



**COUNCIL OF
THE EUROPEAN UNION**

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LIMITE

**PROAPP 12
JAI 358
CATS 78
SCHENGEN 17**

NOTE

From: Presidency

To: Permanent Representatives Committee/Council

Subject: Application of Article 10 of Protocol 36 to the Treaties
- Complementary note on the state of play report

I. BACKGROUND

1. At its meeting on 5 June 2014, the Council (JHA) took note of the report on the state of play and follow up submitted to it by the Presidency (doc. 10114/14).

In particular, as indicated in paragraph 14(b) of that report, a broad technical agreement was provisionally noted 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 (doc. 10115/14), although a number of Member States considered 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 seek to rejoin.

II. EX-THIRD PILLAR NON-SCHENGEN MEASURES

A. List of ex-third pillar non-Schengen measures which the UK will seek to rejoin

2. The Commission has informed the Council that, subject to the formal decisions to be taken on 1 December 2014, it has reached with the UK an understanding on the list of 29 ex-third pillar non-Schengen measures which the UK will seek to rejoin on 1 December 2014 (see list shown in Annex I, which is based on the list circulated by the Commission services, doc 10168/14).

This information follows the list of 6 ex-third pillar Schengen measures to which the UK will seek to re-opt in as contained in Annex I to doc. 9931/41 (see list reproduced in Annex II to the present note). In total, the UK will therefore seek to rejoin 35 ex-third pillar acts.

3. As compared to the list of 35 measures which the UK had informally transmitted in a letter dated 9 July 2013 to Heads of Delegation of CATS,¹ the list transmitted by the Commission shows, in the non-Schengen section, that two acts have been removed from the list, i.e. Decision 2002/494 (contact points on genocide)² and Decision 2008/617 (special intervention units in crisis situations),³ and four acts have been added, i.e. the three implementing Decisions on Europol (Decisions 2009/934, 2009/936 and 2009/968)⁴ and Decision 2008/976 on the European Judicial Network⁵.

¹ Referred to in footnote 4 of doc. 10114/14.

² Council Decision 2002/494/JHA of 13 June 2002 setting up a European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes (OJ L 167, 26.6.2002, p. 1) (No 42 on the general list of ex-third pillar *acquis*, doc. 9883/14).

³ Council Decision 2008/617/JHA of 23 June 2008 on the improvement of cooperation between the special intervention units of the Member States of the European Union in crisis situations (OJ L 210, 6.8.2008, p. 73) (No 74).

⁴ - Council Decision 2009/934/JHA of 30 November 2009 adopting the implementing rules governing Europol's relations with partners, including the exchange of personal data and classified information (OJ L 325, 11.12.2009, p. 6) (No 97);
- Council Decision 2009/936/JHA of 30 November 2009 adopting the implementing rules for Europol analysis work files (OJ L 325, 11.12.2009, p. 14) (No 99);
- Council Decision 2009/968/JHA of 30 November 2009 adopting the rules on the confidentiality of Europol information (OJ L 332, 17.12.09, p. 17) (No 101).

⁵ Council Decision 2008/976/JHA of 16 December 2008 on the European Judicial Network (OJ L 348, 24.12.2008, p. 130) (No 82).

It is recalled that, in the Schengen section of the list of July 2013, as a result of the work of the Friends of Presidency Group, one act had been removed from the list because of being obsolete (the handbook on police cooperation, SCH/Com ex (98)52)⁶ and one act had been added (Decision 2007/171 on SIS II network).⁷

It is also recalled that since July 2013, two measures in that list have been "lisbonised" by amendments adopted post-Lisbon, i.e. Framework Decision 2003/577 (orders freezing property or evidence) and Decision 2005/681 (Cepol), and have therefore been removed from the list as they were no longer subject to the block opt-out.⁸

Likewise, as recalled in the report on the state of play (doc. 10114/14, paragraph 11(b)), the 2000 Convention on mutual assistance in criminal matters and its Protocol have been lisbonised and are therefore no longer subject to the block opt-out. The same goes for one of the Europol implementing decisions (Decision 2009/935 amended by Decision 2014/269).⁹

⁶ SCH/Com-ex (98) 52 (handbook on cross border police-cooperation) (OJ L 239, 22.9.2000, p. 408) (No 107).

