

EXPLANATORY MEMORANDUM (EM) ON COMMISSION STAFF WORKING DOCUMENT

Revised preliminary list of the former third pillar *acquis* – 9883/14-SWD (2014) 166 Final

Submitted by the Home Office and the Ministry of Justice on 26 June 2014

SUBJECT MATTER

1. This EM relates to Commission Staff Working Document SWD (2014) 166 Final. It sets out a non-binding list produced by the European Commission of the measures that, in its view, comprise the former third pillar *acquis* concerning police cooperation and judicial cooperation in criminal matters concluded prior to the entry into force of the Lisbon Treaty ('relevant former third pillar *acquis*').
2. Article 10 (1) to (3) of Protocol 36 to the Treaties introduced a transitional period of five years following the entry into force of the Lisbon Treaty on 1 December 2009 for the relevant former third pillar *acquis*.
3. During this transitional period, the power of the European Commission to issue infringement proceedings against a Member State for the failure to fulfil an obligation under the Treaties and the jurisdiction of the Court of Justice of the European Union did not extend to the relevant former third pillar *acquis*,
4. As from 1 December 2014, or, under Article 10(2) of Protocol 36, if earlier, as from an amendment to a measure, these limitations will end and the relevant former third pillar *acquis* will be submitted to the full powers of the Court of Justice and of the Commission. This is known as 'Lisbonisation'.
5. The Commission Staff Working Document lists 123 measures that the Commission considers to comprise the relevant former third pillar *acquis* and which are, in its view, subject to Article 10 of Protocol 36 to the Treaties.

SCRUTINY HISTORY

6. The Government produced a list of measures it considered subject to the 2014 opt-out decision in December 2011. An updated list was produced in September 2012 and a copy placed in the House Library. In September 2013 the Government produced a revised list that reflected further discussions with the EU institutions and changes as a result of new proposals being adopted.

MINISTERIAL RESPONSIBILITY

7. The measures detailed in this EM are the responsibility of the Home Secretary, Justice Secretary, Treasury Ministers and Transport Secretary.

The Foreign Secretary has overall responsibility for the UK's relations with the EU.

INTERESTS OF THE DEVOLVED ADMINISTRATIONS

8. Policing and criminal justice are devolved issues for Scotland and Northern Ireland. The Government is continuing to engage with the Devolved Administrations and Gibraltar on this matter.

LEGAL AND PROCEDURAL ISSUES

9. A 'Friends of the Presidency' Working Group was established in March 2014 to discuss all matters linked to the end of the five year transitional period. The Commission published an initial preliminary list, Commission Staff Working Document SWD (2014) 109 Final, on 14 March 2014 to support these discussions. This list was prepared by the Commission with a view to assisting Member States and providing clarity on the former third pillar acts to which Article 10 (1) to (3) of Protocol 36 apply.
10. Commission Staff Working Document SWD (2014) 166 Final updates the initial publication of 14 March 2014. The revised list takes account of comments received by other Member States in the Friends of the Presidency Group and recent legislative developments.
11. The Commission Staff Working Document has indicative value only. The list of measures may continue to change up until 1 December 2014. The list does not replace the publication in the Official Journal of each relevant instrument or the notification of adopted instruments, which are the only authoritative formal sources of Union law. Ultimately, in case of any dispute, only the Court of Justice will be able to determine whether a measure is part of the relevant former third pillar *acquis*.
12. The differences between the Commission list and the list published by the Government in September 2013 are set out below to assist understanding of this complex matter.
13. It should be noted that, following the Prime Minister's letter of 24 July 2013, the UK will cease to be bound by all of the relevant third pillar *acquis*, except where the UK seeks to rejoin measures under Article 10(5) of Protocol 36, and the UK's participation is confirmed by Council Decision (in relation to measures forming part of the Schengen *acquis*) and Commission Decision (in relation to all other relevant third pillar *acquis*). Therefore the Commission list is relevant to the UK only in relation to the measures that the UK seeks to rejoin. These are set out in Command Paper 8671.

