



Background note drafted by the secretariat

**Protocol 36 to the Treaty of Lisbon on transitional provision:
the position of the United Kingdom**

I. Legal framework

Protocol 36 to the Treaty of Lisbon includes a 5-year transition period during which the powers of the institutions, notably the Commission and the Court of Justice of the European Union, do not apply to EU measures adopted before the entry into force of the Treaty (on 1st December 2009) in the field of police and judicial cooperation in criminal matters.

After the end of this transitional period, by 1st December 2014, article 10 (4) of Protocol 36 enables UK to decide, at the latest by 31 May 2014, whether to opt out, in bulk, of all the police and criminal justice measures adopted prior the entry into force of the Lisbon Treaty. This option refers to all acts adopted before 1st December 2009 with the exclusion of the acts which have been amended after that date. As a result, all "non-lisbonised" ex-third pillar acquis would cease to apply to the UK as from 1st December 2014.

Article 10 (5) enables UK, any time after its opt-out, to notify the Council of its wish to opt back into acts which have ceased to apply according to its decision to opt out.

Pursuant to Article 4 of Protocol 19, and article 10(5) of Protocol 36, the Commission is given the responsibility to examine the requests to rejoin non-Schengen measures while the Council should decide by unanimity (including UK) on the request by the UK to participate in acts relating to the "Schengen acquis".

For all the ex-third pillar acquis (both Schengen and "non-Schengen acts"), the Council, acting by a qualified majority on a proposal by the Commission, shall:

- determine the necessary consequential and transitional arrangements; (the UK shall not participate in the adoption of this decision);
- may also adopt a decision determining that UK shall bear the direct financial consequences, if any, necessarily and unavoidably incurred as a result of the cessation of its participation in those acts.

According to article 5 of Protocol 36, when deciding about the UK wish to opt back in certain acts, *“the Union institutions and the UK shall seek to re-establish the widest possible measure of participation of the UK in the acquis of the Union in the area of freedom, security and justice without seriously affecting the practical operability of the various parts thereof, while respecting its coherence”*

II. UK decision to opt out and its requests to opt back into certain acts

By letter of 24 July 2013, the UK notified the Council of its decision to opt-out of the ex-third pillar acquis.

At the same time, the UK has informally indicated its intention to opt back into 35 instruments of the relevant acquis, 5 Schengen measures and 30 non-Schengen measures.

To avoid a legal and operational gap, negotiations between the UK and the European Commission and the Council began last March.

The UK and the Commission discussed on the list of non-Schengen legislative acts the UK wishes to rejoin. Meanwhile, in the Council, an ad hoc “Friend of the Presidency” group was established to discuss the consequences of the UK opt out and the list of acts which UK wishes to re-join.

III. State of the negotiations

After an analysis of the list of acts that UK has informally indicated its intention to re-join, the Commission has concluded that the UK should add to its list 3 more decisions relating to EUROPOL¹ and the Council Decision 2008/976/JHA on the European Judicial Network to ensure the practical operability and the coherence of the “package” (see annex).

¹ 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.
Council Decision 2009/935/JHA of 30 November 2009 determining the list of third countries with which Europol shall conclude agreements.
Council Decision 2009/936/JHA of 30 November 2009 adopting the implementing rules for Europol analysis work files

The Commission stressed also the importance for UK to re-join the “Prüm Decisions” relating to cross-border cooperation in combating terrorism and cross-border crime and the Council framework Decision 2008/947/JHA on probation.

UK agreed to include the 3 decisions relating to Europol and the Decision 2008/976/JHA on the European Judicial Network. On the Framework Decision on probation, UK will reconsider the merits of re-opting in. This commitment will be set out in a statement to the UK Parliament and recorded in the minutes of a Council meeting.

UK should also undertake an assessment of the merits and practical benefits of re-joining the “Prüm Decisions”. The results of this assessment shall be published by 30 September 2015 at the latest. UK will decide, by 31 December 2015, on whether to notify, within the following four weeks, its wish to participate in the Prüm Decisions. The UK has indicated that a positive vote in its Parliament will be required before such a decision. Meanwhile, the UK shall be prevented from accessing the Eurodac database for law enforcement purposes.

If at the end of this assessment, UK does not re-join the Prüm decisions, it will have to reimburse to the EU the funds received from the ISEC Programme for two projects related to the implementation of the Prüm Decisions (a total of EUR 1 508 855).

On 26 September 2014, the European Commission adopted 2 proposals for a Council decision. The first one determines certain consequential and transitional arrangements and the second one relating to the financial consequences of UK opt out.

The first proposal stipulates that all the acts which the UK will seek to re-join will be applicable until 7 December 2014, so as to allow enough time for the UK to formally opt back into them.

This proposal also takes note of the engagement by UK above-mentioned on the assessment of the benefits of re-joining the “Prüm Decisions” and on the deadline for deciding to re-join these decisions. Meanwhile, the UK shall be prevented from accessing the Eurodac database for law enforcement purposes.

The second decision determines the financial consequences of the UK’ opt-out of the “Prüm Decisions”, if the UK finally decides not to re-join them at the end of its assessment.

Negotiations are underway in the Council which will have to decide on these 2 proposals, by qualified majority before 1 December 2014 to avoid any legal and practical gap.

The Council will have also to adopt, by unanimity, a third Decision on the UK request to opt back into some Schengen measures. This opt-back list should include the Commission Decision 2007/171 on network requirements for the Schengen information system (SIS II).

These 3 decisions should be adopted before December 1st to avoid any legal or operational gap.

IV The role of the European Parliament

The Parliament does not play any part in this process. However, given the importance of this issue, 2 exchanges of views and an oral presentation by the legal service took place in LIBE on April 10th and on July 23rd.

On June 16th2014, the Secretary-general of the Commission sent to the Secretary-general of the Parliament a non-paper summarising the results of the discussions held between the UK authorities and the services of the Commission in respect of the list of non-Schengen measures which UK wishes to opt back into.

The deadline for an agreement between the Commission and UK and in the Council is approaching. Parliament should be heard on this important issue. An exchange of views with the Commission and the Presidency on this question is scheduled in LIBE on November 5th.

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 responsibility²	
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 setting up Eurojust with a view to reinforcing the fight against serious crime • Council Decision 2003/659/JHA amending Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime
Europol	<ul style="list-style-type: none"> • Council Decision 2009/371/JHA establishing the European Police Office (Europol)
Europol Implementing measures (3)	<ul style="list-style-type: none"> • 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 • Council Decision 2009/936/JHA of 30 November 2009 adopting the implementing rules for Europol analysis work files • Council Decision 2009/968/JHA of 30 November 2009 adopting the rules on the confidentiality of Europol information
European Supervision Order (ESO)	<ul style="list-style-type: none"> • 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 of supervision measures as an alternative to provisional detention

FADO	<ul style="list-style-type: none"> Joint Action 98/700/JHA of 3 December 1998 concerning the setting up of a European Image Archiving System (FADO)
Financial intelligence units	<ul style="list-style-type: none"> Council Decision 2000/642/JHA of 17 October 2000 concerning arrangements for cooperation between financial intelligence units of Member States in respect of exchanging information
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

Schengen measures – Council responsibility

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