in the acquis of the Union in the area of freedom, security and justice without seriously affecting the practical operability of the various parts thereof, while respecting their coherence*". This means that both the UK and the Union (i.e. the Council and the Commission before allowing, under their respective powers, the re-participation of the UK) will have to respect three principles: (1) widest possible measure of participation, (2) not seriously affecting the practical operability of the various parts of the JHA *acquis*, and (3) respecting the coherence of these various parts.

In doing so, the FoP bore in mind that the procedures for re-opting in to the relevant measures differ between non-Schengen measures, for which Article 331(1) TFEU will apply (Commission responsibility) and Schengen measures, for which Article 4 of Protocol 19 will apply (Council responsibility, by unanimity).

7. The Commission has, to the extent possible, kept the FoP updated about its ongoing discussions with the UK on the list of non-Schengen measures which the UK will seek to rejoin on 1 December 2014, without however giving sufficient information on the actual substantive content of such discussions. In addition to this list, several Member States have highlighted other measures which they consider the UK should rejoin in order to meet the criteria set out under Article 10(5) of Protocol 36. In particular<sup>6</sup>, several Member States have highlighted the two Prüm Decisions<sup>7</sup>, the Probation Framework Decision,<sup>8</sup> the Europol implementing instruments,<sup>9</sup> and the European Judicial Network Decision<sup>10</sup>.

Furthermore, a number of Member States consider that the Council should refrain from agreeing on the draft Council Decision on the Schengen *acquis* until such time as there is a clear picture and a political understanding on the list of ex-third pillar measures which the UK will rejoin.

8. The Commission indicated that it would take account of Member States' views during its discussions with the UK on the list of non-Schengen measures which the UK will seek to rejoin. The FoP underlined the necessity to be informed of the content of that list as soon as possible in view of allowing that the list of acts which will be subject to re-opting in be "politically" agreed .

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<sup>6</sup> Other instruments were mentioned by a few delegations, such as the Framework Decision on conflicts of jurisdiction (2009/948), the PIF *acquis*, the anti-corruption *acquis* or the anti-terrorism *acquis*.

<sup>7</sup> Decisions 2008/615 and 2008/616.

<sup>8</sup> Framework Decision 2008/947.

<sup>9</sup> Staff rules (and amending act) of 1998, Decision 2009/934 (exchange of information and data between Europol and partners), Decision 2009/935 (list of third countries for agreements with Europol, which has been "lisbonised" on 6 May 2014), Decision 2009/936 (Europol analysis files) and Decision 2009/968 (confidentiality of Europol information).

<sup>10</sup> Decision 2008/976.

This information is essential in order for the Council to ascertain whether it can proceed with its Decision on Schengen-related measures, also in view of the fact that there are links between the two areas (non-Schengen and Schengen acts).<sup>11</sup>

**B. Schengen-related issues**

*a) The content of the Schengen acquis*

9. The Group reached a general understanding on the content of the ex-third pillar Schengen *acquis* by which the UK will continue to be bound (either because this has been "lisbonised" or because this is not ex-third pillar *acquis*), to which the UK will seek to re-opt in and from which the UK will opt-out as a result of the block opt-out. This is shown in the tables in doc. 9931/14.

*b) Draft Council Decision on the notification of the UK of its wish to take part in some provisions of the ex-third pillar Schengen acquis and amending Decisions 2000/365 and 2004/926 (doc. 9929/14)*

10. Pursuant to Article 4 of Protocol 19, made applicable by Article 10(5) of Protocol 36, the UK "*may at any time request to take part in some or all of the provisions of the Schengen acquis. The Council shall decide on the request by unanimity*" (of the Schengen Member States and the UK). In order to complete the technical work, discussions of tentative drafts were held in the FoP. The current text of the draft Council Decision (doc. 9929/14) is largely supported by the FOP from a technical point of view, subject to the wider issue referred to in point 8 above.

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<sup>11</sup> This is the case, for instance, with regard to the Framework Decisions on the European arrest warrant (2002/584/JHA) and the transfer of prisoners (2008/909/JHA) which both replace "*corresponding provisions*" of the Schengen Convention or the Framework Decision on data protection in police and judicial cooperation in criminal matters (2008/977/JHA) which is part of the ex-third pillar Schengen *acquis* but in effect covers also non-Schengen ex-third pillar *acquis*.

