



**COUNCIL OF
THE EUROPEAN UNION**

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16960/12

**Interinstitutional File:
2012/0033 (NLE)**

**SIRIS 104
SCHENGEN 74
COMIX 670**

NOTE

from: Presidency
to: COREPER (Mixed Committee)

No. prev. doc.: 16590/12 SIRIS 101 SCHENGEN 72 COMIX 658
11142/2/12 REV 2 SIRIS 44 SCHENGEN 45 COMIX 371
11143/2/12 REV 2 SIRIS 45 SCHENGEN 46 COMIX 372

Subject: Council Regulations on migration from the Schengen Information System (SIS 1+) to the second generation Schengen Information System (SIS II) (recast)

1. On 3 May 2012, the Commission presented a proposal for a Council Regulation on migration from the Schengen Information System (SIS 1+) to the second generation Schengen Information System (SIS II) (recast) as set out in 9485/12 SIRIS 31 SCHENGEN 31 COMIX 284.
2. The proposal was discussed by the Working Party for Schengen Matters (Acquis) on 11 May 2012, CATS on 24 May 2012 and JHA Counsellors on 16 July 2012 and 28 November 2012.

3. In order to reflect the particular positions of Ireland and the United Kingdom, the original proposal was divided into two identical texts of proposals for Council Regulations, setting up a more "traditional" legal architecture for this kind of acts. One (11142/1/12 REV 1 SIRIS 44 SCHENGEN 45 COMIX 371 + COR 1) of the instruments dealt with the policing and judicial co-operation elements of SIS II to which those countries are bound subject to their decision under Protocol 19 (the "Schengen Protocol") and the other (11143/1/12 REV 1 SIRIS 45 SCHENGEN 46 COMIX 372 + COR 1) dealt with the border and immigration elements where those countries are not bound because it constitutes a development of the provisions of the Schengen *acquis* in which they do not take part.

4. By letter of 15 May 2012, the Council requested the Opinion of the European Parliament. By letter of 5 October 2012, the European Parliament was further requested to take into consideration the decision to split the initial proposal into two texts of proposals for Council Regulations.
The European Parliament adopted its Opinion on 21 November 2012.

5. On 28 November 2012 the JHA Counsellors met to consider the Opinion of the European Parliament. They agreed to modify the proposals for Council Regulations in order to integrate some concerns expressed by the European Parliament. The revised versions of the proposals for the Council Regulations are now set out in 11142/2/12 REV 2 SIRIS 44 SCHENGEN 45 COMIX 371 and 11143/2/12 REV 2 SIRIS 45 SCHENGEN 46 COMIX 372.

6. At the meeting of the JHA Counsellors on 28 November 2012, the Commission proposed to insert two sentences to recital 28 in both proposals. There was an agreement concerning the first sentence. However, with respect to the second sentence, there were substantive remaining differences between the Commission and the Council, supported by its Legal Service, regarding the type of examination procedure which will apply by virtue of Article 17(3): "*This Regulation should exclude the possibility to adopt an implementing measure by the Commission in case the committee delivers no opinion.*" The Council Legal Service indicated that in light of the Council's position concerning the choice between different types of examination procedure, such a sentence would pre-empt the right of the legislator to freely choose the type of examination procedure and no justification had to be given in recitals for that choice, since there is no hierarchy between the several options for examination procedure as foreseen in Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers¹. Since a similar issue has been recently² resolved in the context of Council Regulation (EC) No 343/2003/EC³ ("Dublin Regulation"), the Council should consider a coherent horizontal position on this matter and not create any precedent.
7. General scrutiny reservations are still pending from AT, DE and FR.
8. These two acts set out the legal regime for the SIS II migration, reflecting the technical migration approach outlined in the SIS II Migration Plan, and will provide for financial support to Member States for costs involved in SIS II national development for migration-related testing activities and the migration itself, which need to be adopted by 31 December 2012.

¹ OJ L 55, 28.2.2011, p. 13.

² At meeting of Coreper, Part 2, on 27 November 2012.

³ OJ L 50, 25.2.2003, p. 1.

9. Taking in consideration the need to adopt these Council Regulations in 2012, **COREPER is requested to endorse the agreement on substance regarding the proposals for Council Regulations on migration from the Schengen Information System (SIS 1+) to the second generation Schengen Information System (SIS II) (recast) and resolve the outstanding legal issue raised in respect of recital 28, with a view to forwarding the proposals for Council Regulations to the Council (TTE) on 20-21 December 2012 for adoption as an A-item.**