⁷ Commission Decision 2007/171/EC of 16 March 2007 laying down the network requirements for the Schengen Information System II (third pillar) (OJ L 79, 20.3.2007, p. 29) (No 118).

⁸ See list of "lisbonised" ex-third pillar *acquis* in doc. 9930/14, points 5 and 10. This document gives an overview of "lisbonised" acts.

⁹ See points 8 and 9 in the above list of "lisbonised" *acquis*, and in particular Council Decision 2009/935/JHA of 30 November 2009 determining the list of third countries with which Europol shall conclude agreements (OJ L 325, 2009, p. 12) (N° 98), which has been amended by Council implementing Decision 2014/269/EU of 6 May 2014 amending Decision 2009/935/JHA as regards the list of third States and organisations with which Europol shall conclude agreements (OJ L 138, 13.5.2014, p. 104).

B. Solution concerning certain acts to which the UK will not re-opt in

4. It results from this information that the UK will block opt-out from a substantive number of ex-third pillar acts (Schengen¹⁰ and non-Schengen). In particular, it will opt-out both from the Prüm Decisions¹¹ and the Framework Decision 2008/947 on probation¹².

However, with regard to the above acts, and taking into account the relevance of some of them to the Schengen *acquis* as already stressed by several delegations in the Friends of Presidency Group, the Commission has explained that a solution has been identified, aiming at the UK's future participation, which consists of the following (the UK has also transmitted a note setting out more details, doc 11057/14, which is reproduced in Annex III):

- (a) on the Prüm Decisions, the Commission intends to submit to the Council proposals for Decisions on consequential and transitional arrangements and on financial consequences whereby, given the importance of those acts, the UK will have to undertake, rapidly and until 30 September 2015, a full assessment of the merits and practical benefits of it rejoining them, in close consultation with operational partners in the UK, all other Member States, Europol and Eurojust.

¹⁰ The list of Schengen measures from which the UK will opt-out is in Annex II to doc. 9931/14.

¹¹ - Council Decision 2008/615/JHA of 23 June 2008 on stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime (the "Prüm Decision") (OJ L 210, 6.8.2008, p. 1) (No 72);
- Council Decision 2008/616/JHA of 23 June 2008 on the implementation of Council Decision 2008/615/JHA on stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime (the "Prüm Implementation Decision") (OJ L 210, 6.8.2008, p. 12) (No 73);
- Council Framework Decision 2009/905/JHA of 30 November 2009 on accreditation of forensic service providers carrying out laboratory activities (OJ L 322, 9.12.2009, p. 14) (No 91).

¹² Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions (OJ L 337, 16.12.2008, p. 102) (No 81).

If this assessment were to be positive, the UK will have to decide by 31 December 2015 whether to notify of its wish to participate in those acts. During this period, the UK will not be allowed to access Eurodac for law enforcement purposes. If the UK were not to notify its wish to re-opt in within four weeks from the end of 2015, it will not be allowed to access Eurodac for law enforcement purposes and will have to repay the amounts it received from the EU budget for implementing the Prüm Decisions;

- (b) on the Probation Framework Decision, the UK will, notably through a statement to the minutes of the Council, undertake to make an assessment in view of reconsidering the merits of notifying its wish to participate in it. This will also be noted in the preamble of the Commission Decision on the UK's rejoining the non-Schengen ex-third pillar measures.

III. CONCLUSION

5. In view of the above, delegation are invited to take note of this complementary note and to indicate whether they agree to:

- (a) note that there is a political understanding on the list of ex-third pillar measures, listed in Annexes I and II, which the UK will seek to rejoin;
- (b) note that there is a political understanding on the solution concerning the Prüm Decisions, on the one hand, and the Probation Framework Decision, on the other hand, as set out above in paragraph 4 and explained by the Commission and the UK.