11. It emerges from the work of the FoP that the overall solution as regards the UK's re-participation in the ex-third pillar Schengen *acquis* could comprise the following elements:

- (a) the proposed drafting technique for the Decision is to have a general Article (Article 1) about the re-opting in and two Articles amending the two existing Decisions on UK participation (2000/365 and 2004/926), preceded by recitals explaining, notably, the specific process foreseen by Article 10 of Protocol 36. It is recalled that these two Decisions were based on Article 4 of the Schengen Protocol and therefore do not belong to the ex-third pillar *acquis* and are not subject to the block opt-out. Proceeding by amendment has the advantage of keeping untouched important parts of the text, including for instance Article 8(2) of Decision 2000/365/EC which is closely linked to the mechanism set out in Article 5(2) of the Schengen Protocol.

The same is true for references to acts belonging to the Schengen *acquis* by which the UK is bound, but which are not part of ex-third pillar *acquis* and are therefore not subject to the block opt-out.<sup>12</sup>

In order to clarify the end result, a consolidated version of each of the two Decisions (2000/365 and 2004/926), as amended by the above amending Decision, could be published in the Official Journal, for information (C part of the OJ), on the same day as the amending Decision will be adopted formally;

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<sup>12</sup> Such as, for instance, Articles 26, 27(1), 75 and 76 of the Schengen Convention or Decision SCH/Com-ex (94) 28 on transport of drugs, Directive 2002/90 on unauthorised entry, Regulation 377/2004 on immigration liaison officers and Directive 2004/82 on passenger data (API).

- (b) when certain provisions or chapters of the Schengen Convention were partly or wholly replaced by subsequent acts to which the UK will participate, either because the subsequent act will be part of the re-opting in list (such as the European Arrest Warrant) or because it has been "lisbonised" and therefore will continue to bind the UK (such as the 2000 Mutual Assistance Convention and its Protocol), the relevant provisions or chapters have been kept in Decision 2000/365, in order to let the different "layers" of successive rules apply as they provide, notably towards the associated countries.<sup>13</sup>

In addition, a specific recital on "lisbonised" acts has been inserted in the draft Decision, which in addition to the above 2000 MLA Convention and its Protocol, refers also to the Schengen Evaluation Mechanism and the 2008 Schengen Agreement with Switzerland;

- (c) the so-called "network" Decision 2007/171, which was considered as being both still in force and necessary to the operability of SIS II, has been inserted in the draft Decision as part of the SIS II related *acquis* by which the UK will need to remain bound in order to join the SIS;<sup>14</sup>
- (d) the references to the Accession Agreements to the Schengen Convention (listed in Article 1(b) of Decision 2000/365), as well as Articles 2 and 3 of Decision 2000/365, were deleted, as these concern provisions giving the names of the competent authorities under Articles 40 and 65 of the Schengen Convention, for which a specific procedure for updating the names was set up by Decision 2000/586, amended by Decision 2003/725, to which the UK will re-opt in.

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<sup>13</sup> This is the case for Chapter 2 of Title III on mutual assistance (Articles 48 to 53), which has been "lisbonised" by the EIO Directive 2014/41/EU (Article 34(1)(b)), Chapter 4 on extradition (Articles 59 to 66), of which "*corresponding provisions*" have been replaced by the EAW Framework Decision 2002/584/JHA (see Article 31(1)(e)), but which will continue to apply with associated countries, and Chapter 5 on transfer of enforcement (Articles 67 to 69), of which "*corresponding provisions*" have been replaced by the Framework Decision on transfer of prisoners 2008/909/JHA (see Article 26(1), 3<sup>rd</sup> indent), but which will also continue to apply with associated countries. This is the case also for Article 73 of the Schengen Convention (on controlled deliveries), which was repealed by the 2000 Mutual legal assistance Convention (see Article 2(2)), itself "lisbonised".

<sup>14</sup> On the other hand, the so-called "test" Decision (2008/173) was considered as having elapsed because it has consumed all its effects (it was a "one-off" act). The same goes for the "SIS migration" Decision (2009/724).

However, the "without prejudice" clauses on the Nordic Passport cooperation contained in the three Agreements with Denmark, Finland and Sweden remain listed as these do not belong to the ex-third pillar *acquis* concerned by the block opt-out;

- (e) the references to the handbook on cross border police cooperation (SCH/Com-ex (99) 6) have been deleted because it is considered as obsolete, or rather replaced or superseded by a number of other instruments;<sup>15</sup>
- (f) the powers of the Council in Article 5(1) and 6(1) of Decision 2000/586 (i.e. notably on the future putting into effect of the SIS II *acquis*) have been qualified as implementing powers conferred on the Council, in accordance with Article 291(2) TFEU, with the appropriate justification in a specific recital in the draft Decision;
- (g) in Decision 2004/926, references to the Framework Decision 2008/977/JHA (data protection in police and judicial cooperation in criminal matters), in which the UK will re-opt in, and to Decision 2008/149/EC (EU-Switzerland Agreement on Schengen), which was "lisbonised" by the EU-Liechtenstein Protocol on Schengen (2011/349/EU), were added to Annex I.<sup>16</sup>

