

EXPLANATORY MEMORANDUM TO
THE CRIMINAL JUSTICE AND DATA PROTECTION (PROTOCOL No. 36)
REGULATIONS 2014

2014 No. [XXXX]

1. This explanatory memorandum has been prepared by the Home Office and Ministry of Justice and is laid before Parliament by Command of Her Majesty.

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the Instrument

2.1 The Criminal Justice and Data Protection (Protocol No. 36) Regulations 2014 (“the Regulations”) will give effect to a Commission Decision and a Council Decision (to be published in the Official Journal in due course) (together “the Protocol 36 Decisions”), to be made under Article 10 of Protocol (No. 36) on transitional provisions (“Protocol 36”) to the EU Treaties. The Regulations will complete transposition in relation to 11 of the 35 measures which the Government has said it is in the national interest for the UK to seek to rejoin under the so called “2014 opt-out decision”.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 The Regulations will be made on or shortly after 1 December 2014. The power to make the Regulations under section 2(2) of the European Communities Act 1972 only crystallises once the Protocol 36 Decisions have been made by the Commission and the Council. This is expected to be no later than shortly after midnight (00:00) on 1st December 2014.

3.2 The Regulations will come into force on the day after the day on which they are made. No delay in commencement is possible as the five year transitional period under Article 10 of Protocol 36, which limits the powers of the European Commission and the jurisdiction of the Court of Justice of the European Union, comes to an end on 1st December 2014. To comply with EU obligations, it is important that the relevant transposition is completed as quickly as possible after that date.

4. Legislative Context

4.1 Article 10(4) of Protocol 36 enabled the Government to decide, at the latest by 31st May 2014, whether or not the UK should continue to be bound by the former third pillar measures in relation to police and criminal justice cooperation adopted before the Treaty of Lisbon came into force, or whether it should exercise its right to opt out *en masse*. On 24th July 2013, following endorsement of both Houses of Parliament, the Prime Minister formally notified the President of the Council that the UK had decided to

exercise its opt-out in relation to all former third pillar measures. The effect of this decision is that these measures will cease to apply to the UK from 1st December 2014.

4.2 However, under Article 10(5) of Protocol 36, the UK may at any time notify the Council of its wish to participate in measures which have ceased to apply to it pursuant to Article 10(4) of the Protocol. The measures fall into two groups: so called “Schengen measures” which are based on the Convention implementing the Schengen Agreement of 14th June 1985; and other measures (“non-Schengen measures”). The Commission has responsibility in respect of non-Schengen measures and will decide on the request of the UK. For Schengen measures, this decision is to be taken by the Council. Further details in relation to the processes for Schengen and non-Schengen measures are set out on pages 5 and 6 of Command Paper 8671 (*Decision pursuant to Article 10 of Protocol 36 to the Treaty on the Functioning of the European Union*) laid before Parliament in July 2013. Article 10(5) of Protocol 36 sets out the criteria to be used by the Commission and the Council when considering a request made by the UK. Pages 4 and 5 of Command Paper 8671 set out further details.

4.3 The Government has engaged in detailed technical level discussions with the Commission and Council on this matter. A full list of the measures and Impact Assessments on which agreement was reached in principle, and that the Government will seek to rejoin in the national interest is set out in Command Paper 8897 (*Decision pursuant to Article 10(5) of Protocol 36 to the Treaty on the Functioning of the European Union*). The full list is as follows:

Non-Schengen Measures

- Council Decision 2007/845/JHA 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
- Council Decision 2000/375/JHA to combat child pornography on the internet
- Council Framework Decision 2006/783/JHA on the application of the principle of mutual recognition to confiscation orders
- Council Decision 2009/917/JHA on the use of information technology for customs purposes
- Council Decision 2000/641/JHA 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)
- Council Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States
- Council Framework Decision 2009/315/JHA on the organisation and content of the exchange of information extracted from the criminal record between Member States

