



**COUNCIL OF
THE EUROPEAN UNION**

**Brussels, 26 February 2014
(OR. en)**

7038/14

LIMITE

**SIRIS 12
SCH-EVAL 24
COMIX 128**

NOTE

From: Presidency
To: Delegations
Subject: Preparation for the accession of the UK to the SIS II

1. Following the discussions and the statement delivered by UK (Annex 1) at the Schengen Matters Working Party (SIS/SIRENE) meeting on 5 February 2014, and the subsequent request for comments regarding the preparation for the UK accession to SIS II, delegations will find attached a compilation of comments received from Member States (Annex 2)¹.
2. The main technical issues conveyed by the Member States are:
 - organisational arrangements for implementation of accession of UK to SIS;
 - transitional arrangements for handling of SIS data in case of potential operational gap;
 - arrangements for validation procedure envisaged by UK and for exchange of SIRENE forms for alerts related to European Arrest Warrant (Article 26² alerts).

¹ As received by the GSC between 12 February 2014 and 19 February 2014, and with linguistic revision as appropriate, in agreement with the delegations involved.

² Council Decision 2007/533/JHA of 12 June 2007 on the establishment, operation and use of the second generation Schengen Information System (SIS II), OJ L 205, 7.8.2007, p. 63.

3. The main issues of more general nature raised by the Member States are:
 - proportionality assessment for the purpose of executing European Arrest Warrants,
 - handling of Article 26 alerts transferred from SIS 1+ to SIS II,
 - handling of Article 26 alerts from Associated Countries.

4. The Presidency recalls that all questions linked to the application of Article 10 of Protocol 36 to the Treaties will be dealt within the mandate of the Friends of Presidency Group, activated on 20 February 2014 by Coreper, which reports to Coreper. On issues concerning the Schengen *acquis*, the relevant Working Parties and experts in charge of that *acquis* may contribute to the discussions within that group, as set out in its terms of reference (please see 6527/1/14 REV 1 JAI 88 CATS 24 SCHENGEN 1).

5. As regards the technical questions raised by Members States in their comments, the Presidency invites the UK to provide its comments and, where relevant, clarifications by COB on 5 March 2014, to the email address sis.sirene@consilium.europa.eu.

STATEMENT FROM THE UK³

On the 24th July 2013, the UK's Prime Minister wrote to the President of the Council of Ministers providing formal notification that the UK had decided to exercise its right to opt out of the 130+ Justice & Home affairs pre-Lisbon treaty measures.

As a result, on the 1st December 2014, the UK will cease to be bound by these measures, except where the UK government has negotiated (with EU member States) to re-join.

At this moment in time, and until the opt out is exercised (1st December 2014), the UK is still bound by the pre-treaty measures and is not outside of the legal provisions of either the EAW Framework or the SIS II Council Decision.

The UK Government has now announced that it intends to seek to re-join a package of some 35 measures. These include the EAW and SISII.

These 35 measures, as announced, is the UK Governments formal position and will form the basis of negotiations with EU Member States. These are laid out in a SISII Command Paper presented to the UK Parliament.

The UK are keen to remain as transparent as possible on this and are keen to conclude this matter within the Greek Presidency so that we can avoid what will almost certainly be significant operational gaps as of the 1st December 2014. In terms of EAW, the UK last year executed some 1400 and we expect this to rise significantly when we join SISII. The UK opting back into the SISII and EAW measures is of significant benefit to both the UK and all EU Member States.

It is in no one's interest to leave this issue until the last minute, which will, almost certainly, risk ongoing and future operational activity.

³ As sent by email from the UK delegation to the GSC on 5 February 2014 and subsequently distributed via email by the GSC to delegations to the Schengen Matters Working Party (SIS/SIRENE) on 10 February 2014.