List of ex-third pillar non-Schengen *acquis* which the UK will seek to rejoin

16	Joint Action 97/827/JHA of 5 December 1997 establishing a mechanism for evaluating the application and implementation at national level of international undertakings in the fight against organized crime (OJ L 344, 15.12.1997, p. 7)
17	Council Act of 18 December 1997 drawing up the Convention on mutual assistance and co-operation between customs administrations (Naples II) (OJ C 24, 23.1.98, p. 1)
21	Joint Action 98/700/JHA of 3 December 1998 concerning the setting up of a European Image Archiving System (FADO) (OJ L 333, 9.12.98, p. 4)
25	Council Decision 2000/375/JHA of 29 May 2000 to combat child pornography on the internet (OJ L 138, 9.6.2000, p. 1)
27	Council Decision 2000/641/JHA of 17 October 2000 establishing a secretariat for the joint supervisory data-protection bodies set up by the Convention on the establishment of a European Police Office (Europol Convention), the Convention on the Use of Information Technology for Customs Purposes and the Convention implementing the Schengen Agreement on the gradual abolition of checks at the common borders (Schengen Convention) (OJ L 271, 24.10.2000, p. 1)

28	Council Decision 2000/642/JHA of 17 October 2000 concerning arrangements for co-operation between financial intelligence units of Member States in respect of exchanging information (OJ L 271, 24.10.2000, p. 4)
37	Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime (OJ L 63, 6.3.2002, p. 1)
50	- Council Decision 2003/659/JHA amending Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime (OJ L 245, 29.9.2003, p. 44)
71	- Council Decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust and amending Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime (OJ L 138, 4.6.2009, p. 14)
39	Council Decision 2002/348/JHA of 25 April 2002 concerning security in connection with football matches with an international dimension (OJ L 121, 8.5.2002, p. 1)
68	- Council Decision 2007/412/JHA of 12 June 2007 amending Decision 2002/348/JHA concerning security in connection with football matches with an international dimension (OJ L 155, 15.6.2007, p. 76)
40	Council Framework Decision 2002/465/JHA of 13 June 2002 on joint investigation teams (OJ L 162, 20.6.2002, p. 1)
43	Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ L 190, 18.7.2002, p. 1)
58	Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties (OJ L 76, 22.3.2005, p. 16)
66	Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognitions to confiscation orders (OJ L 328, 24.11.2006, p. 59)

67	Council Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union (so-called "Swedish initiative") (OJ L 386, 29.12.2006, p. 89)
69	Council Decision 2007/845/JHA of 6 December 2007 concerning co-operation between Asset Recovery Offices of the Member States in the field of tracing and identification of proceeds from, or property related to, crime (OJ L 332, 18.12.2007, p. 103)
75	Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings (OJ L 220, 15.8.2008, p. 32)
78	Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purposes of their enforcement in the European Union (so-called "transfer of prisoners") (JO L 327, 5.12.2008, p. 27)
82	Council Decision 2008/976/JHA of 16 December 2008 on the European Judicial Network (OJ L 348, 24.12.2008, p. 130)

84	Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial (OJ L 81, 27.3.2009, p. 24)
85	Council Framework Decision 2009/315/JHA of 26 February 2009 on the organisation and content of the exchange of information extracted from the criminal record between Member States (OJ L 93, 7.4.2009, p. 23)
86	- Council Decision 2009/316/JHA of 6 April 2009 on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA (OJ L 93, 7.4.2009, p. 33)
89	Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention (OJ L 294, 11.11.2009, p. 20)
92	Council Decision 2009/917/JHA of 30 November 2009 on the use of information technology for customs purposes (CIS) (OJ L 323, 10.12.2009, p. 20)

87	Council Decision 2009/371/JHA of 6 April 2009 establishing the European Police Office (Europol) (OJ L 121, 15.5.2009, p. 37)
97	- Council Decision 2009/934/JHA of 30 November 2009 adopting the implementing rules governing Europol's relations with partners, including the exchange of personal data and classified information (OJ L 325, 11.12.2009, p. 6)
99	- Council Decision 2009/936/JHA of 30 November 2009 adopting the implementing rules for Europol analysis work files (OJ L 325, 11.12.2009, p. 14)
101	- Council Decision 2009/968/JHA of 30 November 2009 adopting the rules on the confidentiality of Europol information (OJ L 332, 17.12.09, p. 17)