Measures included on the Commission Document SWD (2014) 166 Final but absent from the Government's list of September 2013

Council Act of 10 March 1995, adopted on the basis of Article K.3 of the Treaty on the EU, drawing up the convention on simplified extradition procedures between the Member States of the European Union (number 1 on the Commission list)

Council Act of 27 September 1996 drawing up the Convention relating to extradition between the MS of the European Union (number 4 on the Commission list)

Council Decision 2006/697/EC of 27 June 2006 on the signing of the 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 (Number 65 on the Commission's list)

Policy Implications

14. Further to discussions in the Working Group, the Government agrees that these measures are part of the relevant third pillar *acquis*, although they have been superseded. The 1995 and 1996 Extradition Conventions and the provisions of the Schengen Convention on extradition were from 1 January 2004 replaced by the European Arrest Warrant Framework Decision (2002/584/JHA) for relations between the Member States. Neither Conventions make reference to third states or Norway and Iceland in the text of those acts. However, both Conventions apply between Member States and Norway and Iceland as a result of Council Decision 2003/169/JHA (included at number 48 on the Commission's preliminary list and on the Government's list at number 134). Nevertheless, the provisions of the 1995 and 1996 Extradition Conventions will be replaced by the 2006 Agreement between the EU, Iceland and Norway on the surrender procedure between the EU, Iceland and Norway once that agreement comes into force. This is expected before 1 December 2014. Council Decision 2006/697/EC relates to the signature of this 2006 Agreement. The UK has opted-in to the subsequent proposal for the conclusion of that agreement which remains binding on the UK.

Council Decision 2009/820/CFSP of 23 October 2009 on the conclusion, on behalf of the European Union, of the Agreement on extradition between the European Union and the United States of America and the Agreement on mutual legal assistance between the European Union and the United States of America (Number 93 on the Commission's list)

Policy Implications

15. The Government's list of September 2013 included the international agreement to which this Decision relates. Further to discussions in the Working Group, the Government agrees that this measure is part of the relevant third pillar *acquis* for other Member States.

Council Act of 29 November 1996 drawing up, on the basis of Article K.3 of the Treaty on European Union, the Protocol on the interpretation, by way of preliminary rulings, by the Court of Justice of the European Communities of the Convention on the protection of the European Communities' financial interests (number 11 on the Commission list)

Policy Implications

16. This measure is a Protocol to the PIF Convention (number 8 on the Government's list). The PIF Convention will be replaced by the Directive on the fight against fraud to the Union's financial interests by means of criminal law (PIF) COM(2012)363, once adopted. Further to discussions in the Working Group, the Government agrees that this measure is part of the relevant third pillar *acquis* for other Member States.

Council Decision 2008/633/JHA of 23 June 2008 concerning access for consultation of the Visa Information System (VIS) by designated authorities of Member States and by Europol for the purposes of the prevention, detection and investigation of terrorist offences and of other serious criminal offences (number 134 on the Commission list)

Policy Implications

17. The UK is prevented from participating in the VIS by virtue of the ECJ ruling in Case C-482/08 *UK v Council*. Further to discussions in the Working Group, the Government agrees that this measure is part of the relevant third pillar *acquis* for other Member States.

Declaration of the Executive Committee of 9 February 1998 on the abduction of minors (SCH/Com-ex (97) decl. 13 rev 2)

Policy Implications

18. Further to discussions in the Working Group, the Government agrees that this measure is part of the relevant third pillar *acquis* for other Member States. However, the Government notes that this has been superseded by point 5.5 (adding a flag) of the Sirene Manual in which the UK participates (Commission Decision 2008/334/JHA) and by point 6 of Annex VII of the Schengen Border Code (Regulation (EC) No 652/2006) which the UK does not participate in.