The UK considers that its domestic legislation complies with that of the EU. To this end, the UK is sure that its validation process for Article 26 ALERTS and EAW is in line with the Council Decision, in that we assess the A Form (Article 28) and that the EAW must be attached to the ALERT (Article 27). However, we do not fully understand that the Council decision gives EU Member States 3 years to comply with this. The UK has to follow its national laws/legislation and our forthcoming legislation is in line with the Council decision in this regard (except for the 3 year period).

We have listened to Member States (and associated countries) concerns regarding the pre-validation exercise (as a result of the SIS/VIS meeting) and particularly welcome the practical proposals put forward during those discussions. The UK will be seeking to utilise all practical methods to reduce the burden on Member States and Associated Countries.

To this end we will be looking at all methods of obtaining EAW, such as through e-ASF, utilising EAW already in possession and perhaps populating the UK N.SIS with ALERTS during our pre-validation phase.

We will be writing to all Member States and Associated Countries in respect of our requirements and we will include a copy of our written responses to the Commission regarding our Schengen Evaluation process. The UK has now passed the Data Protection Evaluation and we are keen to progress to the next, which is access to SISII data.

The UK intend to join SISII in October 2014 and we see it as a significant benefit to the UK in terms of public safety.

The Prime Minister of the UK has stated publically that, subject to re-election in 2015, he would look to carry out a public referendum of the UK's participation in the EU. However, this is, as yet, a statement and is not ratified in any legislation. To date no formal agreement regarding a referendum nor parliamentary approval for has been granted. As such, and at this point in time, the UK is a full Member State of the EU and will continue to be so.

AUSTRIA

First of all Austria agrees that the UK's decision to opt back into the SIS II measures is of significant benefit to both the UK and all EU Member States/Associated Member States.

With regard to the current legal situation, Austria wishes to make the following comments:

1. Formally, the UK has currently opted out of the SIS II and network decision.

In our understanding the first step – before testing, transmitting data – has to be to provide Member States with legal certainty in opting back into these fields. Otherwise, there is a danger that Member States have to take measures/resources which probably offer no added value if there is no opting back decision from the UK. Since resources and manpower are not unlimited in all Member States, this is a very important point.

In this regard, the question also arises of what will happen to the data transmitted (if there is no opting back from UK) from the data protection point of view?

2. Verification process of Form A

a) Art. 26 SIS II alerts

The UK has requested Member States to send not just form A, but also the European Arrest Warrant (EAW). In accordance with the SIS II Decision and other legal documents (Commission Implementing Decision on the SIRENE Manual⁴), it is not envisaged that the EAW will be transmitted separately to Member States, since the EAW has to be attached to the SIS II alerts. In our opinion, it is questionable whether the separate transmission of the EAW is in line with legal requirements and it causes additional work for MS.

⁴ Commission Implementing Decision of 26 February 2013 on the Sirene Manual and other implementing measures for the second generation Schengen Information System (SIS II). OJ L 71, 14.03.2013, p. 1

b) Art. 26 SIS I alerts (Migrated alerts)

The SIS II decision⁵ gives Member States a period of 3 years time to update the alerts to SIS II alerts. In this respect, it needs to be mentioned that the EAW has to be attached after updating the alert to SIS II format.

In our opinion, it is questionable whether the separate transmission of the EAW is in line with legal requirements and it causes additional work for MS.

Austria questions also the proposal of systematic flagging from UK if a EAW is not transmitted together with the Form A.

c) Proportionality checks of Art. 26

The UK announced, in accordance with its national law, a proportional check of incoming Art. 26. Since this point is not clear (e.g. what will be checked in relation to proportionality?), a more detailed statement with examples would be useful.

⁵ Council Decision 2007/533/JHA of 12 June 2007 on the establishment, operation and use of the second generation Schengen Information System (SIS II).

FRANCE

The French authorities set great store by their cooperation with the United Kingdom, particularly in the area of police and judicial cooperation in criminal matters. They have taken note of the United Kingdom's decision to exercise its right to opt out as provided for in Protocol No 36. The 35 measures which the United Kingdom wishes to re-join include the Council Decision on the establishment of the Schengen Information System (SIS II) (opt-in).

