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NOTE

From: Services of the Commission

To: Delegations

Subject: Article 10 of Protocol 36 to the Treaties
- Transmission of a document of the Services of the Commission

Delegations will find attached a document from the Services of the Commission.

Non paper – State of play of the discussions between the Commission and the United Kingdom on the application of Article 10 of Protocol 36 to the Treaties

Under Article 10 of Protocol 36 to the Treaties, the United Kingdom has the right to opt-out of all acts of the Union in the field of police cooperation and judicial cooperation in criminal matters ("ex-third pillar"). The first stage is a simple notification that this right will be exercised. The UK notified the Council on 24 July 2013 that it has decided to exercise this option.

The second stage of the process allows the UK to notify the Council of its wish to participate in acts otherwise part of this block opt-out (an "opt-back-in"). The Commission is given the responsibility under the Treaty to examine such requests in respect of non-Schengen measures and decide on the request of the United Kingdom.¹ For Schengen measures, the decision is taken by Council.² Article 10 (5) of Protocol 36 sets out the criteria for this examination, which are to re-establish the widest possible participation of the UK in the Justice and Home Affairs acquis "*without seriously affecting the practical operability [of the acquis] while respecting their coherence*".

The starting point for this exercise was a list of thirty-five instruments where the UK indicated it wished to opt-back-in.^{3 4} Commission services conducted an analysis of these items, together with a series of detailed technical exchanges with the UK authorities. The Council Presidency also set up a "Friends of the Presidency Group" which, inter alia, examined the Schengen measures. It should also be noted that the list of acts subject to the provisions of Protocol 36 is subject to gradual reduction – since it does not relate to acts adopted after the entry into force of the Treaty of Lisbon and acts which are subsequently amended (as well as repealed), i.e. are "Lisbonised", and removed from the list of acts under the Article 10 of Protocol 36 process (and thus no longer subject to opt out by the UK).

¹ Article 10 (5) of Protocol 36 in conjunction with Article 4 of Protocol 21 and Article 331 (1) TFEU.

² Article 10 (5) of Protocol 36 in conjunction with Article 4 of Protocol 19.

³ UK Command Paper "Decision pursuant to Article 10 of Protocol 36 to the Treaty on the Functioning of the European Union" (Cm 8671)

⁴ The UK has subsequently indicated two measures originally on its opt-back-in list where it no longer wishes to participate: Council Decision 2002/494/JHA setting up a network of contact points on genocide, crimes against humanity and war crimes; and Council Decision 2008/617/EC on cooperation between Member States' special intervention units.

The technical consideration of the list of acts which the UK sought to re-join has led to the conclusion that the following acts should be added to the UK's opt-back-in list in order to ensure that taken together, the package of acts subject to opt-back-in will not seriously affect the practical operability of the acts, and respect their coherence:

- Europol – Council Decision 2009/934/JHA (Europol relation with partners); Council Decision 2009/936/JHA (Europol analysis work files); Council Decision 2009/968/JHA (Europol information confidentiality rules);
- European Judicial Network – Council Decision 2008/976/JHA.

In addition, it should be noted that according to the discussions in the Council on the non-Schengen measures, the opt-back-in list should also include Commission Decision 2007/171 (network requirements for the Schengen Information System II).

The UK government has also indicated that in a number of other cases, it will set in motion a process towards the subsequent opting-in to certain other instruments of particular importance. In the case of Council Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime (the "Prüm Decision")⁵, the UK has committed to take a decision by the end of 2015 on basis of an impact study involving Member States and the Commission. The UK will communicate its decision on whether to opt back in by [1 December 2015](#) and will, if the decision is negative, reimburse any EU funding it has received for the purpose of implementing these decisions. In such a case the Commission will present a report on the effects of the non-participation of the UK in these decisions. For as long as the UK has not joined Prüm, it shall have no access to EURODAC for law enforcement purposes.

⁵ As well as the Prüm implementing decision Council Decision 2008/616/JHA and the related Council framework decision 2009/905/JHA on accreditation of forensic service providers.

In the case of the Council Framework Decision 2008/947/JHA on probation, the UK 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 UK will publish an assessment of the potential impacts of that measure for the purposes of its reconsideration.

The Treaty states that the formal notification by the United Kingdom of the acts in which it wishes to participate can only happen after the acts have ceased to apply as a result of the initial block opt-out. Since this will only take effect on 1 December 2014, it is only at this point that the formal UK notification, and the formal Commission response, can come. This decision will therefore fall to the College in office on 1 December.

