



HM Government

Decision pursuant to Article 10 of Protocol 36 to The Treaty on the Functioning of the European Union

July 2013



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Presented to Parliament
by the Secretary of State for the Home Department
by Command of Her Majesty

July 2013

Cm 8671

£24.50

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London SW1P 4DF

This publication is also available for download at:
www.gov.uk/home-office

ISBN: 9780101867122

Printed in the UK by The Stationery Office Limited
on behalf of the Controller of Her Majesty's Stationery
Office

ID 2571448 31566 07/13

Printed on paper containing 75% recycled fibre content
minimum.

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Introduction

Article 10 of Protocol 36 to the EU Treaties

1. Article 10 of Protocol 36 to the EU Treaties enables the Government to decide, at the latest by **31 May 2014**, whether or not the UK should continue to be bound by the approximately 130 police and criminal justice measures which were adopted before the Treaty of Lisbon entered into force, or whether it should exercise its right to opt out of them all. The full text of Article 10 is contained in the box below.

Article 10(1) of Protocol 36

2. Article 10(1) of the Protocol provides a transitional period in respect of certain pre-Lisbon or ‘third pillar’ measures in the field of police co-operation and judicial co-operation in criminal matters. During this period, the infraction powers of the European Commission under Article 258 of the Treaty on the Functioning of the European Union (TFEU) do not apply. The powers of the Court of Justice of the European Union (CJEU) are limited to those in Title VI of the version of the Treaty of the European Union (TEU) in force prior to the entry into force of the Treaty of Lisbon. This is the version in force following amendments made by the Treaty of Nice. This means, for example, that the CJEU can only give preliminary rulings on the interpretation of those measures on references made by the Courts of those Member States which have given an appropriate declaration. The UK has not given such a declaration. This also means, for example, that the CJEU has no jurisdiction to review the validity or proportionality of the operations carried out by the police or other law enforcement services of a Member State, or the exercise of the responsibilities incumbent on Member States with regard to the maintenance of law and order and the safeguarding of internal security.
3. The measures referred to with Article 10(1) are defined under Article 9 of Protocol 36 which preserves the legal effects of the measures adopted on the basis of the TEU pre-Lisbon until those measures are repealed, annulled or

amended in implementation of the Treaties. Those measures are those of the Institutions, bodies, offices and agencies of the EU. This includes measures such as Third Pillar Framework Decisions and Decisions adopted under the ex- Article 34(2)(b) and (c) of the TEU.

Article 10(2) of Protocol 36

4. If a measure is amended, Article 10(2) provides for the normal full European Commission and CJEU powers to apply over the amended measure from that time on. This only applies in respect of Member States who participate in that amended measure.

Article 10(3) of Protocol 36

5. Article 10(3) provides for the transitional period to end five years after the date of entry into force of the Treaty of Lisbon. The Lisbon Treaty entered into force on 1 December 2009.
6. The transitional provisions set out under Article 10(1) of Protocol 36 during which infractions powers under Article 258 of the TFEU do not apply will therefore end on 1 December 2014. Therefore:
 - a. If the UK did not opt out then all of these measures will become subject to the full jurisdiction of the CJEU and the enforcement powers of the European Commission on **1 December 2014**;
 - b. If the UK does exercise the opt-out the changes to the jurisdiction of the CJEU and the powers of the Commission will come into effect for all the Member States except the UK on **1 December 2014**.

Article 10(4) of Protocol 36

7. Under Article 10(4) of the Protocol, the UK can give the notification to exercise the opt-out to the Presidency of the Council at the latest six months before the

expiry of the transitional period set out in Article 10(3). Notification must therefore be made by **31 May 2014** at the latest. Notification will indicate that the UK does not to accept the powers conferred on the European Commission and CJEU under Article 258 of the TFEU following expiry of the transitional period set out under Article 10(3) over measures referred to in Article 10(1) of the Protocol. For the reasons given above, this does not include measures that have been amended and so excluded from Article 10(1) by virtue of the provisions set out under Article 10(2) of the Protocol.

8. Should the UK exercise its opt-out, under the second paragraph of Article 10(4), the Council, acting by Qualified Majority Voting (QMV) on a proposal by the Commission shall determine the necessary consequential and transitional arrangements. The UK will not participate in the adoption of this Decision.

9. The Council may, under Article 10(4) of the Protocol, adopt a decision determining that the UK shall bear the direct financial consequences, if any, necessarily and unavoidably incurred as a result of the cessation of its participation in those measures. The Council will act on a proposal from the Commission. This provision confers a power on the Council to adopt a Decision but it is not required to do so. A Decision would be adopted by QMV and the UK can participate in it. The Government considers this to be a high threshold to meet; it would only cover those direct costs incurred as a result of the UK not opting back into a measure.

Article 10(5) of Protocol 36

10. Under Article 10(5), the UK may at any time afterwards 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.

11. Article 10(5) provides that if the UK notifies the Council of its wish to participate in former third pillar measures, the relevant provisions of the Schengen Protocol (No. 19) or the freedom, security and justice Opt-in Protocol (No. 21) will apply. When acting under the relevant Protocols, the EU

institutions and UK must seek to re-establish the widest possible measure of participation of the UK in the *acquis* of the EU in the area of freedom, security and justice without seriously affecting the practical operability of their various parts, while respecting their coherence.

12. The test of practical operability is similar to the test of operability under Article 4a of Protocol 21. The tests of wide participation, practical operability and coherence are also similar to those found in Article 5 of the Schengen Protocol. Under Protocol 21, if the UK's non-participation in an amending measure makes the application of that measure inoperable for other Member States or the EU, the UK may, after following the procedure set out in Article 4a, be ejected from the underlying measure. This is considered to be a high threshold. The test refers to the practical implications of the UK no longer participating in the relevant EU measure.

Procedure to rejoin measures

Schengen measures

13. Under Article 4 of the Schengen Protocol, the decision on whether the UK may re-participate in measures pursuant to Article 10(5) of Protocol 36 will be decided by the Council with the unanimity of its members. No express powers exist with the Schengen Protocol that would allow the European Commission or Council to impose conditions on the UK's re-participation. There is no time limit by which the Council must act on a request.
14. There is no formal or direct role for the Commission under the Protocol.

Non-Schengen measures

15. The procedure for rejoining non-Schengen measures is set out in Article 331(1) of the TFEU, as applied by Article 4 of Protocol 21. The Commission has up to four months to confirm the participation of the UK in the measure. However, there is nothing preventing the Commission giving an immediate

response, nor to agreement being reached informally ahead of the UK's formal application. The Commission may impose conditions on the UK's re-participation and set a time period for those to be fulfilled. If after expiry of the time period the Commission considers that conditions have not been fulfilled, the UK can refer the matter to the Council. The Council (minus the UK) will decide by QMV whether the UK can participate.

Article 10 of Protocol 36

1. As a transitional measure, and with respect to acts of the Union in the field of police co-operation and judicial co-operation in criminal matters which have been adopted before the entry into force of the Treaty of Lisbon, the powers of the institutions shall be the following at the date of entry into force of that Treaty: the powers of the Commission under Article 258 of the Treaty on the Functioning of the European Union shall not be applicable and the powers of the Court of Justice of the European Union under Title VI of the Treaty on European Union, in the version in force before the entry into force of the Treaty of Lisbon, shall remain the same, including where they have been accepted under Article 35(2) of the said Treaty on European Union.
2. The amendment of an act referred to in paragraph 1 shall entail the applicability of the powers of the institutions referred to in that paragraph as set out in the Treaties with respect to the amended act for those Member States to which that amended act shall apply.
3. In any case, the transitional measure mentioned in paragraph 1 shall cease to have effect five years after the date of entry into force of the Treaty of Lisbon.
4. At the latest six months before the expiry of the transitional period referred to in paragraph 3, the United Kingdom may notify to the Council that it does not accept, with respect to the acts referred to in paragraph 1, the powers of the institutions referred to in paragraph 1 as set out in the Treaties. In case the United Kingdom has made that notification, all acts referred to in paragraph 1 shall cease to apply to it as from the date of expiry of the transitional period referred to in paragraph 3. This subparagraph shall not apply with respect to the amended acts which are applicable to the United Kingdom as referred to in paragraph 2.

The Council, acting by a qualified majority on a proposal from the Commission, shall determine the necessary consequential and transitional arrangements. The United Kingdom shall not participate in the adoption of this decision. A qualified majority of the Council shall be defined in accordance with Article 238(3)(a) of the Treaty on the Functioning of the European Union.

The Council, acting by a qualified majority on a proposal from the Commission, may also adopt a decision determining that the United Kingdom shall bear the direct financial consequences, if any, necessarily and unavoidably incurred as a result of the cessation of its participation in those acts.

5. The United Kingdom may, at any time afterwards, notify the Council of its wish to participate in acts which have ceased to apply to it pursuant to paragraph 4, first subparagraph. In that case, the relevant provisions of the Protocol on the Schengen acquis integrated into the framework of the European Union or of the Protocol on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, as the case may be, shall apply. The powers of the institutions with regard to those acts shall be those set out in the Treaties. When acting under the relevant Protocols, the Union institutions and the United Kingdom shall seek to re-establish the widest possible measure of participation of the United Kingdom 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 their coherence.

Measures

Decision pursuant to Article 10 of Protocol 36 to The Treaty on the Functioning of the European Union (The '2014 Decision') – measures the UK will seek to rejoin.

Non-Schengen Measures

- 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
- Council Act of 18 December 1997 drawing up the Convention on mutual assistance and co-operation between customs administrations (Naples II)
- Joint Action 98/700/JHA of 3 December 1998 concerning the setting up of a European Image Archiving System (FADO)
- Council Decision 2000/375/JHA to combat child pornography on the internet
- 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)
- 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

- Council Decision 2002/187/JHA of 28 February 2002 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 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
- Council Framework Decision 2002/465/JHA of 13 June 2002 on joint investigation teams
- Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States
- Council Decision 2002/348/JHA concerning security in connection with football matches with an international dimension
- Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence
- Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties
- Council Decision 2005/681/JHA of 20 September 2005 establishing the European Police College (CEPOL) and repealing Decision 2000/820/JHA
- Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognitions to confiscation orders

- 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
- 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
- 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
- Council Decision 2008/617/JHA of 23 June 2008 on the improvement of co-operation between the special intervention units of the Member States of the European Union in crisis situations
- 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
- Council Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial co-operation in criminal matters
- 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
- 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

- 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
- 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
- Council Decision 2009/917/JHA of 30 November 2009 on the use of information technology for customs purposes
- 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 2009/371/JHA establishing the European Police Office (Europol)

Schengen Measures

- SCH/Com-ex (98)52 on the Handbook on cross-border police co-operation
- 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 48, Article 49(b) – (f), Article 51, Article 54, Article 55, Article 56, Article 57, Article 58, 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
- Council Decision 2007/533/JHA of 12 June 2007 on the establishment, operation and use of the second generation Schengen Information System (SIS II)

Explanatory Memoranda on measures subject to the decision

Signed versions of all Explanatory Memorandum have been laid in the House Library.

EXPLANATORY MEMORANDUM (EM) ON ARTICLE 10(4) OF PROTOCOL 36 TO THE TREATY ON EUROPEAN UNION (TEU) AND THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION (TFEU) - THE '2014 DECISION'

Schengen measures

1/13

Submitted by the Home Office on July 2013

SUBJECT MATTER

1. In accordance with Article 10(4) of Protocol 36 to the Treaties the UK must, by 31 May 2014, decide whether to accept Commission enforcement powers and Court of Justice of the European Union jurisdiction over all EU police and criminal justice measures adopted before 1 December 2009 or to opt out of these measures. The decision to remain bound or opt out must be taken *en masse*. Protocol 36 to the Treaties does permit the UK to apply to rejoin individual measures if it chooses to opt out *en masse*.
2. A number of measures within the scope of the 2014 decision are 'Schengen measures'. Under the Schengen Agreement of 1985 and the Schengen Implementing Convention of 1990, several European countries have agreed to lift border controls between them, creating an area of unrestricted travel known as the Schengen Area. The Schengen Acquis was incorporated into EU law by the Amsterdam Treaty in 1997. The Schengen Area now comprises all of the Member States of the European Union except the UK and Ireland. Bulgaria, Romania, Cyprus and Croatia are bound by the provisions of the Schengen Acquis, but it does not yet fully apply to them. Four non-EU countries are also participating in the Schengen Area (Iceland, Liechtenstein, Norway and Switzerland).
3. To complement the area of unrestricted travel, the States participating in Schengen agreed that compensatory policing and judicial cooperation measures were needed to combat organised crime and terrorism. The UK and Ireland joined selected Schengen provisions on police and judicial cooperation, and the UK is also working to bring into operation the policing elements of the Second Generation of the Schengen Information System (SIS II).
4. The UK's participation in Schengen provisions on police and judicial cooperation, including the Second Generation of the Schengen Information System, is based on two core Council Decisions; Council Decision 2000/365/EC of 29 May 2000 and Council Decision 2004/926/EC of 22 December 2004. The former provides a

list of the specific Schengen Agreement articles that the UK has signed up to, and the Schengen-building measures which existed in May 2000 that apply to the UK. This does not affect UK retention of border controls, and this is confirmed under Protocol 20 to the TFEU.

5. The subsequent integration of Schengen activity into wider EU policy means that many articles and sub-articles of the Schengen Agreement and Schengen measures have been repealed and replaced since 2003. This Explanatory Memorandum therefore provides further information about the Schengen measures which are still in force and are within the scope of the 2014 opt-out decision (numbers 110 – 133 on the list of 15 October, a copy of which was placed in the House Library). The measures are listed in order; however, where measures cover similar substantive areas we have chosen to group them accordingly.

(110) Convention implementing the Schengen Agreement of 1985

Articles 39 (to the extent that that this provision has not been replaced by Council Framework Decision 2006/960/JHA), 40, 42 and 43 (to the extent that they relate to article 40), 44, 46, 47 (except (2)(c) and (4)), 48, 49(b) – (f), 51, 54, 55, 56, 57, 58, 71, 72, 126, 127, 128, 129, 130, Final Act – Declaration N° 3 (concerning article 71(2))

(120) 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

(121) 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

6. **Articles 39 to 47** of the Convention deal with the key principles and procedures that provide for police cooperation between Schengen States.
7. **Article 39** provides that Schengen States will work together, subject to national law, in order to prevent and detect criminal offences.
8. **Article 40** lays out the processes for cross border surveillance between Schengen States. It provides that law enforcement officers of a Schengen State who are keeping a person under surveillance may be given assistance with that continued surveillance if that person crosses into another Schengen State.
9. **Articles 42 and 43** outline the criminal and civil liability for officers acting in the requested State.
10. **Article 44** covers the sharing of equipment and standardisation of telecommunications, especially in border areas.

11. **Article 46** relates to the sharing of intelligence in order to combat future crime and prevent offences. This intelligence is shared through designated central police authorities.
12. **Article 47** provides for the creation of liaison officers to facilitate faster police and judicial co-operation and information data exchange through non-automated (i.e. non-SIS II) means.
13. **Articles 48 to 53** cover mutual legal assistance (MLA) in criminal matters. However, Articles 49(a), 50, 52 and 53 have been repealed and replaced by the Council Act of 29 May 2000 establishing the Convention on mutual legal assistance in criminal matters between the Member States of the European Union (EU MLA Convention 2000), which is also within the scope of the 2014 decision (measure 25). Article 48 explains that this chapter supplements the 1959 European Convention and Article 49 lists the types of proceedings MLA can be provided for and provides for the service of judicial documents. Article 51 provides that the execution of requests for search and seizure may be dependent on certain conditions being fulfilled.
14. **Articles 54 to 58** ensure that the *ne bis in idem* (double jeopardy) principle is applied to cooperation under the Schengen Convention and sets out the principle that a person cannot be punished in one Member State for a crime for which he has been convicted in another Member State.
15. **Articles 71 and 72** require that Schengen States act in accordance with UN Conventions covering narcotic drugs and psychotropic substances whenever they participate in any multilateral operations and any activities at national level. This aims to ensure that all Schengen States follow similar procedures and information requirements, so that investigations and judicial processing in national, cross border and international cases lead to successful convictions.
16. **Articles 126 to 130** cover the Protection of Personal Data, with a direct link to the operation of SIS II.

Policy implications

17. On joining it was deemed that the UK already met the majority of the Schengen obligations, except for certain new aspects. Cross border surveillance elements were implemented through sections 83 and 84 of the Crime (International Co-operation) Act 2003 (CICA), which came into force on 26 April 2004, in order to complement the Regulation of Investigatory Powers Act 2000 (RIPA) and sections 103 and 104 of the Police Reform Act 2002, which were already in force when the UK joined Schengen policing elements. Existing provisions on criminal and civil liabilities (with corresponding legislation in Scotland and Northern Ireland) were extended by way of the International Joint Investigation Teams (International Agreement) Order 2004, which came into force on 7 May 2004. Operational guidance on Schengen activities was issued to all UK police authorities.

18. The obligations imposed in Articles 48, 49 and 51 are also met through the UK's domestic legislation for MLA (e.g. CICA). For example, section 16 of CICA provides that requests for search and seizure must satisfy dual criminality and this is consistent with Article 51 of the Schengen Convention. These Articles (and those already replaced by the EU MLA Convention 2000) will be replaced in whole or in part by the draft Directive of the European Parliament and of the Council regarding the European Investigation Order in criminal matters (EIO). The most recent EM on the EIO is 18918/11, which was submitted on 23 January 2012.
19. The principle of *ne bis in idem* is a well-established principle, not a specific process, within national criminal justice systems and is already reflected across UK law. It now also operates in the EU context across a wide range of measures, in order to prevent someone being tried for the same offence in more than one national jurisdiction.
20. On Narcotic Drugs, Articles 71 and 72 on Narcotic Drugs have a read across to the UN Convention 1961 (amended in 1972) on Narcotic Drugs and UN Convention 1971 on Psychotropic Substances. Subsequently the UN Convention 1988 against illicit traffic in narcotic drugs and psychotropic substances confirmed and built on both Conventions. The UK is a signatory to these relevant UN Conventions which form the basis for Schengen standards and approach, and the Criminal Justice (International Co-operation) Act 1990 and two subsequent Statutory Instruments (the Controlled Drugs (Drug Precursors) (intra-Community Trade) Regulations 2008 and the Controlled Drugs (Drug Precursors)(Community External Trade) Regulations 2008) reaffirmed and fully implemented the UN Conventions.
21. If the UK left the provisions of the Schengen Convention in which it participates, UK legislation such as RIPA and CICA would remain in place. UK law enforcement officers would still have the power to conduct operations as a matter of UK law. For States that are non-EU, but party to these sections of the Schengen Convention, the UK would still be able to provide MLA, including search and seizure, due to our domestic legislation and through pre-existing Council of Europe Conventions or bilateral treaties.
22. The loss of Schengen Article 40 would have an impact upon the ability of SOCA, the future National Crime Agency (NCA) and wider UK law enforcement to carry out operational activity overseas. While Article 40 is not the only way for UK requests for continued cross-border surveillance, it is the most effective. Where the UK requires surveillance support in Europe, or Member States wish to carry out or have carried out surveillance in the UK, this could be on a bilateral "police to police" basis through International Letters of Requests (ILORs) but usually only where the foreign jurisdiction has a parallel operation ongoing.
23. The ILOR route is often slow with significant time delays and the process does not cater well for ongoing surveillance, which is why Article 40 was introduced. These delays and the inability to compel a response to the requests at short notice (usually when the subject is about to leave the UK) would inhibit our ability to continue surveillance across European borders in a timely fashion and

effectively require such activity to be pre-planned. While RIPA does provide for extraterritorial activity to be authorised, this does not mean it can take place in practice as all Member States, including the UK, assert their own sovereignty and would expect such activity to be properly authorised with respect to their domestic legislation (including EU legislation as applied and adopted by them).

24. There is a risk that if the UK opts out of Schengen Article 40, and all other Member States are using Article 40 for urgent assistance in cross-border surveillance operations, ILOR requests (via established bilateral channels) will be deemed a lower priority than other Member States' Article 40 requests. It is difficult to assess the extent to which this will happen; it will differ dependent on the bilateral relationship and the process for passing the ILOR. There would be no way to ensure compulsion to respond to an ILOR.
25. The narcotic drugs provisions overlap with international obligations and therefore domestic legislation would remain, as Schengen States are required to act in accordance with the UN Conventions covering narcotic drugs and psychotropic substances. They aim to ensure that all multilateral operations as well as activities at national level follow similar procedures and information requirements; in order that investigations and judicial processing in national, cross border and international cases lead to successful convictions.
26. On Article 54 (*ne bis in idem*), Scotland would need to review the Double Jeopardy (Scotland) Act 2011 Act, where section 10(3) makes a direct reference to the Schengen Convention when addressing the possibility of sham foreign proceedings. It recognises "the obligations of the United Kingdom under Article 54". This legislation is the recent Scottish equivalent of the provisions which are in force elsewhere in the UK, but are written without direct reference to Schengen, which allow retrials in certain cases.
27. As the Minister for Security said on 9 July 2012 in response to a Parliamentary Question, the UK has made 154 outbound requests for authority to continue surveillance into foreign jurisdictions under Article 40 of the Schengen Convention and has received five such requests from other Member States. These figures do not represent the number of occasions on which UK law enforcement actually conducted surveillance on foreign soil because such requests for continued surveillance are often facilitated by the receiving country, eliminating the need for UK law enforcement to travel. Of the five requests the UK received from other Member States, all were conducted by UK authorities rather than the requesting Member State.

(111) Accession Protocols: (amended in conformity with article 1 (b) of Council Decision 2000/365/EC and Council Decision 2004/926/EC article 1)

Italy: Articles 2, 4 + common declaration on articles 2 and 3 to the extent it relates to Article 2,

Spain: Articles 2, 4 and Final Act, Part III, declaration 2

Portugal: Articles 2, 4, 5 and 6

Greece: Articles 2, 3, 4, 5 and Final Act, Part III, declaration 2

Denmark: Articles 2, 4 and 6 and Final Act Part III joint declaration 3

Finland: Articles 2, 4 and 5 and Final Act, Part II joint declaration 3
Sweden: Articles 2, 4 and 5 + Final Act, Part II Joint declaration 3

(122) 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

(132) Council Decision 2008/149/EC of 28 January 2008 on the conclusion, on behalf of the European Union, of the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen acquis

28. The list of separate accession agreements is the list of States that were not original signatories of the Schengen Convention but had joined Schengen by the time the Schengen Acquis was brought into EU law. Council Decisions 2004/849/EC and 2008/149/EC cover the Swiss Confederation's accession to Schengen.