However, the French authorities attach the greatest value to the preservation of the Community acquis. This opt-out decision must not create problems when it comes to consistency in applying European legislation. France has always stressed the importance of the European arrest warrant (EAW), which is the cornerstone of mutual recognition at European level.

The French authorities therefore thank the United Kingdom for presenting their statement and wish to make the following comments:

- The French authorities are of the opinion that the UK authorities' requirements risk imposing an undue burden on the other Member States. Indeed, from a technical viewpoint:
 - they would make it necessary to process an excessively large number of European arrest warrants
 - they would impose burdensome technical and human constraints
 - in practice, the substantive examination of European arrest warrants by the executing authorities and the systematic forwarding of an electronic copy of these warrants would considerably increase costs (translation of documents) and lengthen processing times.

- In this regard the United Kingdom's intention, prior to connection to SIS II, to inspect all European arrest warrants already distributed in SIS II (checking the A form, electronic copy of the EAW itself), supplemented by a proportionality check, represents an unusual demand not provided for in Community legislation. In any event, the French authorities are against the judicial authorities or SIRENE Bureau operators of the executing State being able to check the proportionality of European arrest warrants issued, since such a ground for refusal is not provided for by Framework Decision 2002/584/JHA. Moreover, in requiring the immediate forwarding of all EAWs, the United Kingdom is disregarding the 3-year transitional period granted to Member States by Council Decision 2007/533/JHA of 12 June 2007 for the purpose of making the necessary adjustments.
- From a data protection viewpoint, the French authorities would also like to know what will happen to the data forwarded to the United Kingdom should it not exercise its opt in.

GERMANY

On the 24th July 2013, the UK's Prime Minister wrote to the President of the Council of Ministers providing formal notification that the UK had decided to exercise its right to opt out of the 130+ Justice & Home affairs pre-Lisbon treaty measures.

As a result, on the 1st December 2014, the UK will cease to be bound by these measures, except where the UK government has negotiated (with EU member States) to re-join.

Comment 1:

All pre-Lisbon treaty measures in the field of JHA (such as SIS II and FWD on EAW) won't be longer applicable with regard to UK.

The mentioned option for re-joining some 35 measures again is still in a stage of a mere announcement. There are serious concerns that the complete procedure to re-join won't be finished in a legally binding manner in due time (01.12.2014). Even the necessary negotiations have not been scheduled yet.

At this moment in time, and until the opt out is exercised (1st December 2014), the UK is still bound by the pre-treaty measures and is not outside of the legal provisions of either the EAW Framework or the SIS II Council Decision.

Comment 2:

Yes, there is a valid legal base until 30.11.2014. But there are serious concerns that there will be at least a gap afterwards (see comment 1).

The UK Government has now announced that it intends to seek to re-join a package of some 35 measures. These include the EAW and SISII.

Comment 3:

From the point of view of the very moment these two statements are mere announcements.

These 35 measures, as announced, is the UK Governments formal position and will form the basis of negotiations with EU Member States. These are laid out in a SISII Command Paper presented to the UK Parliament.

Comment 4:

Keeping in mind the elections in 2015 and the imponderability of the intended referendum (see below) there will be at least a significant term where there won't be a lasting reliability.

The UK are keen to remain as transparent as possible on this and are keen to conclude this matter within the Greek Presidency so that we can avoid what will almost certainly be significant operational gaps as of the 1st December 2014. In terms of EAW, the UK last year executed some 1400 and we expect this to rise significantly when we join SISII. The UK opting back into the SISII and EAW measures is of significant benefit to both the UK and all EU Member States.

Comment 5:

The UK was scheduled to join the SIS for the first time in 2004! This step was postponed on a number of occasions – always by the UK. Bearing in mind that the UK decided the opt-out in July 2013 and that the necessary negotiations for re-joining have not started yet, it is very difficult to comprehend the rationale for scheduling the accession to SIS II for 26.10.2014 – 5 weeks before the expiry of the legal base.