However, there are several reasons why it is prudent to have reached a general understanding on this technical assessment at this stage. In the first instance, the EU institutions and all Member States have an interest in a large degree of clarity concerning the acts which will continue to apply to the UK, notably in order to avoid any operational gap in key aspects of cooperation in the field of police and criminal justice. A prior understanding will also allow the preparation of the decisions in such a way that decisions could be taken very swiftly on 1 December 2014. Finally, the UK government has committed to making its notification of its wishes to opt-back-in subject to approval by the UK Parliament of a specific list of acts. A prior mutual understanding about such a list is therefore the most operational way of ensuring that the UK Parliament can vote on a the basis of a list of measures which is in accordance with the requirements of EU law.

Therefore, an exchange of letters has been undertaken between the Commission and the United Kingdom confirming that both the Commission and the United Kingdom government recognise this as the result of the technical analysis, always subject to the formal decisions to be taken on 1 December 2014, in accordance with the Treaties.

Annex: Measures indicated by the United Kingdom for opt-back-in which the technical analysis has concluded are in accordance with the requirements of Protocol 36, article 10

Non-Schengen Measures - Commission responsibility⁶	
Asset Recovery Office	<ul style="list-style-type: none"> • Council Decision 2007/845/JHA of 6 December 2007 concerning cooperation between Asset Recovery Offices of the Member States in the field of tracing and identification of proceeds from, or property related to, crime
Child pornography	<ul style="list-style-type: none"> • Council Decision 2000/375/JHA to combat child pornography on the internet
Confiscation orders	<ul style="list-style-type: none"> • Council Framework Decision 2006/783/JHA on the application of the principle of mutual recognition to confiscation orders
Customs information system (CIS)	<ul style="list-style-type: none"> • Council Decision 2009/917/JHA of 30 November 2009 on the use of information technology for customs purposes.
Data protection secretariat	<ul style="list-style-type: none"> • 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).
European Arrest Warrant	<ul style="list-style-type: none"> • Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States
ECRIS (2 measures)	<ul style="list-style-type: none"> • 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. • 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.
European Judicial Network (EJN)	<ul style="list-style-type: none"> • Council Decision 2008/976/JHA of 16 December 2008 on the European Judicial Network
Eurojust (3 measures)	<ul style="list-style-type: none"> • Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime • Council Decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust and amending Decision 2002/187/JHA
Article 10 (5) of Protocol 36 in conjunction with Article 4 of Protocol 21 and Article 331 (1) TFEU.	<ul style="list-style-type: none"> • setting up Eurojust with a view to reinforcing the fight against serious crime
10168/14 ANNEX	<ul style="list-style-type: none"> • Council Decision 2003/659/JHA amending Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime

Football safety and security (2 measures)	<ul style="list-style-type: none"> • Council Decision 2002/348/JHA of 25 April 2002 concerning security in connection with football matches with an international dimension • 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
International undertakings in the fight of organised crime (GENVAL)	<ul style="list-style-type: none"> • 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
Joint Investigation Teams	<ul style="list-style-type: none"> • Council Framework Decision 2002/465/JHA of 13 June 2002 on joint investigation teams
Mutual Recognition of Financial Penalties	<ul style="list-style-type: none"> • Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties
Naples II	<ul style="list-style-type: none"> • Council Act of 18 December 1997 drawing up the Convention on mutual assistance and cooperation between customs administrations (Naples II)
Prisoner Transfer (PTFD)	<ul style="list-style-type: none"> • 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
Swedish Initiative	<ul style="list-style-type: none"> • 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
Taking into account convictions	<ul style="list-style-type: none"> • 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

Trials in absentia	<ul style="list-style-type: none">• 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
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Schengen measures – Council responsibility⁷	
Data Protection	<ul style="list-style-type: none"> • 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.
Schengen Convention (3 measures)	<ul style="list-style-type: none"> • Convention implementing the Schengen Agreement of 1985: Article 39 to the extent that that this provision has not been replaced by Council Framework Decision 2006/960/JHA, Article 40, Article 42 and 43 (to the extent that they relate to article 40), Article 44, Article 46, Article 47 (except (2)(c) and (4)), Article 54, Article 55, Article 56, Article 57, Article 58, Articles 59 to 69 (to the extent necessary in relation to the Associated EFTA States) Article 71, Article 72, Article 126, Article 127, Article 128, Article 129, Article 130, and Final Act - Declaration N° 3 (concerning article 71(2)) • 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 • 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
SIS II	<ul style="list-style-type: none"> • Council Decision 2007/533/JHA of 12 June 2007 on the establishment, operation and use of the second generation Schengen Information System (SIS II)
SIS II Networks	<ul style="list-style-type: none"> • Commission Decision 2007/171/EC of 16 March 2007 laying down the network requirements for the Schengen Information System II

⁷ Article 10 (5) of Protocol 36 in conjunction with Article 4 of Protocol 19.