Policy implications

29. The UK does not need to implement these measures. The Council Decisions were simply adopted and published in the Official Journal.

30. If the UK decided not to participate in these measures, there would be no need to repeal domestic legislation. Were we to exercise the block opt-out and rejoin elements of Schengen, the Council Decision setting out our new level of participation would, it seems, negate the need to rejoin these measures. This is because a fresh list of countries which are currently members of Schengen (listing the legislation confirming each country's membership) will be attached to the Council Decision automatically.

31. The Government considers the economic impacts of non-participation in this measure to be negligible.

(112) SCH/Com-ex (93) 14 on improving practical judicial cooperation for combating drug trafficking

32. Under this measure, if a Member State refuses a request for MLA in relation to the combating of drug trafficking, the State is required to inform the requesting party of their reason for refusal and of any conditions which must be met before the request can be enforced. Although there is no legislative basis in domestic law, this was, and remains, standard practice in dealing with MLA requests received by the UK. Moreover, this requirement is included in Article 4 of the EU MLA Convention 2000 (which is also within the scope of the 2014) and Article 15 of the EIO general approach text agreed by the Council on 14 December 2011.

Policy implications

33. It is standard practice in the UK to inform a requesting party of any grounds for refusal of such a request; the UK therefore already complies with this obligation. In respect of EU Member States this measure has been largely superseded by the EU MLA Convention, and will be superseded by the EIO. For other Schengen states or EU Member States not participating in the EIO, this area is governed by the 1959 Council of Europe Convention on Mutual Assistance in Criminal Matters (and its Protocols) or the separate agreement with the EU implementing parts of the EU MLA Convention with Iceland and Norway (note this agreement is not part of the 2014 decision). It is therefore anticipated that there would be no impact on national policy and legislation or on international cooperation if the UK did not participate in this measure.
34. If the UK decided not to participate in this measure, there would be no change to domestic legislation.
35. The Government considers the economic impacts of non-participation in this measure to be negligible.

(113) SCH/Com-ex (96) decl 6 rev 2 (declaration on extradition)

36. SCH/Com-ex (96) decl 6 rev 2 (declaration on extradition) seeks to ensure that States consider the need to protect the Schengen area of free movement and security when considering extradition requests. It requires States to notify other Member States when detention pending extradition no longer applies.
37. This instrument relates to a 1996 intra-EU Convention on extradition and in practice has been superseded by the European Arrest Warrant (2002/584/JHA). The European Arrest Warrant is given effect by parts 1 and 3 of the Extradition Act 2003.

(114) SCH/Com-ex (98) 26 def setting up a Standing Committee on the evaluation and implementation of Schengen

38. This instrument establishes a visit, reporting and confirmation process based on peer-to-peer evaluation and mutual trust, so that States participating in Schengen to any degree (EU Member States, EEA States and Associated States) can ensure that fellow States are applying the Schengen acquis correctly. This process is managed by a Standing Committee comprised of States' representatives and experts. This instrument provides the mechanism by which the UK will be evaluated to join SIS II.

Policy implications

39. The UK currently participates in evaluating candidate States' readiness to lower their internal border controls through the first mandate, and works to ensure that States continue to apply the criteria and meet standards through the second mandate. This instrument provides the mechanism by which the UK will be evaluated to join SIS II. There is no other mechanism available for this purpose.

Whilst we maintain our own border controls, the information we gather from the evaluation of others, in particular those countries which form, or will form, the EU external border, is useful in our analysis of in-country situations and risk assessment of organised crime and illegal migration.

40. This instrument does not impose obligations on States and does not require implementation or changes to UK law. The UK is an active participant and sends representation. No legislative change would be required if the UK were to decide not to participate in this measure.
41. However, we judge that non-participation may jeopardise future participation in SIS II. There is no other evaluation procedure in place through which the UK can demonstrate compliance since the Schengen Convention has been integrated into the EU Treaties.
42. Considering this instrument in isolation, if the UK opted out and did not rejoin this measure, we could instead ask for observer status. This would be dependant on the unanimous agreement of all Schengen States. It should be noted that while this would give the UK a seat at the table and access to Restricted reports and other documents, it would not allow the UK to participate in visits, actively scrutinise or retain its vote on policing and judicial cooperation evaluations of other States (including a vote on any activities which involve or affect the UK operationally).
43. On average, there are eleven one-day meetings in Brussels each year. Each State sends a representative to the Committee at its own cost, which has been assessed as less than £10,000 p.a.
44. The proposed Regulation to establish a Schengen Evaluation Mechanism (SEM) will repeal and replace this measure. This proposal has been subject to extensive negotiation and scrutiny since October 2010. The text currently under scrutiny is 11846/12. Following a legal base change in June 2012 which allows the UK to participate, we did not opt out. The negotiation has completed trilogue and it is highly likely that the new mechanism will be adopted in July or September 2013. The Minister for Security wrote to the House of Lords European Union Committee and the European Scrutiny Committee on 24 June to inform them of this development. Once the mechanism enters into force, SCH/Com-ex (98) 26 will be removed from scope of the 2014 decision.
45. The Government considers the economic impacts of non-participation in this measure to be negligible.

(115) SCH/Com-ex (98)52 on the Handbook on cross-border police cooperation

46. The Schengen handbook is intended to assist EU Member States' police authorities in setting out the parameters and obligations of law enforcement authorities with respect to handling pre-planned and urgent surveillance, the carriage of firearms to EU Member States by foreign surveillance officers and reciprocal assistance, and in doing so establishes the means for practical police

cooperation in compliance with national law and within the scope of existing law enforcement powers. Articles 40, 46 and 47 of the Schengen Convention are applicable to the UK.

47. The handbook provides a practical reference point which sets out the current legal references and basis of practical cooperation as contained within the Schengen Convention.
48. Article 40 of the Schengen Convention pertains to the principles of facilitating cross border surveillance, allowing officers of one participating EU Member State to continue surveillance operations cross border where prior agreement has been given, or in particularly urgent cases. The handbook sets out a practical reference point for the conditions of cross border surveillance relating to police (and under conditions where powers allow) customs authorities within participating EU Member States to continue a surveillance operation initiated in their own country across borders. This includes the conditions for ordinary and emergency surveillance, arrangements for carrying out surveillance and guidance on standard requests for assistance in addition to follow-up and evaluation report forms for requests made under Article 40. SOCA is the UK's designated authority in dealing with all Article 40 incoming and outgoing requests. This responsibility will fall to the NCA.
49. Article 46 of the Schengen Convention provides that each contracting party may send another party information to help combat future crime and prevent offences against or threats to public property. The purpose of the handbook in relation to this Article is to set out the parameters of police cooperation in relation to fostering cooperation to avert dangers to public order and security concerning one or more Member State where there are no bilateral or multilateral arrangements. It gives examples where cooperation may apply such as large scale sporting events or demonstrations where there are large numbers of persons from more than one country. Cooperation focuses both on information exchange through central authorities (i.e. content and the means by which it is communicated) and practical cooperation including the ad hoc secondment and exchange of liaison officers, cooperation in operations and establishing on site joint commands. The handbook further sets out the need for an evaluation report.
50. Article 47 of the Schengen Convention provides for arrangements for secondments of liaison officers between Member States. Such officers are not empowered to take independent coercive action but are permitted to provide advice and assistance. They must report to the head of the relevant police authority to which they are seconded. This provision has been further developed through Council Decision 2003/170/JHA (also subject to the 2014 decision – measure 46). The Handbook directly references the above Council Decision and provides a summary annex of postings for liaison officers and cross references an annex of national contact points which is regularly updated as part of the EU official journal.
51. The Schengen police cooperation handbook on cross border police cooperation also refers to Article 41 of the Schengen Convention. The UK does *not* participate

in Article 41 of the Schengen Convention which relates to hot pursuit across national borders and joint border patrols.

Policy implications

52. SOCA makes significant use of the handbook, particularly in relation to Article 40, which relates to surveillance in other EU Member States. SOCA currently contributes to redrafts of the Handbook on cross-border surveillance. If the UK were to opt out and not rejoin this measure, it is unlikely that SOCA or the National Crime Agency would be able to contribute. However, the UK may still be able to refer to the handbook even were we to not participate in this measure. We judge that there may be a reputational risk around withdrawing from a measure which provides a reference for implementation of a bigger instrument (the Schengen Convention – number 110 on the list), if we were to participate in this measure.

53. In 2005, the UK implemented the applicable provisions of the handbook through administrative measures via production of a Home Office circular which includes UK law enforcement enquiry points.

54. The Government considers the economic impacts of non-participation in this measure to be negligible.

(116) SCH/Com-ex (99)6 on the Schengen acquis relating to telecommunications

55. In order to meet the requirements of Article 44, the Executive Committee established a specialist subgroup (SCH/I-telecom) to agree the necessary technical measures. This instrument is a procedural Decision of the Executive Committee which approves the technical measures agreed by its telecommunications subgroup. The aim is to achieve greater interoperability of EU communications systems.

Policy implications

56. As this instrument is purely technical, we do not judge that non-participation by the UK would have an effect on national policy and legislation, nor on international cooperation.

57. While the UK has adopted these standards, we do not have seamless cross border operations as no equipment manufacturer has put in place the interfaces and technologies to allow that to happen.

58. The UK Government has adopted the standards of Tetra and ETSI referred to in the Decision. We have made as much progress as possible within the existing technology constraints to meet the Decision. Work to develop the necessary technology would continue irrespective of the UK's participation in these measures and it is unlikely that there would be any operational impact should the UK decide not to participate in this measure, as we would continue to operate to the same standard.

59. Should the UK exercise its opt-out there would be no need to amend or repeal domestic UK legislation as concerns this measure.
60. The Government considers the economic impacts of non-participation in this measure to be negligible.

(117) Decision of the Executive Committee of 28 April 1999 on liaison officers (SCH/Com-ex (99) 7 rev. 2)

61. This instrument is non-mandatory and provides for a reciprocal secondment of police liaison officers to advise and assist in the performance of tasks of security and checking at external (Schengen) borders. It aims to facilitate Article 47 of the Schengen Convention and any secondment should be based upon 'bilateral agreements' between the States in question.
62. Liaison officers must be posted principally on border crossing points which are of particular interest in terms of illegal immigration into the Schengen area. They may be posted to executive border police agencies working at the maritime and land borders and corresponding airports, as well as the coastguard.

Policy implications

63. Although this measure is included on the list of measures subject to the 2014 decision, due to its nature and legal base, the UK does not actually participate.
64. There is no implementation date for this measure; it is up to States whether or not they wish to make use of this instrument.
65. The Government considers the economic impacts of non-participation in this measure to be negligible.

(118) SCH/Com-ex (99)8 rev 2 on general principles governing the payment of informers

66. This measure sets out general, non-binding principles for the payment of police informants in the Schengen area but without prejudice to Member States' national guidelines. The principles are intended to reflect best practice, aid inter-State cooperation, and prevent informants from 'shopping around' for the best arrangements.
67. The payment of informers in the UK is devolved to policing agencies which operate to ACPO guidelines which precede the EU instrument. In the UK the general regulatory framework for the authorisation of covert human intelligence sources, which include informants, is RIPA and the Regulation of Investigatory Powers (Scotland) Act 2000 ('RIP(S)A'). The use of an informant will only be authorised under RIPA and RIP(S)A where it is necessary and proportionate. Authorities are also required to have arrangements in place for protecting the informant's safety and welfare. The ACPO guidelines set out the practical aspects of the management and payment of informants. SOCA and the

Metropolitan Police Service consider the current arrangements provide the appropriate level of regulation for the payment of informers.

Policy implications

68. We judge that if the UK were to decide not to participate in this instrument, no legislative change would be necessary. As it is a non-mandatory guiding principle, this instrument does not add any regulative burden on UK law enforcement in the UK or abroad.

69. There is no legislative burden associated with this instrument. This is due to the fact that 'these general principles are to be regarded as non-binding guidelines in the Schengen area'.

70. The Government considers the economic impacts of non-participation in this measure to be negligible.

(119) SCH/Com-ex (99) 11 rev 2 (agreement on cooperation in proceedings for road traffic offences)

71. This agreement allows for Member States to provide contact details of drivers associated with a licence plate on request, and service overseas penalty notices; and for Member States subsequently to be able to transfer enforcement of any fine to the authorities where the offender resides.

72. This measure does not appear to be in force, nor is it likely that it will come into force, as it has largely been superseded by measures on the mutual recognition of financial penalties and exchange of information under Prüm. If the UK were not to participate in this measure, we do not believe that there would be any impact on national policy and legislation or international cooperation.

(123) 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

(124) 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

(125) 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

(126) 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

73. Council Decision 2005/211/JHA constitutes an act building on the Schengen acquis and is concerned with changes to provisions of the Schengen acquis relating to SIS I.

74. Council Decisions 2006/228/JHA, 2006/229/JHA and 2006/631/JHA set the date for the application of certain provisions of Council Decision 2005/211/JHA and are purely procedural in nature.

Policy implications

75. The UK was given permission to participate in SIS I via a separate Council Decision in 2000¹, later than the rest of the EU. A UK SIS I programme was established to deliver this connection, but, as this complex work progressed, existing SIS I countries took the decision in 2005 to upgrade the whole SIS I system to SIS II. In light of this decision, the UK opted to adapt its programme to move directly to SIS II delivery as detailed in the House of Lords Inquiry in 2006. (<http://www.publications.parliament.uk/pa/ld200607/ldselect/lddeucom/49/4902.htm>).

76. As these measures relate to SIS I only, they are of no practical relevance to the UK and have not been fully implemented. Now that the Central SIS II (C.SIS) has entered into operation these instruments have been repealed; the Council Decision which brings SIS II into operation (2007/533/JHA) states that Council Decision 2005/211/JHA will be repealed when SIS II becomes operational.

(127) Commission Decision 2007/171/EC of 16 March 2007 laying down the network requirements for the Schengen Information System II

(129) Council Decision 2008/173/EC of 18 February 2008 on the tests of the second generation Schengen Information System

77. Commission Decision 2007/171/EC constitutes an act building on the Schengen acquis and sets out specific and detailed requirements as required by Article 4(a) of Council Decision 2001/886/JHA of 6 December on the development of SIS II. It forms a technical component of the overall legal basis for SIS II.

78. Council Decision 2008/173/EC sets out the detailed scope, organisation, coordination and validation procedures for certain SIS II tests. It is necessary to conduct these tests in order to assess whether SIS II can work in accordance with the technical and functional requirements as defined in the SIS II legal instruments. Article 8 of 2008/839/JHA requires that the tests contained within Council Decision 2008/173/EC must take place before the SIS II comprehensive test can be run (a precondition for the entry into operation of SIS II).

¹ The United Kingdom is taking part in this Decision, in accordance with Article 5 of the Protocol integrating the Schengen acquis into the framework of the European Union annexed to the EU Treaty and to the EC Treaty, and Article 8(2) of Council Decision 2000/365/EC of 29 May 2000, concerning the request of the United Kingdom of Great Britain and Northern Ireland to take part in some of the provisions of the Schengen acquis.

79. Commission Decision 2007/171/EC and Council Decision 2008/173/EC set out the necessary technical and operational requirements along with the testing specifications and will be implemented by Q1 2013.

Policy implications

80. Commission Decision 2007/171/EC forms a technical component of the overall legal basis for SIS II and while it is necessary to bring the system into operation, we do not judge that it is necessary in order to operate the system. It is necessary to conduct these tests in order to assess whether SIS II can work in accordance with the technical and functional requirements as defined in the SIS II legal instruments. Article 8 of 2008/839/JHA requires that the tests contained within Council Decision 2008/173/EC must take place before the SIS II comprehensive test can be run (a precondition for the entry into operation of SIS II).

81. These instruments set out the necessary technical and operational requirements along with the testing specifications. Although we judge that this instrument has no practical impact on the UK's national implementation programme, it is, of course, in the UK's interest to ensure the capacity and performance of the SIS II network is suitable for operational purposes. The UK participated in the regulatory committee which debated and agreed the network requirements set out in the Commission Decision. Creating the infrastructure to connect the Member States' national systems with the C.SIS II enable the secure exchange of law enforcement data, and as such can only be practically and effectively achieved at the EU level. However, now that the C.SIS II is live these two instruments are preparatory and we do not believe that they will have any impact on the UK.

(128) Council Decision 2007/533/JHA of 12 June 2007 on the establishment, operation and use of the second generation Schengen Information System (SIS II)

82. SIS II enables all participating States to share real-time information on missing people, people wanted for extradition or wanted for judicial purposes, as well as information on stolen vehicles and ID documentation, to law enforcement via a series of "alerts". These "alerts" will be made available via the UK's Police National Computer. Other Member States went live with SIS II 9 April 2013.

83. Council Decision 2007/533/JHA constitutes the necessary legislative basis for governing SIS II for the purpose of police and judicial co-operation in criminal matters. SIS II has been designed to contribute to maintaining a high level of security within the area of freedom, security and justice of the European Union by supporting operational co-operation between police authorities and judicial authorities in criminal matters through the sharing of alert information.

84. Article 8(4) of Council Decision 2007/533/JHA requires that "detailed rules for the exchange of supplementary information shall be adopted [...] in the form of a manual called the 'SIRENE Manual'...". Commission Decision 2008/334/JHA contains the SIRENE Manual in the form of a detailed annex. Due to the technical

nature of the rules, the level of detail needed and the need for regular updating, it was decided not to include the rules in Council Decision 2007/533/JHA. This instrument implements a Council Decision relating to SIS II and as such can be replaced without the UK being required to take an opt-in or opt-out decision.

Policy implications

85. Council Decision 2007/533/JHA constitutes the operational legal basis for SIS II for the purposes of police and judicial co-operation in criminal matters.
86. The UK is seeking to deliver the necessary technical and operational environment to connect to SIS II in Q4 2014. Connection will be subject to an external peer evaluation (Schengen Evaluation). The UK Borders Act 2007 has been put in place to allow immigration officers to detain EEA nationals who are subject to extradition requests at the border pending the arrival of a police officer.
87. The UK decision to participate in the SIS system was taken in the light of very full consideration. The decision to participate in law enforcement provisions of the Schengen Convention pre-dates the trend towards information sharing that was largely precipitated by the Bichard Inquiry in 2002.
88. If the UK decided not to participate in SIS II, UK authorities would have to continue to process EU extradition requests bilaterally (e.g. Wanted or Missing person requests) as the UK would have no legal mandate to utilise SIS II. There is a risk that European partners operating SIS II may change the quantity or information transmitted through current means.
89. The SIS II Programme lifetime cost up to the end of last financial year was £83m. The current forecast spend during 2013/14 is £14m and in 2014/15 it will be £14m. Total Programme spend up to the end of financial year 2014/15 is forecast to be £111m. The Programme's lifetime cash costs are forecast at £168m, against an estimated £624m in net benefits to the UK over the first ten years of live operation. This information was provided to Parliament in a letter from the Security Minister to the Scrutiny Committees on 13 December 2012.
90. In a letter to the European Scrutiny Committees of 22 November, the Security Minister confirmed that the crucial SIS II Milestone 2 test was successfully completed in September 2012. The test provides assurance that the C SIS technical infrastructure and hardware is capable of delivering the full C SIS requirements and of managing the interaction with Member States in an accurate and timely manner.
91. This measure had been previously linked to Commission Decision 2008/334/JHA of 4 March 2008 adopting the SIRENE Manual and other implementing measures for the second generation Schengen Information System (SIS II), which has since been repealed and replaced by Commission Implementing Decision of 26 February 2013 on the SIRENE Manual and other implementing measures for the Second Generation Schengen Information System (SIS II). The new version of the SIRENE Manual was agreed in November and entered into force on 9 April

2013. The UK had no opt-in decision to take. Parliament was notified of this in a letter to the European Scrutiny Committee on 7 November 2012.

(131) 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 (C.SIS)

92. This Decision constitutes an act building on the Schengen acquis. It amends the C.SIS Financial Regulation by setting out the dates from which the Swiss Federation are liable for the installation and maintenance costs of the central SIS I.

Policy implications

93. This instrument is only relevant in practice to those States participating in SIS I, and therefore has no practical impact on the UK. Now that the C.SIS II is live this Council Decision is no longer valid.

94. The Government considers the economic impacts of non-participation in this measure to be negligible.

(133) Commission Decision 2009/724/JHA of 17 September 2009 laying down the date for the completion of migration from the Schengen Information System (SIS 1+) to the second generation Schengen Information System (SIS II)

95. This Commission Decision contains a sole article requiring Member States migrating from SIS I+ to SIS II to use a specific, interim technical architecture under the arrangements provided for in Council Decision 2008/839/JHA.

Policy implications

96. A proposal to replace the existing migration instruments, including this Commission Decision, was adopted at the Transport and Telecommunications Council on 20 December 2012.

97. The Commission Decision relates to SIS I only. As the UK has not implemented SIS I and has no plans to do so, this Commission Decision is of no practical relevance. It was the subject of Explanatory Memorandum 9485/12 deposited on 17 May 2012. This was cleared by the House of Commons on 17 July and the House of Lords on 1 November.

98. The Government considers the economic impacts of non-participation in this measure to be negligible.

SCRUTINY HISTORY

99. There has been extensive and regular scrutiny of Schengen by both Houses since the mid 1990s. Issues have included incorporating the Schengen acquis into the main body of European Union law, the UK's application to join policing and judicial cooperation elements of Schengen, review of the UK's progress to join the Second Generation of the Schengen Information System, the accession of new Member States and the progress of their implementation of the Schengen acquis, amendment of Schengen legislation, and the revision of Schengen evaluation mechanisms and guidance processes.

100. This is one of five Explanatory Memoranda related to the 2014 Decision.

MINISTERIAL RESPONSIBILITY

101. The Schengen measures detailed in this Explanatory Memorandum are the responsibility of the Home Secretary, with the exception of SCH/Com-ex (99) 11 rev 2 (agreement on cooperation in proceedings for road traffic offences), which is the responsibility of the Justice Secretary. The Foreign Secretary has overall responsibility for the UK's relations with the EU.