It is in no one's interest to leave this issue until the last minute, which will, almost certainly, risk ongoing and future operational activity.

The UK considers that its domestic legislation complies with that of the EU. To this end, the UK is sure that its validation process for Article 26 ALERTS and EAW is in line with the Council Decision, in that we assess the A Form (Article 28) and that the EAW must be attached to the ALERT (Article 27). However, we do fully understand that the Council decision gives EU Member States 3 years to comply with this. The UK has to follow its national laws/legislation and our forthcoming legislation is in line with the Council decision in this regard (except for the 3 year period).

Comment 6:

To be in line with the provisions laid down in the Council decision UK is obliged to

- **accept that supplementary information according Article 28 (A-forms) is provided via SIRENE-network while entering the corresponding alert into the SIS II;**
- **accept that additional data according Article 27 - European Arrest Warrant (EAW) is provided via SIS II;**
- **accept that amnestied alerts in the SIS II (Article 70) may not include the EAW.**

We have listened to Member States (and associated countries) concerns regarding the pre-validation exercise (as a result of the SIS/VIS meeting) and particularly welcome the practical proposals put forward during those discussions. The UK will be seeking to utilise *all* practical methods to reduce the burden on Member States and Associated Countries.

To this end we will be looking at all methods of obtaining EAW, such as through e-ASF, utilising EAW already in possession and perhaps populating the UK N.SIS with ALERTS during our pre-validation phase.

Comment 7:

The pre-validation exercise has to be in line with the provisions laid own in the Council decision on SIS II (see Articles 24, 25 and 49(2)) and the Frame Work Decision (FWD) on EAW⁶ (see Articles 3 and 4). There are serious doubts that these requirements are fulfilled:

- **The proportionality assessment is not in line with Article 2(2) FWD on EAW;**
- **The interruption of data flow between UK N.SIS and LTC is de facto an additional flagging system in the second line without any control of the data owner (see Article 49(2) and is not in line with Article 9(2).**

⁶ Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA). OJ L 190, 18.07.2002, p. 1.

As mentioned in comment 6 UK will receive the obligatory A-forms via SIRENE-network whereas the EAW will be accessible as soon as UK N.SIS is fully synchronized with CS.SIS. EAW won't be provided in beforehand via SIRENE-network.

The procedure for providing the necessary information with regard to the pre-verification process in UK was already delivered in July 2013 to SIRENE UK.

The burden on Member States and Associated Countries (27 countries) regarding the preparation of the accession of the UK to SIS II is in general quite significant and in particular very high with regard to the pre-verification process. This expected burden for the 27 countries already connected to the SIS II is justified as soon as there is solid and lasting legal base implemented.

We will be writing to all Member States and Associated Countries in respect of our requirements and we will include a copy of our written responses to the Commission regarding our Schengen Evaluation process. The UK has now passed the Data Protection Evaluation and we are keen to progress to the next, which is access to SISII data.

Comment 8:

The UK answers to the evaluation questionnaire (see note COM 23.01.2014 to Working Party for Schengen Matters [Scheval]) are not satisfying all over (cf. comments 1-7).

The UK intend to join SISII in October 2014 and we see it as a significant benefit to the UK in terms of public safety.

Comments 9:

See comment 5.

The Prime Minister of the UK has stated publically that, subject to re-election in 2015, he would look to carry out a public referendum of the UK's participation in the EU. However, this is, as yet, a statement and is not ratified in any legislation. To date no formal agreement regarding a referendum nor parliamentary approval for has been granted. As such, and at this point in time, the UK is a full Member State of the EU and will continue to be so.

Comment 10:

It is not convincing when UK on one hand gives the impression that the announcement of the intention to seek to re-join some 35 measures again is a reliable base whereas on the other hand with regard to the possible referendum this issue is 'however, as yet, a statement and is not ratified in any legislation'. Both statements are from UK administration and might be easily used vice versa = no reliability.