- Council Decision 2009/316/JHA on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA
- Council Decision 2008/976/JHA on the European Judicial Network
- Council Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime
- Council Decision 2009/426/JHA 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
- Council Decision 2009/371/JHA establishing the European Police Office (Europol)
- Council Decision 2009/934/JHA adopting the implementing rules governing Europol's relations with partners, including the exchange of personal data and classified information
- Council Decision 2009/936/JHA adopting the implementing rules for Europol analysis work files
- Council Decision 2009/968/JHA adopting the rules on the confidentiality of Europol information
- Council Framework Decision 2009/829/JHA 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
- Joint Action 98/700/JHA concerning the setting up of a European Image Archiving System (FADO)
- Council Decision 2000/642/JHA concerning arrangements for cooperation between financial intelligence units of Member States in respect of exchanging information
- Council Decision 2002/348/JHA concerning security in connection with football matches with an international dimension
- Council Decision 2007/412/JHA amending Decision 2002/348/JHA concerning security in connection with football matches with an international dimension
- Joint Action 97/827/JHA establishing a mechanism for evaluating the application and implementation at national level of international undertakings in the fight against organized crime
- Council Framework Decision 2002/465/JHA on joint investigation teams
- Council Framework Decision 2005/214/JHA on the application of the principle of mutual recognition to financial penalties
- Council Act of 18th December 1997 drawing up the Convention on mutual assistance and cooperation between customs administrations (Naples II)
- Council Framework Decision 2008/909/JHA 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

- Council Framework Decision 2006/960/JHA on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union
- Council Framework Decision 2008/675/JHA on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings
- Council Framework Decision 2009/299/JHA 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 (“trials *in absentia*”)

Schengen Measures

- Council Framework Decision 2008/977/JHA on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters.
- Convention implementing the Schengen Agreement of 1985 (as amended): Article 39, 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)), Articles 54 to 58 Articles 59 to 69, Article 71, Article 72, Articles 126 to 130 (to the extent that they relate to the provisions of the Schengen Convention in which the UK participates), and Final Act - Declaration N° 3 (concerning Article 71(2))
- Council Decision 2000/586/JHA 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 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
- Council Decision 2007/533/JHA on the establishment, operation and use of the second generation Schengen Information System (SIS II)
- Commission Decision 2007/171/EC laying down the network requirements for the Schengen Information System II

4.4 A number of these measures require further transposition into domestic law in order to meet the UK’s obligations under them. These are indicated below by an asterisk. These are incorporated in a single Instrument in order to consolidate all new provisions in one place. Other measures have already been transposed into UK law by existing enactments, or do not require further transposition as they already bind the UK as a matter of EU law. Further detail on the UK’s transposition of these measures can be found in Command Paper 8671 (*Decision pursuant to Article 10 of Protocol 36 to the Treaty on the Functioning of the European Union*).

5. Territorial Extent and Application

5.1 Unless stated otherwise (see regulations 2, 25 and 75), this instrument extends and applies throughout the United Kingdom.

6. European Convention on Human Rights

Karen Bradley, Minister for Modern Slavery and Organised Crime, and Shailesh Vara, Minister for the Courts and Legal Aid have made the following statement regarding Human Rights:

“In our view, the provisions of the Criminal Justice and Data Protection (Protocol No. 36) Regulations 2014 are compatible with Convention rights.”

7. Policy Background

7.1 The Government considers that it is in the national interest for the UK to seek to rejoin the 35 measures outlined below, including the 11 measures for which additional transposition is required and covered by the Regulations.

7.2 Asset Recovery Office - This Council Decision obliges Member States to set up or designate national Asset Recovery Offices (“ARO”) to facilitate, through cooperation, the tracing and identification of the proceeds of crime and other crime related assets by exchanging information and best practice. Requests for information are regulated by set time limits mandated by (the “Swedish Initiative”). The UK sent 277 requests for assistance to EU Member States through the ARO network in 2012 alone, demonstrating its value as an effective communication mechanism.

7.3 Combating indecent images of children - The measure to combat child pornography on the internet sets out how Member States should tackle online child abuse images through the development of an appropriate law enforcement response, close working with the internet industry, and international cooperation. Association of Chief Police Officers (ACPO) supports the Government’s decision to rejoin the measure.

7.4 * Confiscation and Freezing Orders - The Freezing orders measure establishes rules under which a Member State recognises and executes in its territory a freezing order for property or evidence issued by the judicial authority of another Member State in the framework of criminal proceedings. The Confiscation orders measure is to ensure all Member States have effective rules governing the confiscation of proceeds from crime, and that they can confiscate not only property that is or which represents the proceeds of the crime for which the individual has been convicted, but also other property that is or represents the proceeds of other criminal activity by the convicted individually.

7.5 Part 2 of, and Schedules 1 and 2 to, the Regulations make provision in relation to the freezing and confiscation of criminal assets, including the instrumentalities of crime (instrumentalities are assets used for criminal conduct). Part 2 transposes the Freezing orders Framework Decision (to the extent that the Framework Decision has not

already been transposed by the Crime (International Co-operation) Act 2003) and the confiscation orders Framework Decision, including that measure as amended by the trials *in absentia* Framework Decision.