INTEREST OF THE DEVOLVED ADMINISTRATIONS

102. While policing and criminal justice are devolved issues, any decision will be binding for the Devolved Administrations and Gibraltar. The Government is continuing to engage with the Devolved Administrations and Gibraltar on this issue.

LEGAL AND PROCEDURAL ISSUES

103. The UK would be exercising a Treaty right by choosing to opt out and seek to rejoin certain measures. Protocol 36 also establishes the process for the Commission and Council to consider the UK's applications to re-participate.

104. For Schengen measures, the UK would be required to submit a formal request to the Presidency to rejoin certain measures. The Council acts by unanimity of the Schengen States, plus the UK, to agree a Council Decision confirming UK participation in those elements of Schengen.

105. If the UK does not rejoin these measures, it will be free to enter into bilateral or multilateral arrangements with the other Member States in the third pillar areas concerned (extradition, police cooperation etc) after the block opt-out takes effect. The position of the other Member States depends on whether the EU has exclusive competence in that area. That requires a measure by measure analysis.

106. If there is no exclusive competence in relation to third pillar measures, the other Member States will not require any permission or authorisation from the EU institutions. If there is exclusive competence in a particular third pillar area, while the UK is free to enter into international commitments after the block opt-out, the other Member States will require authorisation and agreement from the EU. But

in principle, bilateral or multilateral agreements - either with the Member States individually or collectively – would be legally possible with such authorisation.

Fundamental Rights Analysis

107. Some of the provisions of the Schengen Convention/Schengen building measures listed above may engage certain Articles of the Charter of Fundamental Rights of the European Union. As witnessed above, however, a number of the provisions and measures are entirely procedural in nature and therefore do not raise any fundamental rights issues.
108. Article 40 of the Convention, as amended by Council Decision 2003/725/JHA, may engage Article 7 (right to respect for private and family life) as it allows for cross-border surveillance. However, there are numerous safeguards in place to ensure that fundamental rights are protected. Cross-border surveillance is only possible if the person is suspected of involvement in an extraditable offence or there is serious reason to believe that s/he can assist in identifying or tracing such a person. Moreover the authorities of the Member State in whose territory the surveillance will continue must, in general, authorise it, and may attach conditions to the authorisation. The surveillance must also be in accordance with the laws of the Member State in whose territory it is to take place and in all cases entry into private homes and places not accessible to the public is prohibited.
109. Council Decision 2007/533/JHA may also engage Article 7, as well as Article 8 (protection of personal data) as it establishes and deals with the operation and use of SIS II. SIS II will allow for data on various categories of people, including persons wanted for arrest for surrender or extradition purposes, missing persons and persons sought to assist with a judicial procedure, to be entered and shared.
110. However, there are numerous safeguards in place regarding data protection to ensure that fundamental rights are protected. For example, Article 11 of the Council Decision is clear that Member States must apply their duties of confidentiality to all persons and bodies required to work with SIS II data. Article 14 requires people having a right of access to SIS II first to receive training about data security and data protection rules and to be informed of relevant criminal offences and penalties. Article 44 states that alerts entered on SIS II shall be kept only for the time required to achieve the purpose for which they were entered, and also that issuing Member States must review within set periods the need to keep alerts. Chapters XI and XII of the Council Decision contain further detailed data processing rules and data protection provisions and, in addition, there are other specific protections in the Council Decision regarding, for example, the use of photographs and fingerprints (Article 22).
111. Overall, therefore, the Government believes that the relevant provisions of the Schengen acquis strike the appropriate balance between fast and efficient police and judicial cooperation and agreed principles and rules on data protection, fundamental freedoms, human rights and individual liberties.

APPLICATION TO THE EUROPEAN ECONOMIC AREA

112. Those States which are not EU Members but apply the Schengen provisions will have an interest in this EM.

SUBSIDIARITY

113. This EM relates to measures that have already been adopted. Subsidiarity was considered for each of the measures previously and the conclusion reached was that the cross-border action in issue was more appropriate at EU level. No further consideration has therefore been given to this issue in this EM.

CONSULTATION

114. The Devolved Administrations, Foreign and Commonwealth Office, Cabinet Office, and the Ministry of Justice have been consulted in preparing this EM.

IMPACT ASSESSMENT

115. At his appearance before the European Scrutiny Committee on 28 November, James Brokenshire gave an undertaking that the Government will provide an Impact Assessment on the final package of measures that the Government wishes to rejoin, should the Government decide to exercise the opt-out.

FINANCIAL IMPLICATIONS

116. The Council may adopt a Decision determining that the UK shall bear the direct financial consequences, if any, necessarily and unavoidably incurred as a result of the cessation of its participation in the third pillar acts. The UK will participate in this Decision. The Government considers this to be a high threshold to meet.

TIMETABLE

117. A final decision as to whether the UK will accept ECJ jurisdiction over all third pillar measures must be taken by 31 May 2014. This decision will take effect on 1 December 2014.

118. This is one of several Explanatory Memoranda to be submitted on the 2014 decision. In December 2012, the Home and Justice Secretaries agreed to provide Explanatory Memoranda on the following areas:

- Schengen measures;
- Measures for which the Justice Secretary is responsible;
- Measures for which the Home Secretary is responsible (1) – EU agencies, mutual legal assistance, drugs, proceeds of crime;
- Measures for which the Home Secretary is responsible (2) – extradition, crime (including cyber and organised crime), fraud and counterfeiting, databases and automated information exchange, and all others; and

- Measures for which the Chancellor of the Exchequer, Foreign Secretary and Transport Secretary have responsibility.

The Rt. Hon. Theresa May MP

Home Secretary

EXPLANATORY MEMORANDUM (EM) ON ARTICLE 10(4) OF PROTOCOL 36 TO THE TREATY ON EUROPEAN UNION (TEU) AND THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION (TFEU) - THE '2014 DECISION'

EU agencies, mutual legal assistance, drugs, and proceeds of crime

2/13

Submitted by the Home Office on July 2013

SUBJECT MATTER

1. In accordance with Article 10(4) of Protocol 36 to the Treaties the UK must, by 31 May 2014, decide whether to accept Commission enforcement powers and Court of Justice of the European Union jurisdiction over all EU police and criminal justice measures adopted before 1 December 2009 or to opt out of these measures. The decision to remain bound or opt out must be taken en masse. Protocol 36 to the Treaties does permit the UK to apply to rejoin individual measures if it chooses to opt out en masse.
2. This EM relates to a number of measures within the scope of the 2014 decision for which the Home Secretary is responsible – EU agencies, mutual legal assistance, drugs, and proceeds of crime. This EM should be considered in line with several others submitted on the 2014 decision.
3. This EM provides information about each of the measures listed below which remain in force and are within the scope of the 2014 opt-out decision. The measures are listed in order, however, where measures cover similar substantive areas we have chosen to group them accordingly.

(2) Joint Action 96/277/JHA of 22 April 1996 concerning a framework for the exchange of liaison magistrates to improve judicial cooperation between the Member States of the European Union

4. The Joint Action establishes a framework for the posting or the exchange of liaison magistrates between Member States on the basis of bilateral or multilateral arrangements and outlines their function.
5. Liaison magistrates:
 - Advise UK prosecutors and investigators on how to obtain evidence from their host country including drafting guidance on formal mutual legal assistance (MLA) requests.
 - Advise and assist UK agencies regarding extradition requests, including acting as the conduit of information between judicial authorities when supplementary information is required in extradition proceedings.

- Liaise direct with host country officials, including judges and prosecutors, to speed up the MLA process and to help arrange case coordination and planning meetings, and meetings to resolve jurisdictional issues.
- Work closely with the Foreign and Commonwealth Office (FCO) abroad, including Justice and Home Affairs and security officials in the embassies; by doing so, they help ensure a coordinated UK approach when interacting with host country officials and organisations, and ‘practitioner’ input that can be invaluable to UK officials responsible for formulating and implementing policy.

Policy implications

6. There is no requirement to implement this legislation and there would be no need to repeal domestic legislation if the UK were to decide not to participate in this instrument.
7. In practice, the deployment of liaison magistrates is not based or dependent on the Joint Action, which instead provides a ‘framework’ and ‘guidelines.’ More specifically the Joint Action ‘establishes a framework for the posting or the exchange of magistrates or officials with special expertise in judicial cooperation’, and ‘guidelines’ of the joint action ‘serve as a reference’ when Member States ‘decide to send liaison magistrates to another Member State’.
8. The UK first deployed liaison magistrates in 2002 to Spain, Italy and France, and successors remain in post today. The UK has also deployed liaison prosecutors (an identical role) outside Europe, to the USA since 2002, and since 2010 to the United Arab Emirates. France has a Liaison Magistrate in the UK, who spends part of his time based in the Home Office.
9. The liaison magistrate network provides quick cross-border co-operation and reduces bureaucracy as UK law enforcement officials and prosecutors can use the Liaison Magistrate network to easily identify and co-operate with their EU counterparts.
10. We judge that non-participation in the network may diminish the ability of the UK to coordinate complex investigations and prosecutions in international cases involving Spain, Italy and France. It would be more difficult for prosecutors and investigators to make contact with their foreign counterparts, to set up co-ordination and case planning meetings, to resolve jurisdictional issues, to understand how to obtain evidence from those States, and also their ability to do so in a timely manner. However the Joint Action is not in itself a requirement to allow the Liaison Magistrate network to continue.
11. The Government considers the economic impacts of non-participation in this measure to be negligible.

Fundamental rights analysis

12. The measure establishes a framework for the posting or exchange of liaison magistrates between Member States on the basis of bilateral or multilateral

arrangements. It outlines the functions of the role and as such does not directly engage fundamental rights in itself.

13. The purpose for which liaison magistrates would access any personal data is to assist with the detection, investigation and prosecution of serious crimes. This constitutes a legitimate objective for the purposes of Article 52.
14. Given that the liaison magistrates do not generate the personal information to be shared and act as conduits only and given that any information provided can only be used in furtherance of that purpose, any interference with Articles 7 and 8 is both proportionate and necessary.
15. Overall, the Government considers that this Joint Action complies with the principles of fundamental rights.

(4) Joint Action 96/698/JHA on cooperation between customs authorities and business organizations in combating drug trafficking

16. This Joint Action aims to combat drug trafficking and any other offences for which customs are competent, by requiring Member States to establish or further develop Memoranda of Understanding (MoUs) between the customs authorities of Member States and business organisations operating in the EU, and provides guidelines for what such an MoU may include. Member States are also required to periodically review the effectiveness of their MoUs and to inform the Council Secretariat how they have implemented this Joint Action.

Policy implications

17. Specifically in relation to UK Border Force activity, the MoUs build cooperation between carriers and port operators in order to provide data that supports risk-based targeting systems and facilitates day-to-day operation.
18. The UK was required to notify the Council Secretariat of how we had implemented this Joint Action by 29 November 1997. The establishment of MoUs with a variety of organisations, including business organisations, in order to support our customs controls has been a well established practice for at least the last 40 years. We therefore judge that the UK has implemented this measure. This action does not require any domestic implementing legislation and we do not need a legislative vehicle to establish MoUs as they are set up on a voluntary basis. We do not judge that UK participation in this instrument has a positive or negative effect in combating drug trafficking.
19. The Government considers the economic impacts of non-participation in this measure to be negligible.

Fundamental rights analysis

20. Article 2 of this Joint Action states that the MoUs may permit the provision of advance cargo or passenger data to customs, the access by customs to the

signatory's information systems and the checking of staff newly recruited by the signatory.

21. Such MoUs have the potential to engage in particular Article 7 (right to respect for private and family life) and Article 8 (right to protection of personal data) of the Charter of Fundamental Rights of the European Union. (Articles 7 and 8 of the Charter correspond to the qualified right to private and family life contained within Article 8 of the European Convention on Human Rights.) Any engagement with these rights must be justified in accordance with Article 52 of the Charter. The criteria for such a justification are the following: the interference must be provided for by law and respect the essence of the particular right in question; and the interference must comply with the requirements of necessity, proportionality and the pursuit of a legitimate objective.
22. The purpose for which customs would access any personal information is for the prevention, detection, investigation and prosecution of serious crimes, namely drug trafficking or any other offences for which the customs authorities are competent. This would constitute a legitimate objective for the purposes of Article 52.
23. Given that these MoUs may only be concluded for the purpose of combating drug trafficking and that any information provided could only be used in furtherance of that purpose, any interference with Articles 7 and 8 would be both proportionate and necessary.
24. Overall, the Government considers that this Joint Action complies with the principles of fundamental rights.

(5) Joint Action 96/699/JHA concerning the exchange of information on the chemical profiling of drugs to facilitate improved cooperation between Member States in combating illicit drug trafficking

25. The aim of this measure is to enable the exchange of information relating to chemical profiling of drugs. It facilitates interaction between Europol (measure 95 on the list) and Member States through Europol National Units and liaison bureaux. The instrument envisages the exchange of information relating to the chemical profiling of cocaine, heroin, LSD, amphetamines and their ecstasy-like derivatives MDA, MDMA and MDEA and shall include the following data:
 - Analysis of drugs in tablet form;
 - Physical dimensions of the sample – size, weight and colour;
 - Designs and markings – type and position of logo;
 - Type and quantity of the main drug found in the sample;
 - Type and quantity of all other component substances discovered during analysis;
 - Picture of sample;
 - Case registration number; and

- If sample is not in tablet form – type and quantity of both main drug and component substances and case registration number.

Policy implications

26. The UK has implemented this measure administratively by creating a process to routinely exchange profiling data and images via the Europol UK National Unit, which is administered by the Serious Organised Crime Agency (SOCA) with Europol in The Hague. Europol then shares the resulting analysis with all Member States. Additionally, SOCA Forensics share data with other Member State projects directly in Sweden, Finland and Holland. There has been no change to domestic legislation as a direct result of this Joint Action.
27. The measure paves the way for UK law enforcement to liaise with other Member States when common links are identified, and to obtain evidence which facilitates prosecutions in the UK.
28. If we were to exercise the opt-out and not rejoin this instrument, the UK could continue to transmit the data outlined above, with the cooperation of other Member States; we judge it unlikely that other Member States would stop cooperation with the UK. In reality, this information is already shared with Member States through a variety of other means including direct to law enforcement; by forensic providers and through other networks, such as the European Drug Profiling System and Europol analysis workfiles (AWF). We judge that there may be a minor reputational risk if the UK does not seek to rejoin this measure.
29. The Government considers the economic impacts of non-participation in this measure to be negligible.

Fundamental rights analysis

30. It is not considered that this measure engages citizens' fundamental rights, relating as it does to the exchange of information on chemical profiling in order to facilitate greater co-operation between Member States in this area, as opposed to the exchange of personal data relating to individual data subjects.
31. Therefore, the Government considers that this Joint Action complies with the principles of fundamental rights.

(7) Joint Action 96/750/JHA concerning the approximation of the laws and practices of the Member States of the European Union to combat drug addiction and to prevent and combat illegal drug trafficking

32. This instrument ensures Member States take measures to tackle drug addiction, drug tourism and drug trafficking, including severe penalties for drug trafficking offences. For example, the measure requires Member States to consider legislative proposals to combat synthetic drugs (the UK has introduced temporary bans) endeavouring to work with EU enforcement partners (the UK works extensively with Europol – measure 95 on the list -

and other enforcement partners) and take the most appropriate steps towards illicit plants (tackling cannabis cultivation is a key plank of the UK's restricting supply strategy).

Policy implications

33. The instrument aims to improve co-operation on security matters by ensuring enforcement partners cooperate with each other to tackle cross-border drug trafficking. Cooperation between Member States' law enforcement authorities is essential to tackle this threat.
34. The UK has implemented this measure through a combination of administrative and legislative means, such as banning orders (in domestic legislation, this power comes from the Misuse of Drugs Act 1971 s.2A (introduced in Police Reform and Social Responsibility (PRSR) Act in 2011)). If we were to leave this instrument, no domestic legislation would need to be repealed.
35. Law enforcement partners in the UK have played a full part in combating the threats outlined in this instrument. We judge that most of the Articles are part of existing operational practice for the UK and we would not need to formally sign bilateral agreements in order to continue cooperating with European enforcement partners'.
36. The Government considers the economic impacts of non-participation in this measure to be negligible.

Fundamental rights analysis

37. It is not considered that this measure affects citizens' fundamental rights in a disproportionate way, governing as it does actions taken in the sphere of controlled substances and the apprehension of offenders. Member States are to ensure that the penalties imposed for serious drug trafficking are similar to those for crimes of comparable gravity; in the event of a sentence of detention being imposed on an offender, Article 5(1)(a) ECHR does not prevent that person being deprived of his liberty where the detention takes place following conviction by a competent court and in accordance with a procedure prescribed by national law.
38. Overall therefore, the Government considers that this instrument complies with the principles of fundamental rights.

(11) Joint Action 97/372/JHA of 9 June 1997 for the refining of targeting criteria, selection methods, etc and collection of customs and police information

39. The measure requires Member States to make the best use of targeting and selection methods to select consignments for examination to tackle drug trafficking. It also requires the exchange of information and intelligence

through the various EU information systems and action through joint operations.

Policy implications

40. The Articles in this Joint Action essentially outline the importance of a risk-based approach to border control and the importance of sharing information. Border Force has in place well developed targeting and selection criteria and information collection processes which have been in place for at least the last four decades. The Government believes we fully comply with all the Articles set out in this action. We do not judge that there would be any cost if we did not participate in this measure as our frontline operational process would still be risk-based and targeted.
41. The UK has never used this instrument to share intelligence or information for joint customs operations. Rather, we use the provisions of Naples II.

Fundamental rights analysis

42. This Joint Action requires that, for the purpose of combating drugs trafficking, customs authorities shall strengthen the mutual exchange of intelligence and information, make greater use of European customs information systems and organise international joint customs surveillance operations.
43. The access by customs authorities to this intelligence and information engages in particular Article 7 (right to respect for private and family life) and Article 8 (right to protection of personal data) of the Charter of Fundamental Rights of the European Union. (Articles 7 and 8 of the Charter correspond to the qualified right to private and family life contained within Article 8 of the European Convention on Human Rights.) Any engagement with these rights must be justified in accordance with Article 52 of the Charter. The criteria for such a justification are the following: the interference must be provided for by law and respect the essence of the particular right in question; and the interference must comply with the requirements of necessity, proportionality and the pursuit of a legitimate objective.
44. The only purpose for which customs is to access any personal information under the terms of this Joint Action is for the prevention, detection, investigation and prosecution of a serious crime, namely drug trafficking. This would constitute a legitimate objective for the purposes of Article 52.
45. The instrument has never been used to share information but given that this Joint Action only permits the exchange of intelligence and information for the purpose of combating drug trafficking and that any the processing of personal data could only be effected for that purpose, any interference with Articles 7 and 8 would be both proportionate and necessary.
46. Overall, the Government considers that this Joint Action complies with the principles of fundamental rights.

(16) Joint Action 98/427/JHA of 29 June 1998 on good practice in mutual legal assistance in criminal matters

47. Joint Action 98/427/JHA requires Member States to send the Council Secretariat a statement of their good practice in the sending and executing of requests for MLA.
48. The Joint Action provides a number of practices which Member States are required to undertake to promote in their MLA processes. These include acknowledging the receipt of requests, giving the requesting authority details of the person responsible for their request, giving priority to urgent requests, explaining why assistance cannot be provided (or cannot be provided to meet the requesting State's deadline), requiring that requests are sent in compliance with the relevant treaties, etc. Each Member State is required to periodically review compliance with their good practice statements submitted to the Council. The European Judicial Network (measure number 89 on the list) is asked to take stock of Member States' statements and make any necessary proposals.

Policy implications

49. The UK has domestic legislation which allows for the operation of MLA and a number of operational MLA policies, including a full refusals policy. The Joint Action has no bearing on any of this.
50. Many of the issues covered by the Joint Action have been overtaken by Council Act of 29 May 2000 establishing the Convention on mutual legal assistance in criminal matters between the Member States of the European Union (EU MLA Convention 2000), which is also within the scope of the 2014 decision (measure number 25 on the list). In addition, these issues will not be relevant if the Directive of the European Parliament and of the Council regarding the European Investigation Order in criminal matters (EIO) is implemented. The UK opted into the EIO on 27 July 2010 and it is currently under negotiation. The most recent EM, based on the agreed Council general approach, is 18918/11 (submitted 23 January 2012).
51. The Government considers the economic impacts of non-participation in this measure to be negligible.

Fundamental rights analysis

52. The Joint Action mainly serves to set out the ideals of procedural good practice in the sending and executing of requests for MLA. It does not deal with any substantive legal issues that might engage fundamental rights. This instrument has since been superseded by new instruments and agreements in the field of MLA.
53. Overall therefore, the Government considers that this instrument complies with the principles of fundamental rights.

(17) Joint Action 98/699/JHA of 3 December 1998 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and proceeds from crime

54. This Joint Action encourages improved cooperation between law enforcement authorities of Member States by ensuring that arrangements are in place that will permit investigators and prosecutors to direct requests from Member States for assistance in asset identification, tracing, freezing, or seizing and confiscation through appropriate channels.
55. The Joint Action provides for the preparation of user-friendly guides by each Member State to provide up-to-date information on where to obtain assistance, any restrictions on the assistance it is prepared to provide, and the information a country requesting assistance must supply. These guides are sent to the General Secretariat of the Council which translates them and distributes them to Member States, the European Judicial Network and Europol (measures 89 and 95, respectively).

Policy implications

56. Most of the obligations set out in this Framework Decision are met through the UK's asset recovery legislation, currently the Proceeds of Crime Act 2002 and its supporting secondary legislation. However, the measure imposes obligations related to creating a user-friendly guide, including information about where to obtain advice, setting out the assistance it can provide in identifying, tracing, freezing or seizing and confiscating instrumentalities and the proceeds from crime. The UK has not created such a guide. It also imposes obligations relating to judicial training which may not be fully satisfied by the UK.
57. The UK has leading legislation in this area which pre-dates this instrument (Drug Trafficking Act 1986, Criminal Justice Act 1988). We would preserve our domestic legislation and we would not need to make any changes if we chose not to rejoin this measure.
58. The Commission has published a draft Directive on the freezing and confiscation of the proceeds of crime which aims to promote a common basis amongst Member States for freezing and confiscation regimes (document no 7641/12). The UK did not opt in to this Directive. It lays down minimum rules for Member States with respect to freezing and confiscation of criminal assets, through direct confiscation, value confiscation, extended confiscation and non-conviction based confiscation (in limited circumstances) and third party confiscation. If adopted, the Directive would replace this Joint Action in its entirety and, in part, Framework Decision 2001/500/JHA (which repeals certain Articles within this Joint Action) (measure 31 on the list). It would also repeal Framework Decision 2005/212/JHA on confiscation of crime-related proceeds, instrumentalities and property (measure 58 on the list), apart from Articles 2, 4 and 5 which would remain in force.

