



**COUNCIL OF
THE EUROPEAN UNION**

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NOTE

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| from : | Presidency |
| to : | Coreper |
| Prev. doc. : | 16415/09 JUR 483 JAI 860 CATS 127 17178/09 JAI 905 CATS 134 |
| Subject : | Applicable procedures with the European Parliament on Agreements signed on the basis of Articles 24 and 38 of the Amsterdam Treaty |

Eight international agreements based on Articles 24 and 38 TEU have been signed but have not yet been concluded¹. Some of these Agreements provide for provisional application, subject to their conclusion.

¹ - The 2003 Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the application of certain provisions of the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union and the 2001 Protocol thereto.
- The 2006 Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway.
- The 2007 Agreement between the European Union and the United States of America on the processing and transfer of Passenger Name Record (PNR) data by air carriers to the United States Department of Homeland Security (DHS) (2007 PNR Agreement).
- The 2008 Agreement between the European Union and Australia on the processing and transfer of European Union-sourced passenger name record (PNR) data by air carriers to the Australian Customs Service.
- The 2008 Protocol between the European Union, the Swiss Confederation and the Principality of Liechtenstein on the Accession of Liechtenstein to the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederations Association with the implementation, application and development of the Schengen acquis.
- The 2009 Agreement between the European Union and Iceland and Norway on the application of certain provisions of Council Decision 2008/615/JHA on the stepping up of crossborder cooperation, particularly in combating terrorism and cross-border crime and Council Decision 2008/616/JHA on the implementation of Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime, and the Annex thereto.
- The 2009 Agreement between the European Union and Japan on mutual legal assistance in criminal matters, and
- The 2009 Agreement between the European Union and the United States of America on the processing and transfer of Financial managing Data from the European Union to the United States for purposes of the Terrorist Finance Tracking Program ("TFTP" Agreement).

Two of those Agreements (EU-US PNR, EU-AUS PNR) are already applied on a provisional basis, one will be applied as from 1 February 2010 for a maximum duration of 9 months (EU-US TFTP). Regarding the 2008 Protocol with Liechtenstein and the 2009 "Prüm" Agreement with Norway and Iceland, some provisions are being applied on a provisional basis.

As from 1 December 2009, the rules for conclusion of all eight Agreements are governed by Article 218(6) TFEU, which provides that "the Council, on a proposal by the negotiator, shall adopt a decision concluding the agreement". The Council shall be able to adopt such decision on conclusion only after having obtained the consent of the European Parliament.

At the meeting of JHA Counsellors on 8 December 2009 at the CATS meeting of 15 December 2009, the question of application of Article 218 (6) TFEU was discussed. There appeared to be consensus that the Agreements should be sent to the European Parliament as soon as possible.

This new legal situation raises the following issues:

1. **Who, with regard to seven¹ agreements, is the negotiator who should propose the Council decision(s) concluding the agreement(s)?** At the meeting of JHA Counsellors on 8 December 2009 at the CATS meeting of 15 December 2009, the question of application of Article 218 (6) TFEU was discussed. Whereas some Member States thought the Presidency should propose the decision on conclusion, as it had acted as "negotiator" for these Agreements, the Commission indicated that it was prepared to submit proposals for Council decisions in relation to seven agreements. The Presidency was of the opinion that the Council should take a pragmatic approach to the question of who should be considered as the "negotiator", in particular since the Presidency is not mentioned in the Article 218 TFEU. In any case this solution would be for a transitional period only. What was deemed important was that the agreements should be sent to the European Parliament as soon as possible before the end of the year.

¹ There appeared to be consensus that, regarding the 2008 Protocol on the accession of Liechtenstein to the Schengen *acquis*, the Commission has the responsibility for proposing the decision on concluding the protocol.

2. Regarding **the legal basis for the decisions concluding** these Agreements, these will be specified in the proposals the Commission will submit on 17 December 2009 to Coreper and which the Council will forward to the Parliament. It may be expected that the Commission proposals will refer to the articles of the TFEU related to judicial and/or police co-operations (Articles 82 and 87 TFEU). The Council shall eventually determine the legal basis in the Decisions on conclusion that it will adopt. In the course of the discussions that took place so far, the following issues have been raised in this respect:

2.1. with regard to the two PNR Agreements, the legal basis for the decisions on concluding these Agreements could be wider, and could also be based on the provisions of the TFEU related to transport (Articles 91(1)(d) and 100(2)) and Article 37 of the TEU on the common foreign and security policy.

The Presidency is of the opinion that, of the above-mentioned articles, Article 82 and 87 should suffice as a legal basis and that Council should examine these issues upon conclusion of the Agreement;

2.2. with regard to the two PNR Agreements and the TFTP, one delegation has suggested the Decisions on conclusion should also refer to Article 16 TFEU and Declaration No 21 to the Lisbon Treaty.

The Presidency considers that a reference to Article 16 TFEU should be introduced in the Decision on conclusion of these three Agreements and that Council should examine these issues upon conclusion of the Agreement;

3. Are **Member States** still in a position to follow the **constitutional proceedings** (i.e. consultation of/ratification by their national parliaments) in accordance with the statements made under Article 24(5) TEU (Nice version). This provision provided that no agreement is binding on a Member State whose representative in the Council has stated that it has to comply with the requirements of its own constitutional procedure. A number of Member States have made the statements provided for in Article 24(5) TEU (Nice version) in relation to the Agreements referred to in footnote 1. As from the entry into force of the Treaty of Lisbon on 1 December 2009, Article 24(5) TEU no longer exists. Some delegations have argued they should nevertheless still be in a position to follow through these constitutional proceedings, because they made their acceptance of the Decision on signing conditional upon the possibility to follow these constitutional proceedings. In support of this argument, one delegation has referred to Article 9 of Protocol No 36 to the Lisbon Treaty. The Presidency suggests that this issue could be solved in a pragmatic way. The constitutional proceedings Member States are following should not affect the proceedings of the Council, and in particular the decision making of the Council in accordance with rules laid down in the Treaties.

In view of the above, the Presidency invites COREPER to agree to the transmission of the seven Agreement to the European Parliament, together with the Commission proposals for a Council decision concluding these Agreements, in order to obtain the Parliament's consent under Article 218(6) TFEU.