7.6 The Proceeds of Crime Act 2002 makes provision for the freezing and confiscation of criminal property (Part 2 in relation to England and Wales, Part 3 as respects Scotland and Part 4 in relation to Northern Ireland) by means of restraint orders and confiscation orders. Part 2 of the Regulations make provision to enable restraint and confiscation orders made by UK courts against property in other Member States, to be enforced by the authorities in those States. It also makes provision to allow our domestic courts to recognise and enforce restraint and confiscation orders made against property in the UK, or persons normally resident in the UK, made by the authorities in other Member States. It should be noted that this Part of the Regulations only enables domestic courts to transmit restraint orders and confiscation orders they have made themselves, or enforce orders made by other Member States. They do not give any additional powers to make restraint orders and confiscation orders.

7.7 The Regulations facilitate the direct execution of confiscation orders for the proceeds of crime by establishing simplified procedures for recognition among Member States and rules for dividing confiscated property between the Member State issuing the confiscation order and the one executing it. The confiscation orders Framework Decision does not contain deadlines for execution of an order but it does, in the circumstances defined in Article 6, create an obligation to execute confiscation orders without verification of dual criminality.

7.8 Customs Information System (“CIS”) - This Council Decision establishes a “Customs Information System” (“CIS”) and permits customs law enforcement services in Member States to use these electronic information-sharing services to assist each other in combating customs crimes, such as smuggling of drugs, weapons and tobacco. CIS enables activity under Naples II, which has assisted in a number of successful HMRC investigations into cigarette and alcohol fraud, and an oil laundering operation in 2011. These successes prevented over £120 million in potential revenue losses to the UK Exchequer.

7.9 Data Protection Secretariat - This measure establishes a single, independent joint secretariat for the joint supervisory data protection bodies set up under the Europol Convention (now Europol Council Decision), the Convention on the Use of Information Technology for Customs Purposes (now CIS) and the Schengen Convention.

7.10 Arrest Warrant - The purpose of the Arrest Warrant is to speed up the extradition process between Member States, reducing the potential for administrative delay under previous extradition arrangements.

7.11 The Arrest Warrant removed certain barriers to extradition that existed under previous extradition arrangements (the 1957 Council of Europe Convention, or “ECE”)

including the nationality of those sought and applicable limitation periods, where the extradition offence would be time-barred under the law of the requested State.

7.12 Under the ECE there are 13 countries with an absolute bar on extraditing their own nationals to the UK and a further 9 who have made reservations to that effect to the Convention. These include countries like Spain, Slovakia, France, Germany, Greece and Latvia.

7.13 * ECRIS - The two ECRIS measures require Member States to inform each other about convictions of EU nationals in another Member State and permit Member States to request the previous convictions of individuals from the Member State of nationality. In cases involving criminal proceedings, the requesting Member State must provide any information held in national records. In cases that are not criminal proceedings the requested Member State need only provide the information if their national law allows. The Regulations make provision to implement these measures, including establishing the Chief Constable of Hampshire, under whom the Association of Chief Police Officers (“ACPO”) Criminal Records Office formally operates, as the UK’s central authority.

7.14 In 2006 the UK made and received no requests for criminal records. But following the introduction of ECRIS the UK made 25,671 requests to other Member States in 2012/13 and 41,545 in 13/14. From June 2006 to the present we have also received over 55,000 notifications of UK nationals convicted in Member States.

7.15 European Judicial Network - The aim of the European Judicial Network (“EJN”) is to improve judicial cooperation between Member States at both the legal and practical level in order to combat serious crime. The importance of the EJN has been highlighted by a number of senior figures in the field of criminal justice including the Rt Hon Frank Mulholland QC, the Lord Advocate.

7.16 Eurojust - Eurojust is mandated to “stimulate and improve” co-ordination and co-operation between Member States in cross-border criminal investigations and prosecutions. This can involve advising on the requirements of different legal systems, supporting the operation of mutual legal assistance (judicial cooperation) arrangements, bringing together national authorities in coordination meetings, and providing funding and technical support to Joint Investigation Teams (“JITs”).