59. The Government considers the economic impacts of non-participation in this measure to be negligible.

Fundamental rights analysis

60. This Joint Action concentrates on the production of user friendly guides to assist authorities in carrying out their existing functions. It does not in and of itself deal with substantive legal issues which might engage fundamental rights.

61. Therefore, the Government considers that this instrument complies with the principles of fundamental rights.

(31) Council Framework Decision 2001/500/JHA of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime (repealing Articles 1, 3, 5(1) and 8(2) of Joint Action 98/699/JHA)

62. This instrument repealed various Articles of Joint Action 98/699/JHA and recommends that Member States take steps to ensure that all requests from overseas authorities which relate to asset identification, tracing, freezing or seizing and confiscation are processed with the same priority as that given to domestic proceedings.

Policy implications

63. The UK has implemented this legislation through our asset recovery legislation, currently the Proceeds of Crime Act 2002 (POCA) and its supporting secondary legislation. The POCA legislation on international cooperation is the Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005 which allows for the UK to give assistance in requests to freeze and confiscate property subject to another country's proceeds of crime action. Outgoing criminal requests (investigation, freezing and confiscation) are dealt with under the Crime (International Co-operation) Act 2003. There is an unused power under section 445 of POCA which allows us to make an Order to use the financial investigation powers in POCA to assist overseas investigations. UK legislation in the area is leading and we would preserve our domestic legislation; no legislative changes would be required if we were to decide not to participate in this measure.

64. Following Joint Action 1998/699/JHA (on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and proceeds from crime), this instrument builds on the requirements of Council Directive 91/308/EEC (of 10 June 1991 on the prevention of the use of the financial system for the purpose of money laundering), with which we are fully compliant.

65. The Commission has published a draft Directive on the freezing and confiscation of the proceeds of crime which aims to promote a common basis amongst Member States for freezing and confiscation regimes. The UK did

not opt in. It lays down minimum rules for Member States with respect to freezing and confiscation of criminal assets, through direct confiscation, value confiscation, extended confiscation and non-conviction based confiscation (in limited circumstances) and third party confiscation.

66. If adopted, the new Directive would replace Joint Action 1998/699/JHA (on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and proceeds from crime) in its entirety and parts of this Framework Decision (which repeals certain Articles within Joint Action 1998/699/JHA). It would also repeal Framework Decision 2005/212/JHA (on confiscation of crime-related proceeds, instrumentalities and property), apart from Articles 2, 4 and 5 which would remain in force.

67. The Government considers the economic impacts of non-participation in this measure to be negligible.

Fundamental rights analysis

68. This measure focuses on steps in the procedural treatment of requests. It does not involve substantive legal rights which may engage fundamental rights. The underlying requests may engage fundamental rights; most obviously Article 17 (the right to property) of the Charter (which corresponds to Article 1 of Protocol 1 of the ECHR) but this would be a matter for Member States' domestic law. Within the UK, the Proceeds of Crime Act 2002 and judicial supervision would ensure that fundamental rights were protected.

69. Overall therefore, the Government considers that this instrument complies with the principles of fundamental rights.

(19) Council Act of 3 December 1998 laying down the staff regulations applicable to Europol employees

(21) 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

(64) Council Decision 2005/511/JHA of 12 July 2005 on protecting the euro against counterfeiting, by designating Europol as the Central Office for combating euro-counterfeiting

(95) Council Decision 2009/371/JHA establishing the European Police Office (Europol)

(104) 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

(105) Council Decision 2009/935/JHA of 30 November 2009 determining the list of third countries with which Europol shall conclude agreements

(106) Council Decision 2009/936/JHA of 30 November 2009 adopting the implementing rules for Europol analysis work files

(108) Council Decision 2009/968/JHA of 30 November 2009 adopting the rules on the confidentiality of Europol information

70. The Europol Council Decision (2009/371/JHA) establishes the European Police Office (all other listed measures are related to the UK's membership of Europol). It aims to make Europe safer through the provision of support and assistance to Member States in the fight against organised crime and terrorism. Europol is also mandated to combat specific forms of serious crime and, in accordance with the annex to the Europol Council Decision, to deal with crimes such as drug trafficking, trafficking in human beings, computer crime and forgery.

71. Europol is further mandated to deal with crime prevention measures and Article 5 of the Europol Council Decision names Europol as the central office for combating Euro counterfeiting. Europol also has a key role in assessing threats from a European perspective, producing relevant threat assessments and strategic analyses. In addition Europol has scope to participate in joint investigation teams (JITs), further supporting Member States in ongoing criminal investigations.

72. Europol provides a secure platform enabling direct contact between liaison officers from the EU Member States and a number of third countries based in Europol's secure Headquarters. The UK currently has liaison officers from the following UK law enforcement organisations at Europol: SOCA, UK Immigration and Enforcement, Her Majesty's Revenue and Customs (HMRC), the Scottish Crime and Drug Enforcement Agency (SCDEA), and the Metropolitan Police Service (MPS). These officers are able to engage directly with international law enforcement partners to share intelligence and develop operational outcomes to disrupt and dismantle serious organised crime groups having an effect on the UK and in support of counter terrorism investigations, including work focused on extremism.

Policy implications

73. The Europol Council Decision (2009/371/JHA) established Europol as a formal EU entity from 1 January 2010. This is the key measure with regards to the UK's participation in Europol. The Government believes that it should not be necessary to rejoin any of the associated measures in order to participate in Europol.

74. The UK took no separate domestic legislative measures to implement the Decision. Should the UK not continue to participate in Europol, there would be no changes required to domestic legislation.

75. Council Act of 3 December 1998 laying down the staff regulations applicable to Europol employees came into force on 1 January 1999 and did not require action or implementation by Member 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 came into force on 3 December 1999 and simply amends the Council Act of 3 December 1998. Again, this did not require action or implementation by Member States.
76. Council Decision 2005/511/JHA came into force on 15 July 2005 when it was published in the EU Official Journal. No UK domestic legislative measures were required.
77. Council Decisions 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA came into force on 1 January 2010. These measures are associated to the remit and mandate of Europol and as such, there were no specific UK domestic legislative measures introduced for the purposes of implementation.
78. Europol's analytical capabilities are founded in Article 14 of the Europol Council Decision (2009/371/JHA), which establishes the Analysis Work Files (AWFs). These are the mechanisms through which Europol can handle data concerning criminal offences. Article 14(1) of the same decision sets out that the Council shall adopt implementing rules for AWFs. The provisions on AWFs define the operational requirements through which Member States can cross-check data on persons and objects of interest allowing for the supply and analysis of data between Member States.
79. For example, Operation APAR, a drugs, firearms and money laundering operation was coordinated via Europol using its AWFs system (AWF Sustrans). It involved investigation activity in the UK, Spain, Belgium and Ireland over a two year period culminating in coordinated interdictions in four countries on 25 May 2010. A series of coordinated arrests and searches were carried out resulting in the apprehension of 32 people and seizures including drugs, firearms, property, vehicles, and electronic equipment. Within AWF Sustrans, Europol set up a confidential Target Group (TG) and acted as the central repository for the operation. It provided analytical support, facilitated information exchange between investigating law enforcement agencies and arranged operational meetings. In addition to the analysis and intelligence exchange Europol further supported the investigation by deploying their mobile office to the UK, Ireland and Spain. The Europol Mobile Office is a deployable IT suite, which Europol uses to support live operations, whereby it usually deploys an analyst or more into theatre who then use the mobile office to access Europol databases to conduct real-time enquiries in support of the operation concerned. The staff Europol deploys within its mobile office do not hold any coercive powers and are present purely to provide analytical support and subject matter expertise, as well as a live link to Europol's IT systems.
80. Without Europol participation, we judge that the results of operation APAR would have been more limited and the operation would have been

significantly more expensive. Although we maintain bilateral liaison officers in Spain we do not have any in Ireland or Belgium. The UK would have had considerable difficulty securely exchanging real-time intelligence and developing operational action plans with those countries. Additionally Europol's secure IT systems enabled timely and effective communication between all four Member States on the day of the operation.

81. Article 8 of the Decision (2009/371/JHA) imposes an obligation on Member States to establish a national unit and a head of a national unit, and ensure measures are in place so that unit tasks can be fulfilled. The UK is fully compliant with this.
82. Article 11 obliges the national unit of each Member State to have responsibility for communication with the Europol Information System (EIS). The UK is fully compliant, in that it uses the EIS for the transmission of data to Europol and regularly updates its law enforcement intelligence records that are held by Europol.
83. During 2011, an average of 1,300 messages per month were exchanged via the UK Liaison Bureau at Europol, involving daily engagement in support of international investigations. The UK is in the top 5 EU Member States that contribute law enforcement information into the Europol Information System.
84. Europol has a designated budget to support operational activities, which enables Member States to meet in its secure premises to conduct operational meetings, exchange intelligence and proceed quickly. The estimated cost of the UK membership of Europol is around £10.5 million annually.
85. Tackling cross border crime cannot be achieved by the UK acting alone; it can only be achieved through practical cooperation with other EU Member States. Europol plays a key role in this through the provision of analytical data and support to Member States. Co-location of liaison officers from all Member States at Europol is also a factor in facilitating this cooperation. Withdrawing from Europol would not prevent police cooperation on a bilateral basis as the UK could seek to replicate the Europol relationship with bilateral liaison officers.

Counterfeiting

86. The Europol Council Decision (2009/371/JHA) establishes Europol as the Central office for combating Euro counterfeiting; this is amplified by 2005/511/JHA. In practice this means all counterfeit Euros detected within the UK are communicated to Europol via the Counterfeit Monitoring System (CMS) which Europol have set up and manage for this purpose. This is conducted by the Bank of England.
87. If we were to decide not to participate in the Europol Council Decision, the UK would be unable to exchange intelligence with the EU organisation with principle responsibility for Euro counterfeiting. There is a risk that the UK could be perceived by criminals as a safe haven for passing counterfeit Euros,

which could cause significant reputational damage to the UK banking industry. No longer having access to the Counterfeit Monitoring System (CMS) managed by Europol or Europol's AWF SOYA would also prohibit us from accessing a key source of information as well as Europol's analytical expertise to support UK investigations in this area.

Human Trafficking

88. Europol assists the UK in tackling human trafficking by facilitating the exchange of information with EU partners via the central information databases such as SIENA and the specific human trafficking work stream, AWF Phoenix. Europol provides dedicated analysts and specialists to enhance information and identify crossovers and trends. Europol also assists in coordinating operational activity.

Organised Crime

89. Europol is the key agency in the EU for the collection of law enforcement intelligence on organised crime, both to aid enforcement and develop policy.

90. Should the UK withdraw from Europol, the flow of information to the UK and responses to UK requests would be diminished as Europol is key to the facilitation of such activities.

Cyber crime

91. Europol supports the fight against cyber crime within the EU by developing intelligence, best practice and standard operating procedures, and information sharing. The Europol cyber crime centre (EC3) supports UK law enforcement in sharing cyber crime related enforcement intelligence and operational information. It assists in developing the capacity of all Member States to tackle this crime. From this perspective the Council Decision is therefore proportionate as its aims on cyber crime can only be achieved objectively through EU-wide cooperation.

Counter Terrorism

92. Counter-Terrorism Command (SO15) within the Metropolitan Police Service (MPS) has responsibility on behalf of all police forces in the UK for liaising with domestic police forces in Europe, and with Europol when required, as part of the police's ongoing counter-terrorism effort. This includes a network of liaison officers which facilitates appropriate information sharing of between Europol and UK police forces.

93. Europol engagement does play a major role in the law enforcement-led CT agenda. For example the Europol First Response Team (FRT), established in the wake of the attacks in London (7 July 2005), was initiated for the first time following the attacks in Norway in 2011. The EU first response Network is a Europol initiative which, in times of emergency, delivers capabilities to European law enforcement partners, offering a platform to coordinate major

international lines of enquiry. The swift and positive response of the Member States requested to form a FRT greatly assisted Europol's efforts in providing a rapid and appropriate EU law enforcement response to the investigation team in Norway.

94. Europol has supported other operations focusing on CT activity. For example, they offered their mobile operations centre and staff to support Operation Spectre, which targeted port activity across the UK in October 2011. A number of cross matches on Europol databases were identified increasing the success of the operation.
95. The UK also benefits from Europol's role in the Terrorist Finance Tracking Programme (TFTP) which provides extensive financial data on subjects with a nexus to terrorism. This product gives competent UK authorities unique access to US intelligence databases via an operational agreement authorised under EU law. Should the UK withdraw from the Europol Council Decision we may still be able to participate in the current EU-US TFTP, depending on any changes to Europol and how it might treat those not participating. At present there are also discussions at EU level around establishing a new EU TFTP. Whilst we have yet to be convinced of the merits of any such system, if proposals are centred on Europol there may be implications for UK involvement on EU-wide TFTP work should we withdraw from the Europol Council Decision.

Drugs trafficking

96. Europol is mandated to coordinate the exchange of information with Member States through Europol National Units and liaison bureaux. This capability promotes data exchange by maximising intelligence on drug trafficking and supporting Member States' law enforcement agencies in ongoing criminal investigations. Drugs policy and trafficking has therefore always been and continues to be integral to the role of Europol and the Europol-UK relationship.
97. Europol has four work streams (known as focal points) dedicated specifically to drug trafficking. Each work stream acts as a central database for relevant law enforcement intelligence from EU partners, and Europol provides specialist analytical support. Europol has assisted the UK with numerous drugs operations. For example, Operation Behave is an investigation between the UK, Belgium and France concerning a drugs courier network supplying MDMA to Japan and also bringing cocaine from South America to Europe. Europol has been pivotal in supporting this investigation, providing analysis and cross match reports to ensure that other investigations are linked in. Europol has recently identified links between Operation Behave and a Latvian investigation, and a meeting is being coordinated by Europol to de-conflict the investigations. Europol has also supported arrangements for a JIT agreement, and all members of the JIT have agreed to use the secure Europol SIENA system to communicate intelligence between its liaison officers. The arrest phase of this investigation has now begun; three of the main targets were arrested in the UK, another three in France and six in

Belgium. The JIT ensures coordination between the relevant prosecutors involved.

98. More generally, Europol helps to maximise evidential material relating to drug seizures. It also enables the more effective exchange of intelligence about drug trafficking routes used by criminals, which strengthens our understanding of the UK drugs market. Europol also provides guidance and expertise on drugs supply side policy issues that are discussed by Member States at various EU fora.

Asset recovery

99. Europol provides the secretariat for the CARIN network and secure message exchange facilities via SIENA. Europol also provides secure intelligence and message exchange platforms between all MS Asset Recovery Offices (AROs) via the SIENA network, ensuring that Member States can undertake the exchange of Asset Recovery Requests securely, between all AROs, which naturally leads to the restraint, seizure and recovery of criminal assets. The UK has two AROs and two CARIN offices in the UK; 1 in SOCA and 1 in the SCDEA, and both make use of Europol. Scotland is particularly reliant on the CARIN network for the transmission of data in relation to asset recovery because of the different judicial process in Scotland compared to the rest of the United Kingdom.
100. The proposal for a Europol Regulation was published by the Commission on 27 March 2013. The current proposal includes a merger of Europol with the European Police College (CEPOL). The current proposal contains provisions to repeal and replace Europol and CEPOL in their current forms and if it is adopted and enters into force before 1 December 2014, subject to the UK's participation, it will remove both measures from the scope of the 2014 decision. An EM on the proposal for a Europol Regulation was deposited on 3 May 2013 reference, 8229/13 with ADD 1-6.

Fundamental rights analysis

101. Although Europol has no coercive powers, this instrument may engage Article 7 (right to respect for private and family life) and Article 8 (right to protection of personal data) of the Charter of Fundamental Rights of the European Union, (Articles 7 and 8 of the Charter correspond to the qualified right to private and family life contained within Article 8 of the European Convention on Human Rights). This is because much of the support Europol provides to Member States is based on facilitating information and law enforcement intelligence exchange, including personal data.
102. However, the Europol Council Decision (Chapter V) establishes a strict data protection regime, including the establishment of a data protection officer to ensure the legality of the collection and transmission of data. In addition, the decision gives individuals the right to obtain information on whether personal data relating to them are processed by Europol (and, if so, to see that data) and the right to ask Europol to correct or delete incorrect data.

103. In addition, 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, regulates the transmission of personal data between Europol and other EU bodies/third parties, where the appropriate operational cooperation agreement has been established.
104. The protection of personal data within Europol is further supported by the involvement of the Management Board (and its sub-committees; in particular, the Security Committee), which is regularly briefed on all EU negotiations on data sharing agreements, including those between third countries, third parties and other EU organisations. The Joint Supervisory Board, an independent body within Europol, is established in accordance with the Europol Council Decision (Article 34) also has a key role in reviewing any such agreements for compliance with the appropriate data protection standards as well as in ensuring individuals' rights are not violated by storage or process. Overall, the Government considers that the data protection safeguards contained in these instruments comply with the principles of fundamental rights.

(20) Council Decision 1999/615/JHA of 13 September 1999 defining 4-MTA as a new synthetic drug which is to be made subject to control measures and criminal penalties

(36) Council Decision 2002/188/JHA of 28 February 2002 concerning control measures and criminal sanctions in respect of the new synthetic drug PMMA

(50) Council Decision 2003/847/JHA of 27 November 2003 concerning control measures and criminal sanctions in respect of the new synthetic drugs 2C-I, 2C-T-2, 2C-T-7 and TMA-2

(62) Council Decision 2005/387/JHA of 10 May 2005 on the information exchange, risk-assessment and control of new psychoactive substances

(76) Council Decision 2008/206/JHA of 3 March 2008 defining 1-benzylpiperazine (BZP) as a new psychoactive substance which is to be made subject to control measures and criminal provisions

105. Council Decision 2005/387/JHA places a requirement on the UK to share information and intelligence with other Member States on new psychoactive substances (narcotic and psychotropic (NPS)) and, if required by a decision of the Council, the UK is under a duty to submit an NPS to control measures and criminal sanctions. Council Decisions 2002/188/JHA, 2003/847/JHA and 2008/206/JHA are the instances where the Council has made such decisions.

Policy implications

106. The implementation date for Council Decision 2005/387/JHA was 10 May 2005 and the UK has implemented this measure to the required standard. In respect of the requirement to provide information on the manufacture, traffic and use of new psychoactive substances to Europol (measure 95 on the list) and the European Monitoring Centre for Drugs and Drug Addiction (EMCDDA), this is implemented through the UK's coordinator in the Reitox network on drugs (UK NFP) and Europol National Unit (SOCA). The UK NFP submits notifications to the EMCDDA as appropriate and in accordance with the EU's Operating Guidelines and submits a progress and annual report to the EMCDDA for its own annual reporting to the European Parliament, Council and Commission in accordance with the 2005 Council Decision.
107. SOCA, via the Europol National Unit, provides the business process and assurance mechanism for the transmission of UK data on NPS to Europol Analytical work file (AWF) Synergy. Europol and Member States have developed Project Synergy, which is the main synthetic drugs project in the European Union. Project Synergy and its AWF gathers and exploits relevant information available within and outside the Member States in order to discover links between different cases, identify new criminal targets and target groups, and initiate, support and coordinate the intelligence aspects of investigations, whilst enhancing information exchange, knowledge and experience in the area of synthetic drugs-related precursors.
108. The UK supported the one instance of an 'NPS control' decision post-Lisbon: Council Decision 2010/759/JHA of 8 December 2010, though we did not have to introduce control measures as the drug subject to the decision was already controlled under UK drug legislation (Misuse of Drugs Act 1971 Schedule 2).
109. The Government expects the Commission to bring forward a new proposal on psychoactive substances, which will trigger our opt-in. If the UK decides to participate, and the new measure is adopted and enters into force before 1 December 2014, it will repeal and replace Council Decision 2005/387/JHA, thereby removing it from the scope of the 2014 decision. We are expecting the proposal to be brought forward in July 2013.
110. The phenomenon of unregulated emerging new substances in recent years, marketed as 'legal highs' and sold on the internet, has increased the cross-border threat from these substances. While the impact on domestic legislation has been minimal due to pre-emptive drug control in the UK, the UK has independent expert advisers assessing drug harms and has taken significant domestic steps in terms of early warning systems (the Home Office Forensic Early Warning System and a Drugs Early Warning System). The UK's participation in time-sensitive EU wide information about prevalence and harms of new substances enables us to influence EU and Member States' legal responses, supporting enforcement and judicial co-operation in a drugs market that does not respect borders, especially with the role of the internet and use of internal transit countries.

111. If the UK were to exercise the opt-out and not rejoin the 2005 Council Decision (or participate in its successor), we would not be required to repeal any domestic legislation. There is no overlap between UN and EU obligations because the Council Decision applies to substances not listed in the 1961 and 1971 Drug Conventions. Similarly, we would not be required to repeal domestic legislation if we decided not to participate in 1999/615/JHA, 2002/188/JHA, 2003/847/JHA or 2008/206/JHA; we would retain the drug controls in place in respect of all the drugs referred to in the various Council Decisions for domestic reasons.

Fundamental rights analysis

112. It is not considered that these measures, which are aimed at the legitimate control of substances hazardous to health and the imposition of criminal penalties in this context, engage fundamental rights in a disproportionate way.

113. Although the control of certain substances could, in limited circumstances, be considered to engage Article 9 ECHR (freedom of thought, conscience and religion) for example, any interference with this qualified right is considered to be proportionate where the substance in question causes harm, or has the potential to cause harm, to both the physical and mental health of the individual user and to society as a whole.