LITHUANIA

The Lithuanian delegation believes that it is up to the issuing state to decide in every single case whether it is proportionate or not to use this type of legal instrument, i.e. the European Arrest Warrant (EAW). Lithuania has a legal provision (set forth in its Criminal Procedure Code), which obliges its competent judicial institutions to assess the cost-effectiveness and proportionality principles prior to deciding on the issuance of the EAW.

The proportionality assessment for the purpose of the EAW executing decision could not be unilaterally introduced by either the UK or any other country. This issue should be dealt with at an appropriate level and by proper means.

Moreover, the Framework Decision on EAW is based on the mutual recognition principle – which means that the judicial authority of one State recognises the decision adopted by another State's judicial authority.

NORWAY

As there still are questions that are unclear as to UK's procedure for alerts from associated countries and in order to be able to advise the Norwegian Ministry of Justice on this matter, the Norwegian delegation to the SIS/SIRENE working party would like to have answers/comments from the UK on the following issues:

- Norway presumes that the UK, in accordance with Article 26(1) of Council Decision 2007/533/JHA of 12 June 2007 will only request a permanent flag in cases where the Justice of Peace (or Sheriff in Scotland) decides NOT to issue a provisional arrest warrant under section 73 of the UK Extradition Act 2003 - and not systematically request flags on Norwegian Article 26 alerts. Please comment on this.
- However, if the UK requests a flag on a Norwegian Article 26 alert - we presume that the Article 26 alert of the SIS II Council Decision will be transferred into an Article 30 alert "...an alert for the purposes of communicating the whereabouts of the person concerned" ? How long will this procedure take ?
- We would also like to know the expected timeframe from the time when the UK receives a Norwegian Article 26 alert until the alert is visible for the end user.
- When a Justice of the Peace/Sheriff in the UK decides to issue a provisional arrest warrant on a Norwegian Article 26 alert, certain conditions have to be met, ref. section 73 of the UK Extradition Act 2003 states " ...i.e. the person is, or is believed to be, in the UK and is accused in the requesting state...". Are there other conditions, or is this list exhaustive?
- In accordance with Article 26(2), we presume that when the Agreement of 28 June 2006 between the EU and Iceland and Norway on the surrender procedure between the EU and Iceland and Norway enters into force, arrest warrants from Norway and Iceland will follow the same regime in the UK as cases in which the EU Framework Decision 2002/584/JHA applies. We would kindly ask for confirmation.

ROMANIA

If the UK opts in to SIS and the European Arrest Warrant, all Member States, including RO, are bound to send all the A&M forms for the alerts before 9 April 2014 (amnestied alerts) and all A forms related to Article 26, under the SIS II Regulation. This whole process involves a lot of work for SIRENE offices, both from the IT and operational points of view. A technical solution should be found for sending all the data to the UK, including EAW and binary data. We appreciate the UK's efforts to retrieve as much data as possible from e-ASF and also to populate the UK N.SIS with alerts during the pre-validation phase.

Within this approach, Romania would like to ask the UK for a clear calendar relating to this pre-validation in order to give us the time to prepare all the data needed so that we can successfully finalise this process. Romania would also like to make sure that flags will only be requested for those cases in which the UK legislation does not envisage double incrimination or other legislative impediments, and not for minor situations or linguistic misunderstandings.

SLOVAKIA

Slovakia fully supports the proposals of AT and CZ, which were presented at the meeting of SIS/SIRENE Working Party on 5 of February 2014, and in which the need to create a document containing the positions of both parties - the UK and Member States- was articulated.

Because of some existing guesswork and doubts, and as the question of the UK's future direction regarding EU partnership remains open, giving rise to certain concerns over the UK's position on the implementation of the Schengen acquis in the near future, we would like to prevent wasting all efforts, endeavour and costs spent for activities connected with joining the UK into the SIS II, which would be invested ineffectively on the side of all member states.