7.17 Europol - The Europol Council Decision establishes the European Police Office (the implementing measures in relation to Europol are which are also on the list are essential to the UK’s membership of Europol). Together, the measures aim to make Europe safer through the provision of support and assistance to Member States in the fight against organised crime and terrorism. Europol has scope to participate in JITs, further supporting Member States in ongoing criminal investigations. Operation Trivium III is a recent example of the cooperation undertaken through Europol. This operation saw 1,073 suspected criminals arrested in a joint operation between international police teams. The figures showed that foreign suspects were seized for crimes including rape, threats to

kill, serious assault and drugs offences following vital information being shared across Europe.

7.18 * European Supervision Order - The European Supervision Order (“ESO”) enables a suspect or defendant subject to a pre-trial non-custodial supervision measure (such as supervised bail) in a Member State in which they are not resident, to be supervised in their home, or other, Member State until such time as their trial takes place. The Framework Decision does not oblige Member States to release defendants on bail or to seek supervision of bail conditions by another Member State. If the court of the Member State in which the offence is alleged to have been committed considers bail or some kind of supervised bail is not appropriate, the defendant may be remanded in custody or made subject to supervised bail in that Member State pending trial according to national law.

7.19 The Government’s intention to seek to opt into the ESO signals a clear intent to provide additional safeguards that make it easier for people like Mr Symeou to be bailed back to the UK and prevent such injustices occurring in future. The Regulations make provision to give effect to the ESO in England and Wales, and Northern Ireland.

7.20 FADO - FADO is a computerised archive containing images and textual information relating to falsified and authentic identity documents such as passports, identity cards, visas, residence permits and driving licences. It was devised and financed by the EU. FADO is used daily by Border Force and other enforcement agencies.

7.21 Financial Intelligence Units - This Decision is to enable the improved disclosure and exchange of financial information between Member States’ Financial Investigation Units (“FIUs”) in combating money laundering. The UK FIU routinely uses this service. It receives about 30 requests per month from units in other Member States and submits about 40 requests per month on behalf of UK law enforcement agencies.

7.22 Football Safety and Security - These measures set up the National Football Information Points to co-ordinate and facilitate international police co-operation and information exchange in connection with football matches with an international dimension. Every season more than 100,000 football fans from the UK travel overseas to watch club and international teams in European matches. Operational experience has demonstrated that cooperation with countries not subject to the measure, such as Russia and Ukraine, has been more difficult than with countries that are in the measure. ACPO have said that this measure is vital.

7.23 International Undertakings in the Fight of Organised Crime (GENVAL) - This instrument enables the operation of the Working Party on General Matters including Evaluation (“GENVAL”). GENVAL focuses on EU Member States' cooperation in countering serious and organised crime. Some of the evaluations such as the practical operation of the Arrest Warrant had some positive effects in that the UK was able to push for proportionality to be a consideration.

7.24 * Joint Investigation Teams (“JITs”) - This Framework Decision aims to prevent and combat crime (especially drug trafficking, people trafficking and terrorism) by providing for closer cooperation between police forces, customs authorities and other competent authorities in Member States. The measure sets out a framework for the establishment and operation of JITs between two or more Member States and sets clear parameters for operational coordination. Operation Golf is an example of a successful JIT. In the UK this resulted in 20 investigations, 126 arrests and 26 vulnerable children being taken into protective custody. 18 individuals were arrested in Romania and prosecuted for trafficking 272 minors to the UK.

7.25 * Mutual Recognition of Financial Penalties - This Framework Decision requires Member States to collect financial penalties (of over £55.31 or €70) transferred by other Member States, as they would a domestic financial penalty. The enforcing Member State that collects the financial penalty can keep it (but compensation order monies must be remitted back to the victim).

7.26 The money collected by way of financial penalties goes to the Consolidated Fund and the Ministry of Justice receives a proportion of this back under the Fines Incentive Scheme. This measure ensures that offenders are not able to evade financial penalties simply because they do not live in the Member State where they offend.

7.27 The Framework Decision has already been transposed in part by the Criminal Justice and Immigration Act 2008. These Regulations ensure that this measure is fully transposed in England and Wales, and Northern Ireland.

7.28 Naples II - Naples II provides for customs co-operation and mutual assistance between customs authorities. It allows the disclosure of information for the purposes of the detection, prevention, investigation and prosecution of crime. It is also the legal base which allows for the sharing of information during Joint Customs Operations with other Member States. The measure also provides for “special forms of co-operation” between customs authorities such as surveillance, covert and joint investigations.

7.29 HMRC officials estimate that on average 500 seizures are made per year using Naples II. They estimate the average value these seizures to be approximately £250,000 and with a total value of about £60m. There is no other legal base that allows for the breath of work currently conceded under Naples II.