114. It is not considered that any incompatibility with the ECHR arises from the controlling of drugs generally; for example, in *R v Taylor (Paul)* [2001] All ER D 199 it was established that, even assuming a prosecution under section 5(3) of the Misuse of Drugs Act 1971 of a person found in possession of a controlled drug with intent to supply it for religious purposes could be said to interfere with that person's right to freedom of religion, any such interference would be justified by Article 9(2) ECHR, which refers to limitations on this qualified right being prescribed by law and being necessary in the interests of public safety or for the protection of wider public health.

(25) Council Act of 29 May 2000 establishing the Convention on mutual assistance in criminal matters between the Member States of the European Union

(32) Council Act of 16 October 2001 establishing the Protocol to the Convention on mutual assistance in criminal matters between the Member states of the European Union

115. The EU MLA Convention 2000 is currently one of the main instruments used between Member States for the provision of MLA. It was adopted in order to improve the speed and efficiency of cooperation in criminal matters by supplementing the provisions and facilitating the application of the 1959 Council of Europe Convention on Mutual Assistance in Criminal Matters (1959 Council of Europe Convention), and its 1978 Protocol (Additional Protocol), the 1990 Convention applying the Schengen Agreement, and the Benelux Treaty of 1962.

116. The EU MLA Convention 2000 lays down the conditions under which MLA between Member States is accepted and executed. The requested Member States must comply with the formalities and procedures indicated by the requesting Member States. If the deadline set cannot be met, for example, it should inform the requesting Member States as soon as possible and they may try to agree on further action to be taken concerning the request. Specific forms of assistance provided for by the EU MLA Convention 2000 include the following:

- Hearings by video conference;
- Hearings by telephone conference;
- Temporary transfer to the territory of a Member States where an investigation is being carried out on a person held on the territory of another Member State;
- Joint investigation teams (JITs) which allow for two or more Member States to set up a joint investigation team for a specific purpose and for a limited period of time;
- Interception of telecommunications (which may be intercepted and transmitted directly to the requesting State or recorded for subsequent transmission).

117. Its Protocol (the Council Act of 16 October 2001 established in accordance with Article 34 of the Treaty on European Union, the Protocol to the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union) deals with requests for banking information, requiring Member States to ascertain whether persons subject to criminal investigation for serious crime hold accounts in the requested state's territory; to provide historical information on transactions carried out on a specific bank account over a specified period; to monitor transactions; and to impose a duty on banks not to inform the customer of an investigation.

Policy implications

118. Police and judicial co-operation in criminal matters are areas of shared EU competence. The UK has implemented the EU MLA Convention 2000 to the requisite EU standard through the Crime (International Co-operation) Act 2003 (CICA). The provisions in Chapter 4 of the CICA, dealing with the provision of banking information, implement the requirements of the 2001 Protocol.

119. As of June 2013 three Member States (Greece, Italy and Ireland) have not fully implemented the EU MLA Convention 2000. The basis for MLA with these Member States remains the 1959 Council of Europe Convention on Mutual Assistance. In addition, Article 13 of EU MLA Convention 2000 has been overtaken by a separate specific framework decision between Member States on JITs (see 2002/465/JHA, measure 38 on the list).

120. It is likely that the EIO (which the UK opted into on 27 July 2010 and remains under negotiation) will repeal and replace the EU MLA Convention 2000 and the 2001 Protocol in part (or in full). The most recent EM, based on

the agreed Council general approach, is 18918/11 (deposited on 23 January 2012). Once implemented the EIO together with the 1959 Council of Europe Convention and its 1st and 2nd Additional Protocols will provide a sufficient basis for MLA between the UK and Member States, without the need for the EU MLA Convention 2000 and the 2001 Protocol. There may be gaps (service of process, spontaneous exchange of information, restitution, protection of witnesses and JITs) in relation to the Member States that have not ratified the 2nd Additional Protocol, but these are not considered significant (with the exception of JITs, see measure 38). Ireland has not opted into the EIO and, as noted above, has not implemented the EU MLA Convention 2000. The UK's MLA relationship will therefore be unchanged by the approach taken to the EU MLA Convention 2000. Denmark cannot participate in the EIO due to its specific legal status. However, overall the Government expects the 1959 Council of Europe Convention and its Additional Protocols to be a viable alternative for the majority of forms of MLA with Denmark without the need for EU MLA Convention 2000.

121. Although there is no explicit provision for interception of communications and banking information in the 1959 Convention and its protocols, this is not expected to be significant, and is the UK's current position in relation to MLA with the Republic of Ireland. Ireland has not ratified the EU MLA Convention 2000, and instead the 1959 Convention and the 1st and 2nd Additional Protocols are currently used as the international basis for requests.
122. The Government considers the economic impacts of non-participation in this measure to be negligible.

Fundamental rights analysis

123. The EU MLA Convention 2000 and 2001 Protocol can generally be seen as having a positive impact on the fundamental rights of victims in terms of facilitating the effective investigation and prosecution of cross-border crime. This measure may also be used to make MLA requests on behalf of the defence and therefore positively contributes to the package of defendant rights in a criminal trial.
124. In accepting or executing a specific investigative measure the fundamental rights of suspects may be engaged – but the particular fundamental right that may be engaged will depend upon the nature of the MLA request. For example, if the UK executed a MLA request to search the premises of an accused and to seize, retain and transmit any relevant evidence, then this may engage a number of fundamental rights, such as Article 7 (right to respect for private and family life), Article 8 (right to protection of personal data) and/or Article 17 (right to property) of the Charter of Fundamental Rights of the European Union.² However, any such

² Articles 7 and 8 of the Charter correspond to the qualified right to private and family life contained within Article 8 of the European Convention on Human Rights (ECHR) and Article 17 of the Charter corresponds to Article 1 of Protocol 1 of the ECHR.

interference would be in accordance with the provisions of the Crime (International Co-operation) Act 2003, (namely, sections 13 and 16-19). The search warrant itself would have been issued by a judge (using the same powers as are available in a similar domestic case) and any search would have been conducted in accordance with the relevant domestic legislation and guidance, (e.g. Code B of the PACE Codes of Conduct which deals with police powers to search premises and to seize and retain property found on premises and persons). Thus, any interference in fundamental rights here would have been provided for by law (as required by Article 52 of the EU Charter).

125. It is important to note that the Secretary of State retains the discretion to refuse an MLA request if to execute it would constitute a violation of recognised fundamental rights under the European Convention of Human Rights. In addition, these MLA measures do not prevent those affected by MLA requests seeking a legal remedy where their fundamental rights are engaged. This ensures that the protections provided in Article 47 of the EU Charter (right to an effective remedy and to a fair trial) and the corresponding Article 13 of the ECHR are guaranteed for any persons affected by this EU MLA Convention 2000 and 2001 Protocol.

126. Overall therefore, the Government considers that the EU MLA Convention 2000 and 2001 Protocol comply with the principles of fundamental rights.

(27) Council Decision 2000/642/JHA of 17 October 2000 concerning arrangements between financial intelligence units of the Member States in respect of exchanging information

127. The purpose of this Decision is to build upon the earlier EU Directive 91/308/EEC of 10 June 1991 which permits cooperation between contact points within Member States to retrieve suspicious transaction reports on suspicious financial transactions and underlying criminal activity to prevent and combat money laundering. This Decision is to enable the improved disclosure and exchange of financial information between Member States' Financial Investigation Units (FIUs) in combating money laundering.

128. The obligations placed on Member States are as follows:

- Set up FIUs to receive disclosures of financial information and to cooperate with any other FIUs in other Member States (Article 1);
- Ensure that FIUs are a single unit for each Member State and correspond to the following definition: 'A central, national unit which, in order to combat money laundering, is responsible for receiving (and to the extent permitted, requesting), analysing and disseminating to the competent authorities, disclosures of financial information which concern the suspected proceeds of crime or are required by national legislation' (Article 2(1));
- Ensure that FIUs exchange, voluntarily or on request, either under this Decision or existing or future Memoranda of Understanding, any available information to investigate money laundering (Article 2(1));

- Ensure FIUs provide all relevant information to the requesting FIUs (Article 4);
- Ensure any refusal is appropriately explained to requesting FIUs (Article 4(3));
- Ensure receiving FIUs comply with any such restriction as laid down by the transmitting FIUs, who may impose restrictions or conditions on the use of the information, including security measures (Article 5(4) and Data Protection Act (DPA) personal data protection (Article 5(5));
- Make provisions for the voluntary disclosure scheme (Article 6);
- Ensure the appropriate level of cooperation between FIUs and that any SARs which are not compliant with the Decision requirements will be superseded within two years of its coming into effect (Article 9);
- Provide for, and agree on, appropriate and protected channels of communication between FIUs.

Policy implications

129. We judge that the UK has implemented this measure by administrative means in that we have an established FIU which fulfils all of the obligations imposed by this measure.

130. If the UK were to decide not to participate in this measure, there would be no requirement to repeal domestic legislation. The UK is not dependent on this instrument to share intelligence with other countries, as gateway provisions in the Serious Organised Crime and Police Act (SOCPA) 2005 allow for this. However, without this instrument we may need MOUs or bilateral agreements with other Member States to allow them to share intelligence with us where their domestic legislation does not include gateway provisions like ours in SOCPA.

131. The EU has funded and constructed a secure ICT service known as FIU.NET for FIUs to exchange information. The UK FIU routinely uses this service. It receives about 30 requests per month from EU FIUs via FIU.NET and submits about 40 requests on behalf of UK law enforcement agencies. Not all EU Member States are members of FIU.NET. Reporting in 2010 indicated that 20 of the 27 Member State FIUs (including the UK FIU) had joined FIU.NET.

132. The international standard body for anti-money laundering (and counter-terrorist financing) is the Financial Action Task Force (FATF). The UK is a member of FATF, but fewer than half of EU Member States are members. The UK's FIU could continue to exchange information with other countries on a bilateral basis, through the Egmont Group of Financial Intelligence Units or through FATF channels. It is unclear whether non-participation in this instrument would prevent continued UK participation in FIU.NET. However, it may be necessary to seek alternative practical arrangements to ensure law enforcement cooperation continues between the UK FIU and FIUs in other Member States. However, if participation in FIU.NET ended and alternative avenues of continuing cooperation were not quickly introduced there may be reduced opportunities for UK law enforcement operational activity, with consequences for numbers of organised criminals brought to justice and the scale of criminal assets recovered. We judge that there may be a reputational

risk to the UK if we were not to participate in this measure, as non-participation may call into question the UK's commitment to combating money laundering at both a national and international level.

133. For the purposes of Council Decision 2000/642, the UK FIU is the sole competent authority (Article 2(1)). SCDEA leads for Scotland in the context of 2007/845 (AROs), which is not the same as FIU information sharing. SCDEA has a role for Scotland as 2007/845 allows for a secondary ARO to be set up and is a member of the CARIN (is designated as the Scottish ARO within the UK). Information exchange within these conduits has been positive for Scottish law enforcement. For example, recent cooperation between Scottish and Spanish authorities led to significant assets being identified and targeted for recovery from a Spanish-based organised crime group causing significant harm to communities in Scotland. But this activity is not dependent on this instrument for its legal basis.

134. There could be additional administrative costs and burdens, should the UK find it necessary to establish individual agreements with some or all Member State FIUs. It is difficult to predict exactly what these might be, or the extent to which they could be offset against any possibility of savings resulting from not needing to contribute financially to on-going FIU.NET subscriptions, development or replacement.

135. Overall, the Government considers the economic impacts of non-participation in this measure to be negligible.

Fundamental rights analysis

136. Articles 8 (protection of personal data) and 7 (respect for private and family life) of the EU Charter (which correspond to Article 8 of the ECHR) will be engaged when FIUs process personal data and potentially when other financial data is processed. However, we consider that those rights will be respected as compliance with domestic and European data protection laws will be necessary. We note that the instrument contains specific and connected reference to this – see Articles 4(3); 5(2); 5(3); 5(4); 5(5); and 6(1).

137. Overall therefore, the Government considers that this instrument complies with the principles of fundamental rights.

(30) Council Decision 2001/419/JHA of 28 May 2001 on the transmission of samples of controlled substances

138. This instrument provides a system for transmitting seized samples between authorities of Member States, for the purposes of detection, investigation and prosecution of offences or the forensic analysis of samples. Specifically, this instrument sets down the framework for exchange and requires the UK to have a central coordinating body that will manage the exchange and transmission of samples by arranging modes of transport via pre-agreed routes, agree the purpose of the work to be conducted on the

sample and the purpose of receiving the sample. This is agreed using the form annexed to the instrument.

Policy implications

139. There has been no domestic UK legislation to implement the instrument. The designated national contact point for the purposes of this instrument has changed: it was the Forensic Science Service but is now the Centre for Applied Science Technology (CAST).
140. This method has been used approximately three or four times in the last year. However, as licensing is not required we do not see those transactions first hand; these exchanges could have happened lawfully without this instrument.
141. If the UK were not to participate in this instrument, alternative arrangements to enable the transmission of controlled substances may be required. We judge that the transmission of controlled substances could take place between competent authorities without the need for additional licensing. Some operational elements of the Decision, such as the 'sample transmission form', similar to that annexed to the instrument, could be preserved. There would be a need to put in place some mechanism to enable the continued transmission of samples without commission of an offence under domestic legislation. CAST, as a Crown Agent, would be exempt from licensing.
142. We judge that the ability to share information and potentially samples for the purposes of securing a prosecution would not be compromised by a decision not to participate in this measure as that is likely to be covered by the EIO.
143. The Government considers the economic impacts of non-participation in this measure to be negligible.

Fundamental rights analysis

144. It is not considered that this measure disproportionately engages citizens' fundamental rights, relating as it does to the transmission of samples of controlled substances and not wider actions to be taken in relation to individuals. Transportation of samples shall take place in a secure way, shall not exceed the quantity deemed necessary, and any subsequent use of the sample would be subject to the receiving Member State's own rules on law enforcement and judicial process.
145. As such the government considers that this measure is compatible with fundamental rights.

(35) Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime

(77) 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

(136) Council Decision 2003/659/JHA amending Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime

146. Eurojust is an EU agency and is described as the EU's judicial cooperation unit. It was established by Council Decision 2002/187/JHA, which was amended in 2003 and 2009. Under this legislation, 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) (although Eurojust's responsibility for administering this funding beyond 2013 is currently uncertain owing to changes at the EU level over funding arrangements). New legislation on Eurojust, and a parallel proposal for a European Public Prosecutor's Office (EPPO) are expected to be published later this year by the European Commission.

147. Eurojust is composed of small teams of National Members, Deputies and Assistants from each Member State. They are prosecutors, judges or police officers. Each National Member heads up each Member State's National Desk. Together the National Members form a College which is responsible for the organisation and operation of Eurojust.

148. Eurojust's activities include:

- holding co-ordination meetings between Member States to help progress investigations and prosecutions. The meetings are designed to support efficient decision-making about when, where and how law enforcement and judicial action in cross-border cases should take place;
- providing a mechanism for co-ordinating multi-jurisdictional activities such as house searches in multiple Member States at the same time;
- bringing expertise in the functioning of different legal systems;
- supplying expertise and funding in the creation of JITs; and
- assisting in mediating conflicts of jurisdiction.

Policy implications

149. The 2009 Council Decision brought about a number of practical changes intended to improve Eurojust's role in enhancing practical co-operation, such as the creation of a 24/7 on-call co-ordination system. The operational working of the 2009 Council Decision is currently undergoing a peer evaluation process amongst Member States. Some third countries also have an established presence at Eurojust, comprising the USA and Norway. Eurojust is required to inform the Council at the outset where it intends to start pursuing a co-operation agreement with a third country and, under the

consolidated Council Decision, the Council “may draw any conclusions it deems appropriate”. Such agreements may only be concluded after consultation by Eurojust with the Joint Supervisory Body concerning the provisions on data protection and after the approval by the Council, acting by qualified majority.

150. The nature of Eurojust’s supporting role does not lend itself easily to quantifying the benefits it provides. Quantitative data are available about the number of cases the UK National Desk is involved with. The UK National Desk registered 151 new cases at Eurojust in 2011 and 2012, amounting to 5% of the total new cases registered in that period. Over the same period, the UK National Desk was approached by other National Desks to be involved in 387 other cases. This relates to 13% of the total new cases registered in that period. Therefore the percentage of new cases at Eurojust in 2011 and 2012 involving the UK was around 18%.
151. Most of Eurojust’s functions and operations are financed from the general budget of the EU. Eurojust’s revenue in 2012 was €32,967,000. The UK contributes around 12% of Eurojust’s funding, which comes from the overall EU budget. Separately, the costs for staffing the UK National Desk fall directly to the UK; these costs currently amount to around £360,000 annually.
152. As noted above, the UK can apply for funding from Eurojust for JITs. Although JITs are established under a separate EU instrument, Eurojust currently administers a JIT funding project. Between December 2009 and March 2013. UK applications for JIT funding from Eurojust led to receipt of €1.67m. It remains to be seen, however, whether Eurojust will continue to administer this funding beyond 2013.
153. The UK was peer evaluated in May 2013 on its practical operation of the Eurojust and European Judicial Network Council Decisions. Assessment of implementation is ongoing alongside feedback from the evaluators.
154. In terms of new legislation, the European Commission is expected to bring forward two parallel proposals by summer 2013. The first will reform Eurojust under Article 85 of the Treaty on the Functioning of the European Union (TFEU). This may involve, for example, reform to the powers of Eurojust National Members. The second proposal would create a European Public Prosecutor’s Office (EPPO) under Article 86 TFEU. The language in the TFEU refers ambiguously to the EPPO being established “from Eurojust”. It remains to be seen how the Commission will interpret this in practice.
155. Both proposals will trigger the UK opt-in, but the Government has already committed not to participate in the EPPO proposal in the Coalition Agreement. The EU Act 2011 also requires an Act of Parliament and a referendum should any future Government seek to join the EPPO. The EPPO proposal requires unanimity in the Council in order to proceed. As a fall back, a minimum of nine Member States can proceed by means of enhanced co-operation. At present, a proposal under enhanced co-operation seems the most likely scenario.

156. The Government will assess the opt-in decision on the Eurojust proposal once it is published. A decision to opt in would remove the current Eurojust measures from the scope of the 2014 decision, if these measures are adopted and enter into force before 1 December 2014. Withdrawing from Eurojust would almost certainly lead to the removal of the UK desk. It would, however, continue to be possible to operate Liaison Magistrates with other Member States.

Fundamental rights analysis

157. Eurojust works with other organisations that exert coercive powers to support and improve judicial coordination and co-operation, but does not hold or exert such powers itself. Although Eurojust has no coercive powers, its role in information exchange between judicial and law enforcement authorities may still engage Article 7 (right to respect for private and family life) and Article 8 (right to protection of personal data) of the Charter of Fundamental Rights of the European Union, (Articles 7 and 8 of the Charter correspond to the qualified right to private and family life contained within Article 8 of the European Convention on Human Rights).

158. However, because Eurojust functions through small teams of representatives from Member States who act as points of contact between the 27 Member States, any engagement of these fundamental rights will essentially be within the realm of Member State discretion. The Eurojust Council Decisions allow each Member State to decide, after consultation with its National Member, on the extent of access to information and what is shared with other Member States or third parties (Article 16b of the consolidated Council Decision). So the fact that the UK National Member is responsible for data transmitted to Eurojust from the UK ensures that we can comply with pre-existing data protection rules and fundamental rights principles.

159. Overall therefore, the Government considers that these instruments comply with the principles of fundamental rights.

(38) Council Framework Decision 2002/465/JHA of 13 June 2002 on joint investigation teams

160. This instrument 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. It sets out that competent authorities in two or more Member States may agree to set up a joint investigation team (JIT) to carry out criminal investigations in one or more of the Member States setting up the team. A JIT may, for instance, be set up where a criminal offence being investigated by one Member State has links to other Member States, or where a number of Member States are conducting investigations into an offence.

161. The instrument sets out a framework for the establishment and operation of JITs between two or more Member States and sets clear parameters for operational coordination. This reduces the need for lengthy negotiations on each occasion Member States wish to work together to investigate an offence.
162. A JIT may only be set up by mutual agreement and must operate in accordance with the law of the host Member State; members of a JIT from other Member States may only undertake investigative measures where this has been approved by the competent authorities of that person's Member State and the host Member State. Members of a JIT from another Member State are to be regarded as officials of the host Member State with respect to offences committed against them or by them; they shall be liable for any damage caused by them during their operations, in accordance with the law of the host Member State.
163. Since 2009, the UK has been involved in at least 21 JITs covering serious crimes such as drug trafficking, trafficking in human beings, illegal immigration, fraud, money laundering, vehicle crime and cybercrime.
164. '*Operation Golf*' was a successful joint investigation between Europol, the Metropolitan Police and the Romanian Police targeting a specific Romanian organised crime network. Offences associated with the network included trafficking in human beings, money laundering, benefit fraud, child neglect and theft. 126 individuals were arrested in the UK as part of this Operation, and over 28 children were rescued from trafficking/ exploitation or neglect.

Policy implications

165. The UK has implemented this legislation through Home Office circular 53/2002 and Sections 16, 18 and 27 of the Crime (International Cooperation) Act 2003. Should we not participate in this instrument, no change to legislation would be required. The definition of a JIT in UK legislation includes JITs set up under the EU MLA Convention 2000 (measure 25 on the list) or under any other international agreement to which the UK is party and which is specified in secondary legislation, as well as those set up under the Framework Decision.
166. This is the only instrument that allows for a JIT to be formed with every other Member State. However, cooperation could continue outside of this Framework Decision if the UK were to decide not to participate in this instrument. As noted above, the UK could seek to rely on Article 13 EU MLA Convention 2000 but Greece, Italy and Ireland have not ratified this Convention. It would be possible to fall back on the 2nd Additional Protocol to the 1959 Council of Europe Convention if all Member States had ratified this. However, Austria, Cyprus, Finland, Germany, Greece, Hungary, Italy, Luxembourg, Slovenia, Spain, Sweden have not done so, nor have they indicated that they intend to do so in the short term (Austria signed the 2nd

Additional Protocol in 20 September 2012 and Italy signed it on 23 January 2013, but neither has ratified it to date).

167. The UK included JITs as an example of best practice on 'Practical Cooperation to tackle Organised Crime' in its 2010 paper to the EU Standing Committee on Internal Security and law enforcement are in favour of remaining bound. During 2011 and 2012 the UK was involved in at least 21 JITs with a number of EU Member States, some of which also had analytical support from Europol (measure 95 on the list) and funding from Eurojust (measures 35, 77 and 136 on the list).