List of ex-third pillar Schengen *acquis* to which the UK will seek to re-opt in

102	<p>Convention of 19 June 1990 implementing the Schengen Agreement of 14 June 1985 (OJ L 239, 22.9.2000, p. 19)</p> <ul style="list-style-type: none">- Chapter 1 on police cooperation - Art. 39, 40, 42¹³, 43¹³, 44, 46 and 47¹⁴;- Chapter 3 on <i>ne bis in idem</i> - Art. 54 to 58;- Chapter 4 on extradition - Art. 59 to 66;- Chapter 5 on the transfer of enforcement of criminal judgments - Art. 67 to 69;- Chapter 6 on narcotic drugs - Art. 71 and 72;- Title VI on personal data protection - Art. 126 to 130¹⁵;- Declaration 3 to the Final Act concerning Article 71(2)
112	<p>Council Decision 2000/586/JHA of 28 September 2000 establishing a procedure for amending Articles 40(4) and (5), 41(7) and 65(2) of the Convention implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at common borders (OJ L 248, 3.10.2000, p. 1)</p>
116	<p>Council Decision 2003/725/JHA of 2 October 2003 amending the provisions of Article 40(1) and (7) of the Convention implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at common borders (OJ L 260, 11.10.2003, p. 37)</p>
117	<p>Commission Decision 2007/171/EC of 16 March 2007 laying down the network requirements for the Schengen Information System II (third pillar) (OJ L 79, 20.3.2007, p. 29)</p>

¹³ To the extent that it relates to Article 40.

¹⁴ Except for Art. 47(2)(c) and (4).

¹⁵ To the extent that it relates to the provisions of the 1990 CISA in which the UK participates.

118	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)
122	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 (OJ L 350, 30.12.2008, p. 60)

Note by the United Kingdom**Additional information on the solution reached in respect of the Prüm and Probation
measures*****Prüm Decisions***

One aspect of the agreement reached between the United Kingdom and the Commission concerns the Prüm Decisions. The United Kingdom will not seek to rejoin the Prüm Decisions in autumn 2014, but it has agreed to undertake a full business and implementation case for the Prüm Decisions and publish that in the UK Parliament by 30 September 2015. The full outline of this agreement is as follows:

The United Kingdom has agreed to:

- (a) undertake a full business and implementation case to assess the practical benefits of, and the steps that would be necessary for the United Kingdom to rejoin, the Prüm Decisions, including in close consultation with operational partners in the United Kingdom, all other Member States, Europol and Eurojust; and
- (b) by 30th September 2015, publish the results of that business and implementation case; and
- (c) if the business and implementation case shows practical benefits for the United Kingdom rejoining the Prüm Decisions, and following a vote in the UK Parliament, by 31st December 2015, make a decision as to whether the United Kingdom should apply to participate in the Prüm Decisions under Article 10(5) of Protocol 36 on the basis of the business and implementation case.

The United Kingdom has agreed to provide the Council (and others who have contributed) with the draft business and implementation case to give Member States the opportunity to make observations on it.

The United Kingdom will publish the business and implementation case as a Command Paper to be laid before the UK Parliament.

The United Kingdom will draft any domestic implementing legislation which would be required to give effect to the Prüm Decisions and include it in the Command Paper that is laid before the UK Parliament.

The United Kingdom has proposed running a pilot Prüm-style test of 10,000 unsolved UK crime samples (DNA) with the Member States which are applying Prüm and publishing the results of this as part of the business and implementation case.

Until such time as the United Kingdom rejoins the Prüm Decisions the United Kingdom is prevented from accessing the Eurodac database for anything other than asylum purposes.

If the United Kingdom has not made a decision to rejoin the Prüm Decisions by 31st December 2015 and has not formally applied to opt back in within four weeks of that date, the funds received by the United Kingdom from the ISEC Programme will not have been used for the implementation of the Prüm Decisions, and will therefore be repaid by the United Kingdom as the direct financial consequences, necessarily and unavoidably incurred as a result of the cessation of its participation in the Prüm Decisions. This amounts to approximately €1.5m.

The United Kingdom has agreed to table a minute statement at the next JHA Council setting out this agreement. The Commission will also propose or adopt the necessary decisions to give legal effect to these obligations.

Probation

In the case of the Council Framework Decision 2008/947/JHA on probation, the United Kingdom will in due course reconsider the merits of notifying its wish to participate in it. This commitment will be set out in a statement to the UK Parliament and recorded in the minutes of a Council meeting. The United Kingdom will publish an assessment of the potential impacts of that measure for the purposes of its reconsideration.