Measures included on the Government's list of September 2013 but absent from Commission Document SWD (2014) 166 Final

Council Decision 2005/211/JHA of 24 February 2005 concerning the introduction of some new functions for the Schengen Information System, including in the fight against terrorism (Number 123 on the Government's list)

Council Decision 2006/228/JHA of 9 March 2006 fixing the date of application of certain provisions of Decision 2005/211/JHA concerning the introduction of some new functions for the Schengen Information System, including the fight against terrorism (Number 124 on the Government's list)

Council Decision 2006/229/JHA of 9 March 2006 fixing the date of application of certain provisions of Decision 2005/211/JHA concerning the introduction of some new functions for the Schengen Information System, including the fight against terrorism (Number 125 on the Government's list)

Council Decision 2006/631/JHA of 9 March 2006 fixing the date of application of certain provisions of Decision 2005/211/JHA concerning the introduction of some new functions for the Schengen Information System, including the fight against terrorism (Number 126 on the Government's list)

Council Decision 2008/328/EC of 30 November 2009 amending the Decision of the Executive Committee set up by the 1990 Schengen Convention, amending the Financial Regulation on the costs of installing and operating the technical support function for the Schengen Information System (Number 131 on the Government's list)

Policy Implications

19. The UK does not participate in these five measures which relate to the Schengen Information System (SIS). These measures have been repealed by the relevant SIS II measures for those Member States that have gone 'live' on SIS II. The UK is scheduled to 'go live' on SIS II in October 2014 and it is only at this point these measures will be repealed for the UK (see Article 69 of Council Decision 2007/533/JHA (SIS II) and Article 1 of Council Decision 2013/157/EU). Until then, the Government considers that these measures are part of the relevant third pillar *acquis*.

Council Decision 2006/317/CFSP of 10 April 2006 concerning the conclusion of the Agreement between the European Union and the Republic of Croatia on security procedures for the exchange of classified information (Number 70 on the Government's list)

Policy Implications

20. This measure relates to Croatia. Although Croatia acceded to the EU on 1 July 2013, this measure has not been formally repealed. The Government considers that this measure is part of the relevant third pillar *acquis*.

Council Decision 2004/731/EC of 26 July 2004 concerning the conclusion of the agreement between the European Union and Bosnia and Herzegovina on security procedures for the exchange of classified information (Number 53 on the Government's list)

Council Decision of 2004/843/CFSP 26 July 2004 concerning the conclusion of the Agreement between the European Union and the Kingdom of Norway on security procedures for the exchange of classified information (Number 55 on the Government's list)

Council Decision of 2005/296/CFSP, JHA of 24 January 2005 concerning the conclusion of the Agreement between the European Union and the former Yugoslav Republic of Macedonia on the security procedures for the exchange of classified information (Number 61 on the Government's list)

Council Decision of 2005/481/CFSP of 13 June 2005 concerning the conclusion of the Agreement between the European Union and Ukraine on the security procedures for the exchange of classified information (Number 63 on the Government's list)

Council Decision of 2006/467/CFSP of 21 November 2005 concerning the conclusion of the Agreement between the European Union and the Republic of Iceland on security procedures for the exchange of classified information (Number 71 on the Government's list)

Council Decision of 2007/274/JHA of 23 April 2007 concerning the conclusion of the Agreement between the European Union and the Government of the United States of America on security procedures for the exchange of classified information (Number 75 on the Government's list)

Council Decision of 2008/568/CFSP of 24 June 2005 concerning the conclusion of the Agreement between the European Union and the Swiss Confederation on security procedures for the exchange of classified information (Number 78 on the Government's list)

Council Decision of 2010/348/EC of 17 November 2009 concerning the conclusion of the Agreement between the Government of the Russian Federation and the European Union on security procedures for the exchange of classified information (Number 109 on the Government's list)

Policy Implications

21. These measures relate to third country agreements between the European Union and other States in relation to data. The Government considers that the Justice and Home Affairs elements of these measures are subject to the UK's opt-out. Further to discussions in the Working Group, the Government agrees that this measure is part of the relevant third pillar *acquis* for other Member States.