Fundamental rights analysis

168. Many of the provisions of the EU Charter/ECHR can be engaged during a police investigation, whether that investigation is conducted domestically or jointly with other Member States. However, this instrument does not in itself give rise to any significant fundamental rights issues because it simply establishes a framework for joint investigations to be carried out rather than setting out detailed provisions on how a criminal investigation must be carried out. A JIT may only be set up by mutual agreement, it must operate in accordance with the law of the host Member State and members of the JIT from other Member States may only undertake investigative measures where this has been approved by the competent authorities of both Member States.

169. Members of a JIT from another Member State are to be regarded as officials of the host Member State with respect to offences committed against them or by them and are liable for any damage caused by them during their operations, in accordance with the law of the host Member State. This ensures that police officers operating outside their own territory do not have immunity and that the right to an effective remedy is protected (Article 47 of the EU Charter and Article 13 of the European Convention on Human Rights) because the host Member State is entitled to prosecute a foreign police officer for the commission of a crime committed within its territory.

170. Moreover, the instrument is clear that any joint investigation must be undertaken while respecting the principles of human rights, fundamental freedoms and the rule of law. Overall, the Government considers that the framework of co-operation and the corresponding legal safeguards in this instrument comply with the principles of fundamental rights.

(48) Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence

171. This instrument 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. In relation to freezing of evidence, the Framework Decision provides that a 'freezing order' issued by one Member State may be sent to participating Member States requesting that evidence is

frozen. This instrument requires the Order to be considered by a court in the requested Member State within 24 hours of receipt where possible.

Policy implications

172. The UK has implemented this legislation in relation to evidence (not property). Sections 10-12 (outgoing) and 20-25 (incoming) of the Crime (International Cooperation) Act 2003 (CICA) were commenced on 19 October 2009 and came into immediate effect. The UK can therefore send and receive Freezing Orders relating to evidence under this Framework Decision. Freezing of terrorist property is dealt with by Schedule 4 of CICA.

173. Requests to search and seize evidence can be made under the 1959 Council of Europe Convention (all Member States have ratified this Convention) or the EU MLA Convention 2000. If the UK were not to participate in this measure, evidence could still be 'seized' using search and seizure powers in sections 16 and 17 of CICA and property could be 'restrained' using the Proceeds of Crime Act 2002 (POCA) in response to an MLA request from a Member State.

174. Although the UK would not be able to rely on this measure when making a request to a Member State, there is an implementation gap across the EU on this measure, and all Member States appear to have alternative processes for 'freezing' evidence or property on the basis of an MLA request. Furthermore, the EIO will repeal and replace this measure in relation to evidence.

175. In regards to evidence, since implementation of this measure in 2009, the UK has not issued a request under this measure and has only received four requests from Member States. Only one was executed. It was not possible to execute the others due to deficiencies in the requests received.

176. The Government considers the economic impacts of non-participation in this measure to be negligible.

Fundamental rights analysis

177. As with other MLA measures this can be seen as having a positive impact on the fundamental rights of victims in terms of facilitating the effective investigation and prosecution of cross-border crime.

178. In accepting or executing an overseas Freezing Order, the fundamental rights of suspects may be engaged by way of Article 7 (right to respect for private and family life), Article 8 (right to protection of personal data) and/or Article 17 (right to property) of the Charter of Fundamental Rights of the European Union.³ However, there are several safeguards against violations of

³ Articles 7 and 8 of the Charter correspond to the qualified right to private and family life contained within Article 8 of the European Convention on Human Rights (ECHR) and Article 17 of the Charter corresponds to Article 1 of Protocol 1 of the ECHR.

fundamental principles provided in this instrument and in the domestic implementation of this measure.

179. For example, in implementing this measure into domestic legislation (and specifically the objectives and respect of fundamental rights as laid out in Article 1), section 21(7) of CICA allows for a court not to give effect to an overseas freezing order where it would be incompatible with ECHR rights. Furthermore, there are grounds for non-recognition in Article 7 that strike a balance between respecting the fundamental rights of law abiding citizens and providing a basis for Member States to pursue evidence and criminal assets across border. In addition, Article 11 of this measure requires that Member States ensure that all interested parties have access to legal remedies where the recognition and execution of an overseas freezing order has adversely affected a person's fundamental rights. This ensures that the protections provided in Article 47 of the EU Charter (right to an effective remedy and to a fair trial) and the corresponding Article 13 of the ECHR are guaranteed for any persons affected by this instrument. Overall therefore, the Government considers that this measure complies with the principles of fundamental rights.

(54) Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of drug trafficking

180. This instrument requires Member States to ensure their domestic legislation lays down minimum provisions on the constituent elements of criminal acts and penalties in the field of drug trafficking.

Policy implications

181. With the exception of Articles 8(1)(b) and (c), the UK has implemented all compulsory elements of this instrument. Provisions under Section 20 of the Misuse of Drugs Act 1971, and the legislative framework in place for the extradition of UK citizens for offences under Articles 2 and 3 of the Council Framework Decision mean transposition of Articles 8(1)(b) and (c) is not necessary.

182. The requirements of the Framework Decision were already met in UK law prior to 2004 through primary and secondary legislation. The measure has been implemented by the Misuse of Drugs Act 1971, Criminal Justice (International Cooperation) Act 1990, Proceeds of Crime Act 2002, Serious Crime Act 2007, Anti-social Behaviour Act 2003, Criminal Attempts Act 1981, Drug Trafficking Act 1994, The Controlled Drugs (Drug Precursor)(Community External Trade) Regulations 2008 and the Controlled Drugs (Drug Precursors)(Intra-Community Trade) Regulations 2008.

183. There would be no requirement to repeal domestic legislation if the UK were to decide not to participate in this measure.

184. This instrument ensures Member States take a joint approach to tackling drug trafficking and related offences, though we judge that the aims of

the instrument can largely be achieved by Member States through domestic legislation. The instrument does not contain explicit provisions for formal judicial cooperation.

185. Non-participation in this measure would not require the negotiation of individual agreements with Member States to ensure cooperation. Other instruments or means, such as Joint Investigation Teams and the EIO, provide mechanisms for this cooperation.
186. The Government considers the economic impacts of non-participation in this measure to be negligible.

Fundamental rights analysis

187. It is not considered that this measure, aimed at laying down minimum provisions on the constituent elements of criminal offences in the field of illicit drug trafficking, engages fundamental rights in a disproportionate way.
188. It is not considered that any incompatibility with the ECHR arises from the controlling of drugs generally; for example, in *R v Taylor (Paul) [2001] All ER D 199* it was established that, even assuming a prosecution under section 5(3) of the Misuse of Drugs Act 1971 of a person found in possession of a controlled drug with intent to supply it for religious purposes could be said to interfere with that person's right to freedom of religion, any such interference would be justified by Article 9(2) ECHR, which refers to limitations on this qualified right being prescribed by law and being necessary in the interests of public safety or for the protection of wider public health.
189. If a sentence of imprisonment were imposed, in accordance with the maximum terms set out in the measure, Article 5(1)(a) ECHR permits lawful detention where this takes place in accordance with a procedure prescribed by law and after conviction by a competent court. Furthermore, Article 6(1) ECHR provides, amongst other matters, that in the determination of any criminal charges everyone is entitled to a full and public hearing within a reasonable time by an independent and impartial tribunal established by law, and judicial process undertaken in a Member State would have to be carried out in compliance with these fundamental rights. Nothing in this measure interferes with the availability or application of those rights.
190. Overall therefore, the Government considers that this measure complies with the principles of fundamental rights.

(58) Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-related Proceeds, Instrumentalities and Property

191. The aim of this instrument 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 (a power known as 'extended confiscation'). Essentially it requires Member States to take measures to enable them to perform two types of confiscation:

- Confiscation of instrumentalities and proceeds of crimes that are punishable by deprivation of liberty for more than a year, or property of a value corresponding to such proceeds;
- Extended confiscation, which can be implemented in one of three ways (MS may choose which approach to adopt): either
 - a) confiscation of property that has been derived from the criminal activities of the convicted person during a period prior to the conviction for the offence; or
 - b) confiscation of property that has been derived from *similar* criminal activities of the convicted person during a period prior to conviction for the offence; or
 - c) confiscation of property where it is established that the value of the property is disproportionate to the lawful income of the convicted person and that the property in question has been derived from the criminal activity of that convicted person.

Policy implications

192. The UK has implemented this instrument through asset recovery legislation; currently the Proceeds of Crime Act 2002 and its supporting secondary legislation. There would be no need to repeal domestic legislation if the UK were not to participate in this measure.

193. UK legislation on instrumentalities (contained in s.143 of the Powers of Criminal Courts (Sentencing) Act 2000) applies to property that has been seized from the convicted individual, or which was in his possession or under his control at the time he was apprehended. It does not apply to 'any property' in the same manner as the Framework Decisions.

194. The Commission has published a draft Directive on the freezing and confiscation of the proceeds of crime which aims to promote a common basis amongst Member States for freezing and confiscation regimes. It lays down minimum rules for Member States with respect to freezing and confiscation of criminal assets, through direct confiscation, value confiscation, extended confiscation and non-conviction based confiscation (in limited circumstances) and third party confiscation. If adopted, the Directive would replace Joint Action 1998/699/JHA (money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and proceeds from crime) and, in part, Framework Decision 2001/500/JHA (which repeals certain Articles within Joint Action 1998/699/JHA). It would also repeal this Framework Decision, apart from Articles 2, 4 and 5 which would remain in force.

195. The Government considers the economic impacts of non-participation in this measure to be negligible.

Fundamental rights analysis

196. This Framework Decision concerns the confiscation of property. As such, Article 17 (right to property) of the EU Charter (which corresponds to Article 1 of Protocol 1 of the ECHR) is engaged. Article 17 makes clear that no one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law. Confiscation in the relevant cases would be under applicable domestic law (Proceeds of Crime Act 2002) and would be under the supervision of the Courts. We are satisfied that correct use of confiscation would not breach Article 17.

197. Overall therefore, the Government considers that this instrument complies with the principles of fundamental rights.

(67) Council Decision 2005/681/JHA of 20 September 2005 establishing the European Police College (CEPOL) and repealing Decision 2000/820/JHA

198. The European Police College (CEPOL) is an agency of the European Union and was established as such with effect from 1 January 2006. The aim of CEPOL – as set out in the Council Decision – is to help train senior police officers of the Member States by optimising cooperation. It aims to support and develop a European approach to the main problems facing Member States in the fight against crime, crime prevention, and the maintenance of law and order and public security.

Policy implications

199. In practice, CEPOL operates as a pan-European training and development network. It brings together senior police officers in Europe to support the development of a network and encourage cross-border cooperation by organising training activities.

200. CEPOL organises between 80 and 100 courses and seminars each year on topics relevant to police forces across Europe, such as counterterrorism and drug trafficking. It also runs an exchange programme for police officers and trainers from Member States of the EU. Officers from Turkey are invited to attend all CEPOL training events and officers from Switzerland, Iceland and Norway have previously attended CEPOL training events.

201. This instrument came into force on 1 January 2006 – it does not provide a date by which it is to be implemented. The only provisions of this instrument that require implementation by the UK are Articles 2 to 4. The remainder of the instrument concerns the purpose, objectives and tasks of CEPOL, the appointment and functions of the CEPOL Governing Board, Director and Secretariat, and the powers and duties of CEPOL in relation to various matters such as finance – these provisions are for implementation by CEPOL itself, not Member States. Arguably, Articles 2 and 3 (legal personality and privileges and immunities, respectively) have not been fully implemented by the UK to the required standard. If the UK were to participate in CEPOL post-December 2014, then to fully implement our obligations under the

instrument we would need to make further orders under Section 1 of the International Organisations Act 1968. Article 4 (seat) has been implemented by administrative means by the provision of premises for CEPOL at Bramshill.

202. CEPOL receives funding from the EU's general budget. In 2012, its allocated budget was €8.451m (£6.85m), of which the UK pays 11.5% (approximately €972K) through our general contribution to the EU. The CEPOL Secretariat manages the day-to-day work of CEPOL and has approximately 30 staff based at Bramshill, UK. CEPOL currently pays the College of Policing £266K a year for renting office and training space.

203. If a police officer attends a CEPOL training course, there is no cost to that individual or his/her police force for the course or accommodation as it is provided free of charge by CEPOL. Figures for attendees at CEPOL training courses between 2007 and 2011 are:

2007: 90
2008: 111
2009: 115
2010: 105
2011: 71
2012: 108

204. The Home Secretary announced on 12 December 2012 that the police training site at Bramshill will close. CEPOL have been provided with a guarantee of occupation until at least March 2014. We anticipate a degree of flexibility in relation to when CEPOL will be required to vacate the Bramshill site. Discussions are underway with CEPOL on the most appropriate way forward to ensure as little disturbance as possible to the operations of CEPOL. If the Secretariat is relocated, we would need to seek an amendment of the instrument as Bramshill is named as the 'seat' of CEPOL in the Council Decision. An amendment may remove the instrument from the scope of the 2014 decision.

205. On 27 March, the Commission published a new Regulation which will merge CEPOL with Europol. The new Regulation proposes that CEPOL is relocated, with its headquarters moving to The Hague. This Regulation is subject to the UK's opt-in decision. If the new Regulation is adopted and enters in to force before 1 December 2014, and should the UK decide to participate, the current CEPOL measure will be removed from scope of the 2014 decision.

Fundamental rights analysis

206. The instrument provides for the establishment of a European Police College, sets out the College's objectives and makes provision for such administrative matters as the location, legal status, governance arrangements and funding of the College. It does not give rise to any fundamental rights issues.

(68) Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognitions to confiscation orders

207. This instrument facilitates 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 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.

Policy implications

208. This instrument, along with 2003/577/JHA on the execution of orders freezing property or evidence (measure 48 on the list) attempts to facilitate cooperation across the EU.

209. Although the UK has not implemented this measure, other Member States which have implemented it have received very few cases. Indeed, a communication from the Commission in 2010 that assessed this instrument reported that many Member States had implemented this instrument incorrectly. As of November 2011, eight EU countries, including the UK, had not implemented this Framework Decision. We judge that implementing this instrument would require changes to primary legislation. Currently the UK still relies on the 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime in order to transfer confiscation orders to other EU Member States. Additionally, our definition of instrumentalities differs from this measure in the Framework Decision (and does not apply to ‘any property’ in the same manner as the Framework Decisions).

210. The Government considers the economic impacts of non-participation in this measure to be negligible.

Fundamental rights analysis

211. The focus of this Framework Decision is the procedures by which confiscation orders for the proceeds of crime are recognised between member states. Therefore, in and of itself, it does not engage fundamental rights. The underlying domestic procedures by which confiscation orders were obtained may engage Articles 17 (right to property) and 47 (right to an effective remedy and to a fair trial) – these rights correspond to Article 1 of Protocol 1 of the ECHR and Article 13 and 6 of the ECHR respectively. These would be issues for the individual Member States to ensure. Within the UK we are confident that these rights would be respected.

(69) 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

212. This instrument seeks to simplify the exchange of information and intelligence between law enforcement authorities in EU 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. This Framework Decision is also known as the 'Swedish Initiative'.
213. Article 8 of this instrument puts limits on how another Member State can use the information exchanged; these limits cannot be more stringent than the limits placed on domestic partners. The Decision sets out that all requests for information exchange are to be made in line with domestic data protection law.

Policy implications

214. The UK has implemented this Decision through existing legal provisions supported by Home Office Circular 30/2008.
215. This Decision ensures that data protection does not go beyond national legislation. In the UK, data protection is regulated and enforced by the Data Protection Act, and includes transfers of data to international and domestic partners. In the UK and in other Member States, this instrument is only used as a 'last resort' or when time and/or a case requires it, as outside the mandate of this Council Decision there are other information exchange practices available to law enforcement. In urgent cases, police would expect the intelligence to be exchanged much more quickly than the 8 hours afforded by this instrument.
216. The use of forms to exchange information under this Decision allows for uniformity across the EU and acts as a prompt for a minimum standard of information. There is no overriding requirement on law enforcement to use the form and use in the UK is minimal. The only area where there is a requirement to use the form is as a result of the fulfilment of obligations arising from measure 2007/845/JHA concerning Asset Recovery (measure 73 on the list). As a consequence, the Asset Recovery Office (ARO) makes regular use of the form for outgoing inquiries. In 2011, there were 271 outbound requests made from AROs via the Swedish Initiative as a consequence of the 2007/845/JHA measure. In theory, AROs could utilise the CARIN Network, however the CARIN Network does not give the time-bound response afforded by the Swedish Initiative.
217. There is a risk that, should the UK not participate in this measure and push to use CARIN, other Member States may face difficulties as they prefer the Swedish Initiative.
218. The Government considers the economic impacts of non-participation in this measure to be negligible.

Fundamental rights analysis

219. This instrument may engage Article 7 (right to respect for private and family life) and Article 8 (right to protection of personal data) of the Charter of Fundamental Rights of the European Union, (Articles 7 and 8 of the Charter correspond to the qualified right to private and family life contained within Article 8 of the European Convention on Human Rights), as it deals with the exchange of information and intelligence between law enforcement authorities in EU Member States. However, there are numerous safeguards in place regarding data protection to ensure that fundamental rights are protected.

220. For example, Article 8 of this Framework Decision states that 1) the use of information and intelligence which has been exchanged directly or bilaterally shall be subject to the national data protection provisions of the receiving Member State (i.e. the Data Protection Act 1998 in the UK), 2) personal data processed in the context of the implementation of this Framework Decision shall be protected in accordance with various Council of Europe instruments, such as the Convention on the Protection of Individuals with regard to Automatic Processing of Personal Data 1981, 3) information and intelligence provided may be used by the competent law enforcement authorities of the Member State to which it has been provided *solely* for the purposes for which it has been supplied (with a few exceptions) and 4) the providing competent law enforcement authority may impose conditions on the use of the information and intelligence by the receiving competent law enforcement authority.

221. Article 1(4) of this instrument also ensures that this instrument does not impose any obligation on the part of the Member States to provide information and intelligence to be used as evidence before a judicial authority nor does it give any right to use such information or intelligence for that purpose.

222. Overall therefore, the Government believes that this instrument strikes the appropriate balance between fast and efficient law enforcement cooperation and agreed principles and rules on data protection, fundamental freedoms, human rights and individual liberties.

(73) 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

223. This instrument 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 between AROs are regulated by set time limits:

- 8 hours for urgent requests for information and intelligence when it is held in a database that is directly accessible by law enforcement, as mandated by Article 4 of Council Framework Decision 2006/960/JHA (the ‘Swedish Initiative’).
- One week for non-urgent requests for information and intelligence when it is held in a database directly accessible by law enforcement;

- Two weeks in all other cases.

Policy implications

224. The UK is compliant with the Council Decision having created an Asset Recovery Office (ARO) within the Serious Organised Crime Agency (SOCA) Financial Intelligence Unit (FIU). The ARO also processes non-EU requests (including through Egmont Group requests and Camden Assets Recovery Interagency Network (CARIN) channels). The ARO will be carried over into the National Crime Agency.
225. The majority of inbound and outbound requests for financial intelligence are conducted through the ARO arrangement. In 2012, there were 72 ARO inbound requests from Member States for assistance on asset recovery and only 5 such requests from non-Member States through CARIN. In the same year, there were 277 ARO outbound requests to Member States and 66 to non-Member States through CARIN. Whilst requests could be conducted with some Member States on a non-ARO, law enforcement to law enforcement basis (e.g. Germany), we judge that this might be more difficult for other Member States who rely on the ARO system as a legal gateway for issuing and receiving information requests.
226. Were we to exercise the opt-out and not rejoin this measure, we believe Member States would continue to exchange information and intelligence and cooperate with the UK in the pursuit of criminal finances. We do not believe there would be a requirement to repeal any domestic legislation. The Government expects that exchange of information and intelligence would continue as was the case before the instrument took effect in 2007.
227. The Government considers the economic impacts of non-participation in this measure to be negligible.

Fundamental rights analysis

228. Asset Recovery Offices do not in and of themselves engage with substantive legal issues that could engage fundamental rights. They will need to ensure that any personal data is processed properly (Articles 7 (respect for private and family life) and 8 (protection of personal data) of the Charter) but this should be ensured by existing EU data protection measures as transposed into domestic laws.
229. Overall therefore, the Government considers that this instrument complies with the principles of fundamental rights.

(89) Council Decision 2008/976/JHA of 16 December 2008 on the European Judicial Network

230. 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 decision lays down the operational provisions of the EJM and defines the composition of the EJM as being made up of a network of central authorities responsible for international judicial cooperation.

231. Contact points from each Member State, who are experts in MLA, are appointed, as well as national correspondents and tool correspondents for each Member State who oversee the functioning of the network in their Member State. This instrument establishes the functions of the EJM, provides for the setting up of a telecommunications tool on the EJM website (Article 9) and clarifies the relationship between the network and Eurojust (Article 10). In addition, plenary meetings of the EJM are organised on a regular basis and at least three times a year (Article 5). The activities for the EJM are covered by the budget of Eurojust (Article 11).

Policy implications

232. The UK has implemented this measure fully, by establishing the relevant contact points and sending representatives to plenary meetings. The EJM may help support effective international cooperation by accessing a list of practitioners across Member States and by meeting other Member State contact points at EJM meetings and events. While it would be difficult for individual Member States to organise contacts comprehensively across the EU, now that the network is set up, it may be possible to maintain those contacts without formally participating in this Council Decision. Practical experience has shown that the contacts are not always the right people to speak to; often the contact points have a coordinating role. We judge that practitioners will know the names and numbers of people they need to speak to regularly.

233. Non-Member States are involved in the EJM as Contact Points; this includes EU candidate countries, Norway, Switzerland and Lichtenstein. However, unlike Member States these countries do not have information about their MLA processes on the EJM website and they are not involved in all EJM meetings.

234. UK experience of the EJM plenary meetings has shown that they add little or no value. Ireland is not hosting any EJM meetings during their presidency because they do not justify the time and resource expended on them.