7.30 * Prisoner Transfer Framework Decision - This measure provides for the compulsory transfer of foreign national offenders between Member States without the

consent of the prisoner. It also restricts the circumstances by which a Member State can refuse to accept back one of its nationals. The measure enables non-British EU nationals held in prisons in the UK to be returned to their country of nationality to serve their sentences, and for British nationals held in other Member States to be returned to serve their sentences in the UK.

7.31 The total prison population (as at 30 June 2014) stands at 85,509 of which 10,834 are FNOs, representing 13% of the total prison population. 39% (4,256) of the FNO population are EU nationals. The Framework Decision is already largely transposed by the Repatriation of Prisoners Act 1984. These Regulations complete the transposition of this measure, in particular to Northern Ireland.

7.32 * Swedish Initiative - This measure seeks to simplify the exchange of information and intelligence between law enforcement authorities in Member States for the purposes of conducting criminal investigations or criminal intelligence operations. It provides a systemised (standard form to be used) and time bound (8 hours) process for the exchange of information between Member State's law enforcement agencies. The Regulations transpose the measure into domestic law. In 2011 there were 271 outbound requests made from AROs via this Framework Decision and 53 inbound requests.

7.33 * Taking Into Account Convictions - This Framework Decision requires courts in the Member States to take account of a defendant's previous convictions in any other Member State "to the extent previous national convictions are taken into account".

7.34 * Trials in absentia - There are several EU measures which deal with the issue of judgments *in absentia* (decisions handed down following a trial at which the person concerned did not appear personally). These instruments deal with the recognition of decisions handed down *in absentia* in different ways and require mutual recognition of judgments. This Framework Decision aligns the criteria and amends each of the relevant measures to ensure adequate safeguards for the defendant. The Framework Decisions amended by this measure which the Government has indicated it intends to seek to rejoin are those concerning the Arrest Warrant, confiscation orders, mutual recognition of financial penalties and prisoner transfers.

7.35 * Data Protection - The purpose of the Framework Decision is to establish a common level of protection and an appropriate level of security when Member States exchange personal data within the framework of police and judicial cooperation in criminal matters. It applies to "competent authorities", when they process personal data in order to prevent, instigate, detect or prosecute crime or execute criminal penalties in cross-border cases. In the UK this includes police, the National Crime Agency and many government departments.

7.36 * Schengen Convention - The Schengen Convention (as amended by two measures which are also listed) aims to tackle the threat of cross-border crime by facilitating police cooperation and cross-border surveillance. Article 40 allows UK law enforcement officers to cooperate across borders in Schengen States.

7.37 SIS II & SIS II Networks - SIS II is the new EU database for swapping alerts between Member States in relation to missing and wanted people and objects. It will also become the main way of transmitting data about people wanted on Arrest Warrants.

7.38 In the EU there have been numerous examples of SIS II being used locate dangerous criminals as well as missing children. Furthermore, Member States have made it very clear that SIS II is being used to identify and track foreign fighters. As Member States have integrated SIS II into their exit and entry checks, on the UK's connection into SIS II this will provide an excellent law enforcement tool to track and identify subjects of interest. It will also extend the UK's capability to locate criminals who have fled UK justice. SIS II has just over 51 million records or alerts on the system. This includes the following: 900,000 alerts for wanted or missing persons (including approximately 35,000 Article 26 alerts), 40 million alerts for identity documents; 3 million vehicle alerts; and 600,000 Article 24 (refused entry or stay into the Schengen Area) alerts which will not be visible in the UK.

8. Consultation outcome

8.1 Consultation has been undertaken with operational partners and stakeholder groups as well as other government departments and the devolved administrations. The Government has also considered the findings of Parliamentary Committees.

9. Guidance

9.1 The Home Office and Ministry of Justice will publish any necessary guidance on the effect of these changes.

10. Impact

10.1 An impact assessment in respect the Government's anticipated exercise of its power under Article 10(5) of Protocol 36, of the anticipated Protocol 36 Decisions, and the relevant measures covered by these Regulations was laid before Parliament in July 2014 (Command Paper 8897 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/326698/41670_Cm_8897_Accessible.pdf).

11. Regulating small business

11.1 The legislation has no impact on small business.

12. Monitoring & review

12.1 The Home Office and Ministry of Justice will closely monitor the impact of these Regulations.

13. Contact

Any queries regarding the instrument can be sent to:

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