Council Decision 2004/849/EC of 25 October 2004 on the signing, on behalf of the European Union, and on the provisional application of certain provisions of the Agreement between the European Union, the European Community and the Swiss Confederation concerning the Swiss Confederation's association with the implementation, application and development of the Schengen *Acquis* (Number 122 on the Government's list)

Policy Implications

22. Further to discussions in the Working Group, the Government agrees that the subsequent Council Decision on the conclusion of the above Agreement (Number 132 on the UK's list) has been 'Lisbonised' (by virtue of the Protocol on the accession of Liechtenstein to that Agreement) and so both these measures are no longer part of the relevant third pillar *acquis* to which the block opt-out can apply. In any event, the Government considers that the UK's participation in the Schengen *acquis* must be together with other Member States and the Associated EFTA States.

Council Decision of 2 December 1999 amending the Council Act of 3 December 1998 laying down the staff regulations applicable to Europol employees, with regard to the establishment of remuneration, pensions and other financial entitlements in euro

23. This measure is relevant to Dutch employees on staff regulations referring to guilders. The Government considers that this measure is part of the relevant third pillar *acquis*.

Measures categorised differently from the UK's list of September 2013 in Commission Document SWD (2014) 166 Final

Council Framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence (Number 113 on the Commission's list, number 43 on the Government's list)

Council Decision 2003/170/JHA of 27 February 2003 on the common use of liaison officers posted abroad by the law enforcement agencies of the Member States (Number 115 on the Commission's list, number 46 on the Government's list)

Council Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters (Number 122 on the Commission's list, number 90 on the Government's list)

Policy Implications

24. The Government's list of September 2013 included these measures as non-Schengen measures. Further to discussions in the Working Group, the Government recognises the Commission's arguments for categorising these measures as Schengen measures.
25. Council Framework Decision 2008/977/JHA is included in the 35 measures set out in Command Paper 8671. As a result of the re-categorisation (see paragraph 23), a decision to rejoin would be subject to agreement by the Council.

Accession Agreements: Italy, Spain, Portugal, Greece, Austria, Denmark, Finland, Sweden.

Policy Implications

26. The pre-Amsterdam accession agreements currently referred to in Article 1(b) of Decision 2000/365/EC were based on Article 140 of the Schengen Convention (which stated that any Member State may become a party to the Convention). Article 140 is no longer operative and was not given a third pillar legal base in Council Decision 1999/435/EC. Further to discussions in the Working Group, the Government considers the better view is that these provisions are outside the scope of the block opt-out. In any event, the Government considers that the UK's participation in the Schengen *acquis* must be together with other Member States and the Associated EFTA States.
27. The Government further notes that the Articles and declarations of the relevant accession protocols included in Council Decision 2000/365/EC refer to various provisions which have been superseded. In relation to the Articles which refer to the Nordic Passport Union, the Government notes that these were given a Schengen Protocol legal base in Council Decision 1999/436/EC, and so are also outside the scope of the UK's opt-out. In addition, these clauses continue to apply to the relevant Nordic countries and the UK's position cannot affect that given that it is not part of the Nordic Passport Union.

APPLICATION TO THE EUROPEAN ECONOMIC AREA

28. Some of the measures contained in the Commission's list of the relevant former third pillar *acquis* relate to agreements concluded between the European Union and states in the European Economic Area.

SUBSIDIARITY

29. The Commission Staff Working Document complies with the principle of subsidiarity. The Commission produced a list of police and criminal justice measures concluded prior to the Lisbon Treaty to ensure that it could fulfil its role as set out in Article 10 of Protocol 36 to the Treaties. Article 10(1) of Protocol 36 to the Treaties refers to the powers of the Commission in relation to the relevant measures prior to the end of the five year transitional period, and subparagraphs (4) and (5) provide a role for the Commission in the event of the exercise by the United Kingdom of its opt-out of those measures and any subsequent application to rejoin certain measures.

CONSULTATION

30. All Member States were invited to offer their views on the Commission's provisional list prior to the revised list being published.

IMPACT ASSESSMENT

31. Not applicable in relation to this report.

FINANCIAL IMPLICATIONS

32. There are no direct financial implications for the UK arising from this document.

TIMETABLE

33. There is no specific timetable envisaged for the Commission Staff Working Document which may continue to evolve up to the end of the transitional period set out in Article 10 of Protocol 36 to the Treaties (1 December 2014).