235. The Government considers the economic impacts of non-participation in this measure to be negligible.

Fundamental rights analysis

236. The EJM can be seen as having a positive impact on the fundamental rights of victims in terms of improving and facilitating co-operation and the effective investigation and prosecution of cross-border crime across Member States.

237. Although EJM has no coercive powers, there is the possibility that its composition of central authorities responsible for international judicial cooperation and its role in improving judicial cooperation may engage Article 7 (right to respect for private and family life) and Article 8 (right to protection of personal data) of the Charter of Fundamental Rights of the European Union, (Articles 7 and 8 of the Charter correspond to the qualified right to private and family life contained within Article 8 of the European Convention on Human Rights). However, because EJM functions mainly through Member State experts, any engagement of these fundamental rights will essentially be within the confines of Member State discretion. So the fact that the UK expert can choose how far to cooperate with other experts ensures that the UK can comply with pre-existing data protection rules and fundamental rights principles.

238. In practice though, the EJM instrument primarily provides a contact points list and a forum for plenaries between Member States, so it is highly unlikely to engage fundamental rights.

239. In summary therefore, the Government considers that the EJM instrument complies with the principles of fundamental rights.

(91) Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters

240. The European Evidence Warrant (EEW) was intended to replace the system of MLA in criminal matters between Member States for obtaining objects, documents and data (which already exist) for use in criminal proceedings. It establishes the procedures and safeguards for Member States whereby EEWs are to be issued and executed. The aim of the EEW was to speed up MLA between Member States, partly by the introduction of deadlines for dealing with requests, providing specific and limited grounds for refusing a request and a standardised request form thereby theoretically reducing the bureaucracy of the MLA process.

Policy implications

241. As a result of the limitations of the EEW, particularly because it can only be used for evidence that already exists and the very short deadlines, the majority of Member States have not implemented the EEW (it is estimated that less than a third of MLA requests received by the UK include an investigative measure within the EEW definition). The EEW also states that only 'judicial authorities' can refuse the EEW and this runs contrary to the common law system where MLA requests are considered by a 'central authority' on behalf of the Secretary of State. Poor implementation of this measure has led to the EIO which, once it has been adopted and has entered into force, will repeal and replace the EEW in full, thereby removing it from the scope of the 2014 decision.

242. An implementation framework is in place for Scotland: section 92 of the Criminal Justice and Licensing (Scotland) Act 2010 provides an enabling power allowing for the EEW to be implemented in Scotland by secondary legislation. This power has not been exercised.

Fundamental rights analysis

243. The goals of the EEW (in creating a faster and more efficient MLA system) can be seen as having a positive impact on the fundamental rights of victims in terms of facilitating the effective investigation and prosecution of cross-border crime. In accepting or executing a specific investigative measure, the fundamental rights of suspects may be engaged (although this will depend on the particular nature of the MLA request). Although the EEW is limited to evidence that already exists and specifically excludes taking evidence from witnesses or carrying out bodily examinations, it is possible that an MLA request issued in accordance with this instrument could engage Article 7 (right to respect for private and family life), Article 8 (right to protection of personal data) and/or Article 17 (right to property) of the Charter of Fundamental Rights of the European Union⁴.

244. However, this instrument contains a number of safeguards to protect against any unnecessary interference with fundamental rights. For example, the measure provides grounds for non-recognition (see Articles 13 and 14) that strike a balance between respecting the fundamental rights of law abiding citizens and providing a basis for Member States to pursue evidence and criminal assets across borders. In addition, the Secretary of State retains the discretion to refuse an MLA request which would be a violation of recognised fundamental rights under the European Convention of Human Rights. Furthermore, Article 18 of the EEW requires that Member States ensure that all interested parties have access to legal remedies where the recognition and execution of the EEW has adversely affected a person's fundamental rights. This ensures that the protections provided in Article 47 of the EU Charter (right to an effective remedy and to a fair trial) and the corresponding Article 13 of the ECHR are guaranteed for any persons affected by this instrument.

245. Overall, the Government considers that the EEW complies with the principles of fundamental rights.

(101) Agreement on mutual legal assistance between the European Union and the United States of America

246. The EU-US MLA and Extradition agreements were proposed as part of a counter-terrorism package at a Justice and Home Affairs Council in September 2001 and entered into force on 1 February 2010. The EU-US agreement required a number of changes to the pre-existing 1994 MLA treaty between the UK and US (UK-US Treaty). Amendments were made to the UK-US Treaty via an Exchange of Notes on 16 December 2004.

⁴ Articles 7 and 8 of the Charter correspond to the qualified right to private and family life contained within Article 8 of the European Convention on Human Rights (ECHR) and Article 17 of the Charter corresponds to Article 1 of Protocol 1 of the ECHR.

Policy implications

247. Article 216(2) of the TFEU provides that agreements concluded by the Union are binding on the EU and the Member States. Therefore, the UK is currently bound by the provisions of the EU-US MLA Agreement as a matter of EU law, and has a separate but parallel international obligation to the US pursuant to the bilateral instrument.
248. The UK has fully implemented the EU-US Agreement. By virtue of Article 3(1) of the EU-US Agreement, the UK was required to amend its existing bilateral treaty with the US, namely, the UK-US bilateral Treaty which was signed on 6 January 1994.
249. These amendments were intended to supplement, not replace, bilateral arrangements. Therefore, if the UK decided to exercise the opt-out and not seek to rejoin this measure, the pre-existing bilateral treaty, as amended, would be maintained. This is linked to the Agreement on extradition between the European Union and the United States of America (measure 102 on the list).
250. The Government considers the economic impacts of non-participation in this measure to be negligible.

Fundamental rights analysis

251. The amendments to the existing treaty effectively extended most of the provisions of EU MLA Convention 2000 and 2001 Protocol to the US. As such, this agreement can be regarded as respecting fundamental rights (please see fundamental rights analysis provided above).

(135) Council Decision 2008/852/JHA on a contact-point network against corruption

252. This decision establishes a network of Member States' contact points responsible for preventing and combating corruption, particularly corruption connected to law enforcement bodies and agencies. The aim of the network is to enhance cooperation between these contact points in order to step up action against corruption at the European Union (EU) level.
253. In essence, this decision formalises a mechanism for dialogue and cooperation, supported by a dedicated website, and sets out the minimum tasks of the network which consist of:
- setting up a forum for the exchange of best practices and experiences concerning the prevention and fight against corruption;
 - facilitating and upholding communication between its members.
 - meeting at least once a year in order to carry out its tasks.
254. The network of contact point is composed of *“the heads and key representatives of EU Member States' national police monitoring and*

inspection bodies and those of their anti-corruption agencies with a wider remit.” Each Member State is permitted to designate one to three organisations as members. The UK is the only exception, given devolution - where inspection and monitoring of police has a devolved element, so the UK has five representatives which are:

- HM Inspectorate of Constabulary
- Independent Police Complaints Commission
- Serious Organised Crime Agency
- Police Complaints Commissioner for Scotland
- Police Ombudsman of Northern Ireland

255. The Commission also participates in the activities of the network and designates its own representatives. Similarly, Europol and Eurojust may take part in the network.

Policy implications

256. The Decision is explicit in setting out that the establishment of the network will not affect the rules governing police and judicial cooperation between Member States nor the role of the CEPOL. In terms of funding, each Member State, the Commission, Europol and Eurojust bears its own expenses relating to the network.

257. The UK has fully implemented this measure, as have all other Member States. Given that it is simply a network of contact points, formalising previously informal relationships, then it is relatively simple to meet the requirements and no legislation is required to implement or repeal.

258. Given the increasing focus on tackling corruption in public office and tackling corruption linked to organised crime, the network can be helpful in looking at trends and best practice across borders. The costs of membership are minimal and there are some benefits to it through the opportunity to share information and discuss relevant issues.

259. In essence, any decision to stay bound or not would be likely to make little practical difference. The UK bodies listed would seek to work closely with their European partners as and when required, and there would be no legal barriers to their doing so.

260. The Government considers the economic impacts of non-participation in this measure to be negligible.

Fundamental rights analysis

261. Not applicable. The network does not facilitate the exchange of personal data or intelligence. Any associated intelligence is shared through other existing legal gateways.

262. Overall therefore, the Government considers that this instrument complies with the principles of fundamental rights.

SCRUTINY HISTORY

263. There has been extensive and regular scrutiny by both Houses since the mid 1990s.

264. This is one of five Explanatory Memoranda related to the 2014 Decision.

MINISTERIAL RESPONSIBILITY

265. The measures detailed in this EM are the responsibility of the Home Secretary. The Foreign Secretary has overall responsibility for the UK's relations with the EU.

INTEREST OF THE DEVOLVED ADMINISTRATIONS

266. While policing and criminal justice are devolved issues, any decision will be binding for the Devolved Administrations and Gibraltar. The Government is continuing to engage with the Devolved Administrations and Gibraltar on this issue.

LEGAL AND PROCEDURAL ISSUES

267. The UK would be exercising a Treaty right by choosing to opt out of the measures covered in this EM and by seeking to re-participate in certain measures. Protocol 36 also establishes the processes for the Commission and Council to consider the UK's applications to re-participate in measures.

268. For non-Schengen measures, the Commission may seek to set conditions to be met for the UK's re-participation in a measure. If it considers that the conditions have not been met, the matter can be referred by the UK to the Council who must decide on the UK's application by way of a Qualified Majority.

APPLICATION TO THE EUROPEAN ECONOMIC AREA

269. Not applicable.

SUBSIDIARITY

270. This EM relates to measures that have already been adopted. The UK would have considered subsidiarity for each of the measures at the time that the measures were drafted and adopted. It would have been concluded at the time that the operative provisions in the measures were more effectively and appropriately undertaken at EU level.

POLICY IMPLICATIONS

271. If the Government does decide to exercise the opt-out, cooperation with other Member States could take a number of forms. The Home Secretary said in her statement of 15 October that *'we will consider not just opt-ins and opt-outs but the other opportunities and options that are available'*.
272. Firstly, the Government could apply to rejoin measures within the scope of the 2014 decision.
273. Secondly, the Government believes that in some cases it would be possible to rely on pre-existing Council of Europe Conventions or bilateral treaties. For example, if the EIO is not adopted and entered into force before 1 December 2014 and the Government did not opt back in to the EU MLA Convention 2000, we believe that most forms of cooperation would continue on the basis of the 1959 Council of Europe Convention on Mutual Assistance in Criminal Matters (and its Protocols). Indeed, as not all Member States have implemented EU MLA Convention 2000 the impact on our MLA relations with those States would be largely negligible.
274. Thirdly, in some cases it may be possible to negotiate bilateral treaties with each Member State or with the EU that would effectively replace the instruments in question. The position of the other Member States depends on whether the EU has exclusive competence in that area. That requires a measure by measure analysis.
275. If there is no exclusive competence in relation to third pillar measures, the other Member States will not require any permission or authorisation from the EU institutions. If there is exclusive competence in a particular third pillar area, while the UK is free to enter into international commitments after the block opt-out, the other Member States will require authorisation and agreement from the EU. But in principle, bilateral or multilateral agreements - either with the Member States individually or collectively - would be legally possible with such authorisation.
276. Fourthly, in some cases there may simply be no need for any such agreement to be in place in order for there to be cooperation.

CONSULTATION

277. The Devolved Administrations, Foreign and Commonwealth Office and the Ministry of Justice have been consulted in preparing this EM.

IMPACT ASSESSMENT

278. At his appearance before the European Scrutiny Committee on 28 November, James Brokenshire gave an undertaking that the Government will provide an Impact Assessment on the final package of measures that the Government wishes to rejoin, should the Government decide to exercise the opt-out.

FINANCIAL IMPLICATIONS

279. The Council may adopt a Decision determining that the UK shall bear the direct financial consequences, if any, necessarily and unavoidably incurred as a result of the cessation of its participation in the third pillar acts. The UK will participate in this Decision. The Government considers this to be a high threshold to meet.

TIMETABLE

280. A final decision as to whether the UK will accept ECJ jurisdiction over all third pillar measures must be taken by 31 May 2014. This decision will take effect on 1 December 2014.

281. This is one of several Explanatory Memoranda to be submitted on the 2014 decision. In December 2012, the Home and Justice Secretaries agreed to provide Explanatory Memoranda on the following areas:

- Schengen measures;
- Measures for which the Justice Secretary is responsible;
- Measures for which the Home Secretary is responsible (1) – EU agencies, mutual legal assistance, drugs, proceeds of crime;
- Measures for which the Home Secretary is responsible (2) – extradition, crime (including cyber and organised crime), fraud and counterfeiting, databases and automated information exchange, and all others; and
- Measures for which the Chancellor of the Exchequer, Foreign Secretary and Transport Secretary have responsibility.

The Rt. Hon. Theresa May MP

Home Secretary

EXPLANATORY MEMORANDUM (EM) ON ARTICLE 10(4) OF PROTOCOL 36 TO THE TREATY ON EUROPEAN UNION (TEU) AND THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION (TFEU) - THE '2014 DECISION'

Extradition, crime (including cyber and organised crime), fraud and counterfeiting, databases and automated information exchange, and all others

3/13

Submitted by the Home Office on July 2013

SUBJECT MATTER

1. In accordance with Article 10(4) of Protocol 36 to the EU Treaties the UK must, by 31 May 2014, decide whether to accept Commission enforcement powers and Court of Justice of the European Union jurisdiction over all EU police and criminal justice measures adopted before 1 December 2009 or to opt out of these measures. The decision to remain bound or opt out must be taken en masse. Protocol 36 to the Treaties does permit the UK to apply to rejoin individual measures if it chooses to opt out en masse.
2. This Explanatory Memorandum relates to a number of measures within the scope of the 2014 decision for which the Home Secretary is responsible – extradition, crime (including cyber and organised crime), fraud and counterfeiting, databases and automated information exchange. A full list of the related measures is contained below. This EM should be considered in line with several others submitted on the 2014 decision.
3. This Explanatory Memorandum provides information about each of the measures listed below which remain in force and are within the scope of the 2014 opt-out decision. The measures are listed in order; however, where measures cover similar substantive areas, we have chosen to group them accordingly.

(3) Joint Action 96/610/JHA concerning the creation and maintenance of a Directory of specialised counter-terrorism competences, skills and expertise to facilitate counter-terrorist cooperation between the Member States of the European Union.

4. This measure seeks to create and maintain a Directory of specialised counter-terrorist competences, skills and expertise to facilitate counter-terrorist co-operation between EU Member States.

Policy Implications

5. The UK is a world leader in work on Counter Terrorism and this instrument could therefore be seen as enhancing the UK's reputation. However, the UK

meets the standards of this measure in domestic policy and would continue to do so should we decide not to participate in this measure. The directory is little used in practice and existing bilateral relationships between operational agencies is unlikely to be affected if the UK were not to participate.

6. The UK has implemented this measure through administrative means. If the UK did not participate in this measure, no domestic legislation would need to be repealed
7. The Government considers the economic impacts of non-participation in this measure to be negligible.

Fundamental rights analysis

8. No fundamental rights are engaged by this measure as it relates to the maintaining of a database of Member States' counter terrorist competences in order to assist co-operation between Member States and thereby enhancing Counter Terrorism capabilities. The aim of the database is not to hold any personal data relating to individuals. The measure does not require action which would affect the rights of individuals. As such the Government considers that these instruments comply with the principles of fundamental rights.

(6) Joint Action 96/747/JHA concerning the creation and maintenance of a directory of specialized competences, skills and expertise in the fight against international organized crime, in order to facilitate law enforcement cooperation between the Member States of the European Union

9. This instrument created a directory of areas of specialised competences, skills and expertise, which would be available to authorities in Member States, to assist in cooperation in fighting crime across the EU. Member States' Heads of Europol National Unit (HENU) took the decision on 16 February 2012 to close the directory as there are now other operational mechanisms (such as Expert Platforms) in place which are more effective than the directory which the UK participates in. We therefore consider this measure to be defunct.

Fundamental rights analysis

10. No fundamental rights are engaged by this measure as it relates to the maintaining of a directory of Member States' specialized competences, skills and expertise in the fight against international organised crime. It operates to assist co-operation between Member States thereby enhancing relevant capabilities. The aim of the directory is not to hold any personal data relating to individuals. The measure does not require action which would affect the rights of individuals. Furthermore the directory has now been superseded. As such the Government considers that these instruments comply with the principles of fundamental rights.

(10) Joint Action 97/339/JHA of 26 May 1997 with regard to cooperation on law and order and security

11. This instrument allows for cooperation and mandates information sharing between Member States regarding large scale events which are attended by large numbers of people from more than one Member State such as sporting events, rock concerts and demonstrations. The primary purpose of this information sharing arrangement is to maintain law and order, protect people and their property, and prevent criminal offences. This does not cover football violence and disorder which is covered by two separate instruments (numbers 35 and 72 on the list).

Policy Implications

12. The UK supports police to police cooperation in this field. UK Police Forces use other bilateral or multi-lateral agreements for sharing information with other Member States' Police Forces. These include, for example, the 'Swedish Initiative' (measure 69 on the list) emphasising information sharing at a practical level in line with internal Member State practices. This measure is not used as the functions are replicated in these agreements. If the UK did not participate in this measure the Police would continue to share information bilaterally and multi-laterally using established communication channels.
13. The UK has implemented this measure through administrative means. If the UK were to decide not to participate in this measure, there would be no requirement to repeal domestic legislation.
14. The Government considers the economic impacts of non-participation in this measure to be negligible.

Fundamental rights analysis

15. The instrument engages Article 7 (respect for private and family life) and Article 8 (protection of personal data) of the Charter of Fundamental Rights. These Articles correspond to the qualified right to a private and family life under Article 8 of the European Convention on Human Rights. Any engagement with these rights must be justified in accordance with Article 52 of the Charter. The criteria for such a justification are the following: the interference must be provided for by law and respect the essence of the particular right in question; and the interference must comply with the requirements of necessity, proportionality and the pursuit of a legitimate objective.
16. The purpose of this instrument is public safety and the maintenance of law and order. These purposes would constitute a legitimate objective for the purposes of Article 52.
17. Article 1(2) of the instrument states that information shall be supplied "in accordance with national law". Our obligations when sharing data are enshrined in legislation, principally the Data Protection Act 1998 and the Government considers that those obligations comply with Article 8 of the ECHR and Article 7 and 8 of the Charter. On this basis the Government considers that this instrument complies with the principles of fundamental rights.

(13) 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

18. 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. It provides for a peer evaluation mechanism that enables Member States to evaluate the application and implementation of EU instruments designed to combat international organised crime.
19. To date, five evaluation rounds have been conducted and a sixth is currently underway. The evaluation rounds are as follows:
- Mutual legal assistance in criminal matters. This was conducted from 1999 to 2001.
 - Law enforcement and its role in the fight against drug trafficking. This was conducted from 1999 to 2003.
 - Exchange of information and intelligence between Europol and the Member States and among the Member States respectively. This was conducted from 2002 to 2007.
 - The European Arrest Warrant. This was conducted from 2006 to 2009.
 - Financial crime and financial investigations. This was conducted from 2008 to 2011.
 - The sixth round of evaluation is on the practical implementation and operation of the Decisions on Eurojust and the European Judicial Network in criminal matters and is expected to be completed in 2014.

Policy Implications

20. The evaluation process enables Member States to share best practice and can also be an opportunity to detect any relevant weaknesses in implementation. It also provides a mechanism for recommendations as to how a Member State may improve its implementation.
21. If the UK were to decide not to participate in this measure, there are other avenues that could be pursued such as working bilaterally with Member States. Summary reports are made public at the end of each evaluation and would be available to the UK.
22. The UK has implemented this measure through administrative means. If the UK were to decide not to participate in this measure, no domestic legislation would need to be repealed.
23. The Government considers the economic impacts of non-participation in this measure to be negligible.

Fundamental rights analysis

24. An instrument that enables the GENVAL Working Group to facilitate a peer evaluation review mechanism exercise does not in itself give rise to fundamental rights issues.

25. On this basis the Government considers that this instrument complies with the principles of fundamental rights.

(18) Joint Action 98/700/JHA of 3 December 1998 concerning the setting up of a European Image Archiving System (FADO)

26. 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 as a direct result of this Joint Action. The system took many years to develop and became fully operational in late 2005. A public-facing website (PRADO) exists which has a mechanism through which the public can see limited information relating to falsified and authentic identity documents. This website would be available to the UK regardless of participation in FADO.

Policy Implications

27. The UK has supported the FADO database and its development as a tool for the detection of falsified documents and the exchange of information between Member States on authentic and falsified passports, ID cards and residence permits. FADO is used regularly by government agencies and departments in the UK.

28. Access to FADO is largely funded by the EU. Ongoing annual running costs to the UK are around £40,000 per year.

29. If the UK did not participate in FADO we would still exchange some paper documents with other Member States but this is unlikely to be as comprehensive. The UK does not have an equivalent database to FADO. Alternative agreements on exchanges of information with other Member States would be required to create a domestic equivalent with the same level of information and development may take a several years.

30. Norway, Switzerland and Iceland have access to FADO.

31. The UK has implemented this measure through administrative means. If the UK were to decide not to participate in this measure, no domestic legislation would need to be repealed.

Fundamental rights analysis

32. Although FADO has no coercive powers, this instrument may engage Article 7 (right to respect for private and family life) and Article 8 (right to protection of personal data) of the Charter of Fundamental Rights of the European Union, (Articles 7 and 8 of the Charter correspond to the qualified right to private and family life contained within Article 8 of the European Convention on Human Rights). It is up to each Member State to provide information concerning genuine and false documents. The UK decides what information to provide to ensure that the processing can comply with pre-existing data protection rules and fundamental rights principles.

33. We consider that these instruments comply with the principles of fundamental rights.

(22) Council Decision 2000/261/JHA of 27 March 2000 on the improved exchange of information to combat counterfeit travel documents

34. This introduced a standard form and questionnaire for use when providing information alerts about counterfeit documents to other EU Member States. It followed on from Joint Action 98/700/JHA of 3 December 1998 and was designed to fill the gap before FADO (measure 18 on the list) was fully operational.

35. FADO is now fully implemented across the EU and for those Member States who wish to circulate alerts in hard copy the last Spanish Presidency introduced document 5606/11 FAUXDOC 5 COMIX 36 which effectively updates the original Joint Action in respect of counterfeit travel documents. This instrument is therefore effectively defunct.