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<sup>15</sup> The same goes for the Declaration on abduction of minors (SCH/Com-ex (97) decl. 13 rev 2) which has been superseded by point 5.5 of the Sirene Manual and by point 6 of Annex VII of the Schengen Border Code. As regards the agreement on cooperation in proceedings for road traffic offences (SCH/Com-ex (99) 11 rev 2), delegations were reminded of the Council Legal Service opinion of 3 December 1999 (doc. 12882/99) under which this cannot be considered as EU *acquis* because it is an international agreement between States which include third countries, besides EU Member States.

<sup>16</sup> It is recalled that Decision 1999/439 on the Schengen Agreement with Norway and Iceland and Decision 2007/801 on the full application of the Schengen *acquis* to the CZ, EE, LV, LT, HU, MT, PL, SI and SK were both based on legal bases not belonging to the ex-third pillar *acquis* and are therefore not subject to the block opt-out.

c) *Issues related to the Schengen Information System II (SIS II)*

12. The SIS II *acquis* is part of the list of ex-third pillar Schengen *acquis* and of the informal list of 35 measures the UK wish to re-join. On the basis of the existing Decision 2000/365/EC which authorised the UK to take part in some of the provisions of the Schengen *acquis*, the UK asked in November 2012 to join SIS II and to be therefore evaluated for that purpose. The first step in this accession process was the successful conclusion of a data protection evaluation, which was taken note of by the Council on 3 March 2014.<sup>17</sup>

A precondition for taking the second step of the process, i.e. a live evaluation of the use and functioning of the SIS, is that the Council would decide unanimously to provisionally allow the UK to load and use real SIS data and to enter the SIS alerts stemming from UK databases. Following a statement made by the UK on 5 February 2014, the Schengen matters (SIS/SIRENE) Working Party held a discussion on 9 April on the UK's technical preparations for accession to SIS II. Its conclusions were sent to the FoP.<sup>18</sup>

13. As had become clear during the discussions both in the SIS/SIRENE Working Party and in the FoP, including from written observations by delegations, the Presidency noted at the FoP on 15 April that a unanimous decision could not be adopted on the UK's provisional loading of the data for evaluation purposes and on the putting into effect of SIS II for the UK before the relevant formal decisions have been taken by the Council and the Commission, respectively, on 1 December 2014 as regards the ex-third pillar measures in which the UK would opt-back in.

#### IV. FOLLOW UP

14. In view of the above, the Presidency invites delegations to take note of this report and to:

- (a) take note of the work already done to scrutinize the list of measures that constitute the ex-third pillar *acquis*, as reflected in the doc 9883/14.

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<sup>17</sup> Doc. 6479/14 and doc. 5324/1/14 REV 1 RESTREINT UE/EU RESTRICTED.

<sup>18</sup> Doc. 8838/14

- (b) provisionally note that there is a broad technical agreement on the text of the draft Council Decision on the notification of the UK of its wish to take part in some provisions of the ex-third pillar Schengen *acquis* and amending Decisions 2000/365 and 2004/926, although a number of Member States consider that the Council should refrain from agreeing on the draft Decision until such time as there is a clear picture and a political understanding on the list of ex-third pillar measures which the UK will rejoin;
- (c) provisionally note that, in order to clarify the end result, a consolidated version of each of the two Decisions (2000/365 and 2004/926), as amended by the above amending Decision, should be published for information in the OJ (Part C);
- (d) provisionally note that, for transparency and legal certainty reasons, the list of the ex-third pillar *acquis* which "*shall cease to apply to*" the UK as a result of the block opt-out should be published for information in the OJ (Part C);
- (e) take note that decisions on the UK's loading the data for evaluation purposes and on the putting into effect of SIS II for the UK could take place only after the relevant formal decisions have been taken by the Council and the Commission, respectively, on 1 December 2014 as regards the ex-third pillar measures in which the UK would opt-back in.

15. The necessary technical work in the FoP will continue on this file, in accordance with its terms of reference, including with regard to the list of ex-third pillar *acquis* of which some measures have been or will be identified as being obsolete and therefore appropriate for being covered by the REFIT initiative of the Commission. It was noted that the Commission will issue a communication on that initiative in June and will prepare draft proposals for repealing the relevant EU acts after that. The FoP will address, *inter alia*, this obsolescence issue at its first meeting under the incoming Italian Presidency in July. Other issues might also be addressed (such as for instance the possible need for transitional measures or the issue of financial consequences).