As the United Kingdom has already taken many steps and measures and has made significant investments in connection with joining the SIS II, we are convinced that the UK is very well aware of all the difficulties which it will have to overcome in the future.

Slovakia supports the UK in its efforts regarding SIS II, further development of SIS and increasing security across Europe. We expect that the United Kingdom will fulfil all the conditions it has agreed to and will respect the common rules of SIS/SIRENE cooperation in the same way as other Member States.

SPAIN

1. Art 27 of Council Decision 2007/533/JHA (SIS II Decision)⁷ reads “*If a person is wanted for arrest for surrender purposes on the basis of a European Arrest Warrant the issuing Member State shall enter in SIS II a copy of the original of the European Arrest*”. Therefore, we consider that neither this nor any other article of the SISII Decision provides for the obligation to attach the European Arrest Warrant (EAW) to the A Forms.
2. Article 70 of the SISII Decision provides for a transitional period of 3 years after the entry into force of the Decision, i.e. 9 April 2013, to adapt the contents of the alerts transferred from SIS1+ to SISII. Accordingly, we are of the view that for the time being there is no legal obligation to comply with the UK requirements regarding the availability of all EAWs associated with Art 26 alerts.
3. Regarding the proportionality assessment envisaged by the United Kingdom, it should be noted that it is not provided for in Framework Decision 2002/584/JHA⁸ as one of the grounds for optional non-execution of the European Arrest Warrant. Spain would welcome the opinion of the legal services (both the Commission and Council Legal Services) on this issue.
4. Besides, in practical terms the transfer of Forms A + associated EAWs to the UK should be done on a “1 by 1” basis, what would imply a huge work overload and high risks for the system.
5. The Timing Schedule is also a reason for concern since the UK considers it necessary to have real information on personal data before they become “operational”. That would introduce another difference vis-à-vis the traditional connection to SIS II followed by other Member States and associated countries.

As already mentioned at the meeting by other MS, we are of the view that this issue is directly linked to the “opting-out/ back in” scenario and that a detailed analysis of all the elements involved is needed before taking a Decision on further steps.

⁷ Council Decision 2007/533/JHA of 12 June 2007 on the establishment, operation and use of the second generation Schengen Information System (SIS II)

⁸ Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA). OJ L 190, 18.07.2002, p. 1

THE NETHERLANDS

Further to the discussions held at the SIS/VIS Committee meeting on 4 February 2014 and the Schengen Matters Working Party (SIS/SIRENE) meeting on 5 February 2014, and in response to the statement presented by the UK delegation, the Dutch delegation would like to propose the following.

The UK had expressed its intention to join SIS II in October 2014. This decision in itself is to be applauded but, considering the UK opt-out (not being included in the third pillar measures as from 1 December 2014), it brings a number of fundamental and practical problems.

A possible SIS II opt-in by the UK will have to be decided on by the European Council unanimously. A decision regarding the European Arrest Warrant (EAW) will have to be negotiated with the Commission; in the meantime, the legal exchange of data with the UK will not be possible. In addition, the UK has apparently decided not to choose an opt-in as regards the 2007 and 2008 Schengen Decisions on network connections and the manual, which does not favour the cohesion of Schengen measures.

Connecting the UK to SIS II will require a great deal of effort and practical work by the Member States, and these will have to be repeated after an opt-in, as the nature of SIS II data means that a mere renewed connection will not be possible because of the daily changes.

It is for these reasons, and because it is not yet definite that the UK will decide to make use of SIS II, that the Netherlands is of the opinion that it would be much better to wait for the final decision within the framework of the approx. 35 measures before connecting the UK to SIS II.

Note:

In order to ensure that a great deal of effort is made without any guarantee that it will not be in vain, it might be advisable to wait for the outcome of the referendum the Prime Minister of the UK has announced for 2017 before connecting the UK to SIS II.