Fundamental rights analysis

36. This Council Decision introduced a standard form and questionnaire for use when providing information (in hard copy) about counterfeit documents to other EU Member States. When it was in use this Council Decision may have engaged Article 7 (right to respect for private and family life) and Article 8 (right to protection of personal data) of the Charter of Fundamental Rights of the European Union, (Articles 7 and 8 of the Charter correspond to the qualified right to private and family life contained within Article 8 of the European Convention on Human Rights).

37. When completing the standard form and questionnaire the UK made an assessment around the information to be provided, and ensured that the processing complied with pre-existing data protection rules and fundamental rights principles.

38. As such the government considers that these instruments comply with the principles of fundamental rights.

(23) Council Decision 2000/375/JHA to combat child pornography on the internet

39. This instrument 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.

Policy Implications

40. The UK meets the requirements of the instrument through a range of administrative measures which are not EU-specific. The applicable domestic legislation on illegal images is the Protection of Children Act 1978, as amended.

41. UK policy has been to encourage countries to develop appropriate legislation, law enforcement structures and private sector support to tackle child abuse images. The Child Exploitation and Online Protection (CEOP) Centre is the national lead for tackling illegal images. Close working with the industry, and the Internet Watch Foundation has ensured that there is a structure that allows reports of illegal images to be made and the police to be informed. This Decision supports the UK's work by ensuring that there is a common approach to protecting children across the EU. UK participation in the measure may therefore contribute to the UK's good reputation in this field.
42. If the UK were to exercise the opt-out and decide not to rejoin this measure, there would be little practical impact as the obligations set out in the Decision exist in UK domestic law. There is a risk that it might reduce our influence with other Member States on improving their work in this area, however, it is unlikely that the efforts of other countries would be reduced as a result.
43. The instrument provides a framework for cooperation but allows this to occur through other channels (for example, Mutual Legal Assistance and Joint Investigation Teams). This is foreseen in Article 2 of the measure. If we did not participate in this measure, we could continue to work with a wide range of international partners to tackle this problem through these cooperation mechanisms.
44. The Government considers the economic impacts of opting out of this measure to be negligible.

Fundamental rights analysis

45. This measure relates to the development of a wide-ranging response to child pornography within Member States and any development would be done in line with domestic laws, which would respect fundamental rights.
46. The Council Decision may engage certain articles of the Charter of Fundamental Rights of the European Union. Article 1 of the Decision requires Member States to encourage internet users to alert authorities to suspected child pornography on the internet. This may engage a user's rights under Article 7 (right to respect for private and family life) – which corresponds to the user's rights under Article 8 of the ECHR – but any such limitation on those rights would be justified in accordance with Article 52. Measures which are designed to tackle child pornography serve a legitimate aim and protect the rights and freedoms of others.
47. Articles 2 and 4 of the Decision, which require cooperation between Member States in relation to the investigation and prosecution of offences and the review of existing criminal offences to reflect technological developments, may engage – for example – a user's rights under Article 7 (right to protection of personal data) of the Charter – which corresponds to rights under Article 8 of the ECHR. Any such limitation is in accordance with Article 52 because – for example - it involves the operation of the criminal law by a Member State.

48. Articles 3 and 5 of the Decision, which require cooperation by industry in relation to eliminating child pornography on the internet and information sharing to combat it may engage Article 16 (freedom to conduct a business) and Article 17 (right to property) of the Charter – which correspond to qualified rights protected under Article 1, Protocol 1 of ECHR. This is because such co-operation could be viewed as a limitation on the activities of those who operate businesses. Any such limitation here is also justified under Article 52.
49. The Government, therefore, considers that these instruments comply with the principles of fundamental rights.

(33) Council Decision 2001/887/JHA of 6 December 2001 on the protection of the euro against counterfeiting

50. This instrument seeks to protect the Euro against counterfeiting. It lays down procedures for expert analysis of suspected counterfeit notes and coins and obliges Member States to communicate information on investigations to Europol.

Policy Implications

51. Numbers of counterfeit Euros found in the UK have been falling since 2007. Most counterfeit Euros are detected in Member states where the Euro has been adopted as currency. In 2010 and 2011, 0.06% of counterfeit Euros were detected in the UK. The low levels of detections mean that there is very little operational activity in the UK.
52. Domestic legislation is in place to deal with offences of Euro Counterfeiting including the Forgery and Counterfeiting Act 1981, the Proceeds of Crime Act 2002 and the Serious Crime Act 2007.
53. The UK has largely implemented this measure through administrative means, although Statutory Instrument 2001 No. 3948 establishes the Bank of England as the UK's National Analysis Centre for Euro Banknotes and SOCA as the National Analysis Centre for all counterfeit coins (as required under Article 2). If the UK did not participate in this measure, no domestic legislation would need to be repealed. However, a consideration may be required around whether to remove the conditions of Statutory Instrument 2001 No.3948 establishing the National Analysis Centres.

Fundamental rights analysis

54. The provision for information sharing with Europol and the nature of the information to be shared engages Article 7 (right to respect for private and family life) and Article 8 (right to protection of personal data) of the Charter of Fundamental Rights of the European Union, (Articles 7 and 8 of the Charter correspond to the qualified right to private and family life contained within Article 8 of the European Convention on Human Rights). Any engagement with these rights must be justified in accordance with Article 52 of the Charter. The criteria for such a justification are the following: the interference must be provided for by

law and respect the essence of the particular right in question; and the interference must comply with the requirements of necessity and proportionality.

55. The purpose of the information sharing is for the prevention, detection, investigation and prosecution of counterfeiting and offences relating to counterfeiting of the euro. This constitutes a legitimate objective for the purposes of Article 52.
56. The Government considers that the safeguards set out in the instrument and the relevant Europol legislation satisfy the requirements of necessity and proportionality.
57. Overall, the Government considers that the measure complies with the principles of fundamental rights.

(39) Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism

(87) Council Framework Decision 2008/919/JHA of 28 November 2008 amending Framework Decision 2002/475/JHA on combating terrorism

58. These instruments set requirements for the creation of a number of terrorism and terrorism related offences and attempts to harmonise and streamline the definitions. Whilst not prescriptive, these require that Member States must be capable of prosecuting those offences, both where they are committed wholly or partially within its territory, and also where an offence has been committed elsewhere but extradition is not possible.

Policy Implications

59. The UK is compliant with this measure by virtue of provisions contained within the Terrorism Act 2000 and the Terrorist Act 2006. As a result no action would be required if we were to decide not to participate and domestic legislation would remain in place.
60. The offences created by the Decision are a useful standard for terrorist offences and by ensuring other Member States can prosecute relevant terrorist behaviours a more hostile environment for terrorists ought to be created across Europe. However it is possible that the aims of the instrument (i.e. the creation of offences) could be achieved by Member States acting individually.

Fundamental rights analysis

61. A number of fundamental Charter rights of individuals may be engaged by this measure including Articles 6 (right to liberty and security); 11 (freedom of expression and information); 12 (freedom of assembly and association); 16 (freedom to conduct a business) 17 (right to property). The criminal offences referred to in the measure already largely exist in domestic law but, in any event, such rights will not be breached because any potential intrusion into fundamental rights would be justified and proportionate and any interference

would be a result of a criminal sanction applied after a full judicial process. This process must take account of all corresponding ECHR provisions and jurisprudence.

62. Overall, the Government considers that the measure complies with the principles of fundamental rights.

(40) 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

63. This measure establishes a network of national contact points for exchanging information on investigations of genocide, crimes against humanity and war crimes.

Policy Implications

64. The UK has nominated Contact Points and is actively involved in meetings. Meetings are well attended and include representatives from non-Member States (e.g. Canada and US) as well as other organisations (including the ICC, Red Cross, Amnesty International etc). The conferences organised by the Genocide Network aim to promote close cooperation between the relevant national authorities in relation to these types of crimes. It is likely we would be able to continue to attend conferences or contact experts in other Member States without being party to this measure.

65. The UK has implemented this measure through administrative means. If the UK were to decide not to participate in this measure, there would be no requirement to repeal domestic legislation.

66. The Government considers the economic impacts of opting out of this measure to be negligible.

Fundamental rights analysis

67. The nominated Contact Points provided for under this Council Decision can be seen as having a positive impact on the fundamental rights of victims in terms of improving and facilitating co-operation and the effective investigation and prosecution of persons responsible for genocide, crimes against humanity and war crimes.

68. Although the nominated Contact Points have no coercive powers, it is possible that their role in the exchange of information may engage Article 7 (right to respect for private and family life) and Article 8 (right to protection of personal data) of the Charter of Fundamental Rights of the European Union, (Articles 7 and 8 of the Charter correspond to the qualified right to private and family life contained within Article 8 of the European Convention on Human Rights). However, the nominated Contact Points can choose how far to cooperate with other experts and will only exchange information within the confines of the pre-existing data protection rules and fundamental rights principles as set out in

domestic UK law. Article 2(2) of this Council Decision explicitly provides for this safeguard by stating that “[w]ithin the limits of the applicable national law, contact points may exchange information without a request to that effect”.

69. In practice, this Council Decision sets up a network of contact points and a forum for plenaries between Member States, so it is highly unlikely to engage fundamental rights. In summary therefore, the Government considers that this instrument complies with the principles of fundamental rights.

(51) Council Decision 2003/335/JHA on the investigation and prosecution of genocide, crimes against humanity and war crimes

70. Under this measure Member States must inform law enforcement authorities when facts are established which give rise to a suspicion that a migrant has committed genocide, crimes against humanity and war crimes. It includes three obligations a) to assist one another in investigating and prosecuting these crimes; b) to obtain relevant information where an application for leave to remain gives rise to suspicion (where the applicant has previously sought residence in another Member State), and; c) to oblige a Member State to inform if they become aware that a suspected person is in another Member State.

Policy Implications

71. Cross border co-operation between Member States into the investigation and prosecution of these crimes is conducted through existing mutual legal MLA structures and procedures. The UK is active in promoting policies designed to combat impunity for the most serious crimes of international concern and work is likely to continue regardless of whether the UK remains part of this measure.

72. This measure imposes obligations in regard to the routine sharing of information, for instance about the immigration status of individuals, even where there is no criminal investigation or where there is only suspicion of involvement in these types of crimes. The sharing of such information raises issues regarding the safeguarding of personal information, confidentiality, use of material, and disclosure. Whilst the UK has implemented the measure through administrative means, the information sharing requirements make it difficult to operate in practice.

73. The Government considers the economic impacts of opting out of this measure to be negligible.

Fundamental rights analysis

74. In terms of sharing information where there is no criminal investigation (outside the formal MLA system), there may be an impact on the fundamental rights of those individuals that are the subject of the information being shared (this could include victims, suspects and witnesses), specifically in regards to Article 7 (right to respect for private and family life) and Article 8 (right to protection of personal data) of the Charter of Fundamental Rights of the European Union, (Articles 7 and 8 of the Charter correspond to the qualified right to private and

family life contained within Article 8 of the European Convention on Human Rights). However, Article 6 of the measure states that “[a]ny kind of exchange of information or other kind of processing of personal data under this Decision shall take place in full compliance with the requirements flowing from the applicable international and domestic data protection legislation”. Therefore the Government considers that this instrument complies with the principles of fundamental rights.

(41) Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States

75. The purpose of the European Arrest Warrant (EAW) Framework Decision is to speed up the extradition process between Member States, reducing the potential for administrative delay under previous extradition arrangements.
76. The EAW system has abolished ‘traditional’ extradition procedures between Member States and instead adopts a system of surrender between judicial authorities, based on the principle of mutual recognition and a high level of confidence and ‘mutual trust’ between Member States. The EAW removes 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 the statute of limitations, where the extradition offence would be time-barred under the law of the requested state.

Policy Implications

77. The EAW is the most widely known of all former third pillar JHA measures and is cited by the Commission as a positive example of cross-EU co-operation.
78. The EAW Framework Decision is given effect in the UK by Parts 1 and 3 of the Extradition Act 2003 which came into force on 1 January 2004. The Extradition Act 2003 has been amended by schedule 13 to the Police and Justice Act 2006 and Part 6 of the Policing and Crime Act 2009.
79. Between April 2009 and April 2013, 5,184 people were arrested under an EAW in England and Wales, and 4,005 were surrendered to another EU country; of these only 181 were British nationals. Over the same period, 507 people were surrendered to the UK from another EU country; of these, 277 were British nationals. It is believed that since 2009, over 100 people have been returned to the UK from countries which did not extradite their own nationals under the previous extradition systems in place. On average, it takes approximately three months to extradite someone under an EAW. A Part 2 extradition (i.e. extradition to non-EU countries) takes approximately ten months.
80. The European Arrest Warrant has been successful in streamlining extradition processes and returning serious criminals. However, the government has been clear that there have been some problems with its operation. Particular concerns have been raised about the disproportionate use of the EAW for trivial offences, the lengthy pre-trial detention of some British citizens overseas and

the use of the EAW for actions that are not considered to be crimes in the UK. The Government has undertaken to consider what changes can be made to improve the EAW's operation.

81. The estimated unit cost of executing an incoming EAW in the UK is approximately £20,000 per EAW. This includes costs to the police, the CPS, court and legal aid costs, as well as detention before extradition. The cost of executing a Part 2 extradition request is expected to be higher than an EAW given the increased timescales but no detailed costs are available. Work is underway to establish the unit costs of extraditing a person back to the UK under an EAW.
82. If the UK were to decide not to participate in this measure, we believe the UK would revert to the ECE and its additional Protocols. All Member States have ratified the ECE. Some barriers to extradition exist under the ECE that do not exist under the EAW, including the nationality of those sought and the statute of limitations (where the extradition offence would be time-barred under the law of the requested state). In order to remove these barriers work would need to be taken bilaterally, but there is no guarantee this would be possible where Constitutional barriers exist.

Fundamental rights analysis

83. Given that the EAW process entails arrest, potential detention and transfer to another country, it may engage a number of articles of the Charter of Fundamental Rights of the European Union, including Article 6 (right to liberty and security) and Article 7 (respect for private and family life).
84. However, there are many safeguards in place to ensure fundamental rights are protected. The Framework Decision is clear that when a person is arrested s/he shall be informed of the EAW, its contents, and shall have a right to be assisted by legal counsel and an interpreter (Article 11). A decision on detention must be taken in accordance with the law of the executing Member State (Article 12). The person has a right to be heard by the courts in the executing Member State before a decision is taken on surrender (Articles 14 and 19). EAWs must be dealt with as a matter of urgency, there are tight time limits for the decision to execute and extension of those time limits is only possible in exceptional circumstances (Article 17). Likewise there are tight timescales for the surrender of the person after a decision to execute, and the person must be released if s/he is still in custody at the expiry of those time scales (Article 23). In addition, post-surrender, the issuing Member State is obliged to deduct all periods of detention from the execution of the EAW from the total period of detention to be served in the issuing State as a result of a custodial sentence being imposed (Article 26).
85. In addition, and bearing in mind Article 50 of the Charter, the mandatory grounds of refusal in Article 3 of the FD require the executing Member State to refuse to execute the EAW where the person has already been finally judged by a Member State in respect of the relevant acts (and has served his/her sentence, where there has been one).

86. Although there is no express ground of refusal to cover cases where the executing State is satisfied that execution would result in a breach of the person's human rights, recital (12) and Article 1(3) are relevant. Recital (12) stresses that the FD respects fundamental rights and observes the principles recognised by ex-Article 6 TEU and reflected in the Charter and Article 1(3) makes clear that the FD shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles enshrined in ex-Article 6 TEU. It is on this basis that the UK has enacted section 21 of the Extradition Act 2003, which requires the judge at the extradition hearing to discharge the person if the judge is of the view that execution of the EAW would result in the person's ECHR rights being breached.
87. The Commission appears to agree that in exceptional cases a Member State may refuse to execute an EAW on human rights grounds (e.g. COM (2006) 8).
88. Overall, the Government considers that the measure complies with the principles of fundamental rights.

(43) 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

89. This Framework Decision requires Member States to create a penal regime to prevent the facilitation and unlawful entry of illegal migrants to the EU. It aims to strengthen the sanctions available for breach of articles 1 and 2 of Directive 2002/90/EC (which defines the facilitation of unauthorised entry, transit and residence) in which the UK already participates. This regime applies across the EU and so requires appropriate sanctions to be in place in each Member State, where there has been an act of unlawful facilitation in breach of the laws of any other Member State.

Policy Implications

90. The framework decision assists with EU-wide enforcement of UK law. The UK is part of an EU-wide penal regime under which each Member State is required to criminalise certain acts which would facilitate a breach of the immigration laws of all other Member States. The Government's aim is to secure the border and control migration, and it works closely with partners to manage asylum and prevent illegal immigration coming through Europe. There may therefore be a risk to the UK's reputation if we ceased participation in this measure.
91. Article 7 also creates a route for the exchange of information on known facilitators between EU Member States. UK domestic legislation meets the facilitation requirements of the Framework Decision (section 25 of the Immigration Act 1971) and we do not require participation in it, in order to prosecute or exchange information.
92. The UK is compliant with this measure by virtue of provisions contained within the Immigration Act 1971. As a result, no action would be required if we were to

decide not to participate in this measure, and domestic legislation would remain in place.

93. The Government considers the economic impacts of opting out of this measure to be negligible.

Fundamental rights analysis

94. This measure requires Member States to strengthen the criminal sanctions which already exist for the facilitation and unlawful entry of illegal migrants. There is no requirement for any harsher penalty imposed as a result of this measure to be retrospective in effect; therefore no issues under Article 49 of the Charter arise. Likewise all Member States are obliged to respect fundamental rights (including under Article 6 of the ECHR) in their criminal and civil proceedings of which these sanctions would form part and therefore no issues under Article 47 of the Charter arise. Therefore the Government considers that this instrument complies with the principles of fundamental rights.

(44) Council Decision 2002/956/JHA of 22 November 2002 setting up a European Network for the Protection of Public Figures

(96) Council Decision 2009/796/JHA of 4 June 2009 amending Decision 2002/956/JHA setting up a European Network for the Protection of Public Figures

95. These relate to setting up a European Network for the Protection of Public Figures (ENPPF) to enable the sharing/exchanging of information and intelligence relating to the protection of public figures, defined in Council Decision 2002/956/JHA as 'any person to whom a protection service is assigned'.

Policy Implications

96. These measures provide for the UK to receive and share information and intelligence on protection operations throughout the EU which involve a UK protected principal travelling to the EU and vice-versa. The European Network for the Protection of Public Figures (ENPPF) enables EU Member States to share best practice in the area of police protection. Meetings are held twice a year and are attended by the UK's two national contact points. Attendance is not obligatory and some Member States rarely attend.

97. The UK has implemented this measure through administrative means. If the UK did not participate in this measure, no domestic legislation would need to be repealed.

98. The sharing of information between Member States in this area is minimal and occurs irrespective of this measure. If the UK were to decide not to participate in this measure, information could be exchanged, in line with current practice, on a bilateral basis either through embassies or designated contact points in each Member State.

Fundamental rights analysis

99. This instrument may engage fundamental rights. The information shared or exchanged relates to intelligence about any potential or actual threats posed to a protected person and as such may engage Article 7 (right to respect for private and family life) and Article 8 (right to protection of personal data) of the Charter of Fundamental Rights of the European Union, (Articles 7 and 8 of the Charter correspond to the qualified right to private and family life contained within Article 8 of the European Convention on Human Rights).
100. Any engagement with these rights must be justified in accordance with Article 52 of the Charter. The criteria for such a justification are the following: the interference must be provided for by law and respect the essence of the particular right in question; and the interference must comply with the requirements of necessity, proportionality and the pursuit of a legitimate objective.
101. The purpose of the information sharing is ultimately for the protection of public figures. This constitutes a legitimate objective for the purposes of Article 52.
102. The Government considers that the safeguards provided for the sharing of any information within the Network, that is the application of domestic data protection law, satisfy the requirements of necessity and proportionality.
103. Overall, the Government considers that the measure complies with the principles of fundamental rights.

(45) Council Decision 2002/996/JHA of 28 November 2002 establishing a mechanism for evaluating the legal systems and their implementation at national level in the fight against terrorism

104. The instrument establishes a mechanism for the peer evaluation of Member States' legal systems with regards to the fight against terrorism. The instrument provides that the Presidency will select evaluation teams of experts proposed by Member States to visit and assess the national arrangements already in place in other Member States.

Policy Implications

105. The first review looked at improving national machinery and capability for the fight against terrorism, highlighting good practice and recommendations possible to be applied to Member States or at the EU level. The second review looked at Preparedness and Consequence Management in the event of a terrorist attack, focusing on structures and organisational frameworks of national crisis centres, training and exercise and soft targets. The UK seconded national experts to evaluation teams that carried out both reviews alongside most other Member States.
106. Evaluation reports were produced for both but the UK has not implemented the recommendations or used them to inform a change in practice. Conclusions

of reviews are not binding on Member States and the measure is explicit that the primary responsibility resides with Member States for designing and implementing their legal systems.

107. The UK has developed a comprehensive body of domestic legislation on Counter Terrorism over the last decade and the Government is committed to ensuring that legislation is effective, fair and proportionate. The Acts passed include:

- The Terrorism Act 2000
- The Anti-terrorism, Crime and Security Act (ATCSA) 2001
- The Prevention of Terrorism Act 2005
- The Terrorism Act 2006
- The Counter-Terrorism Act 2008
- The Terrorist Asset-Freezing etc Act 2010
- The Terrorism Prevention and Investigation Measures (TPIM) Act 2011
- The Protection of Freedoms Act 2012

108. The UK wishes to maintain its strong reputation in Counter Terrorism. It may be possible that the objective of strengthening Counter Terrorism capability across the EU could be met by influencing and sharing best practice outside of the framework, if the UK were to decide not to participate.

109. The Government considers the economic impacts of opting out of this measure to be negligible.

Fundamental rights analysis

110. This instrument does not in itself give rise to fundamental rights issues as it relates to the evaluation of counter terrorism provisions and their implementation in Member States.

111. On this basis the Government considers that this instrument complies with the principles of fundamental rights.

(56) Council Decision 2004/919/EC of 22 December 2004 on tackling vehicle crime with cross-border implications

112. This instrument aims to create a network of Law Enforcement specialists (single points of contact) to exchange information and best practice in how to tackle organised (cross-border) vehicle crime. It also requires Member States to take action in terms of issuing alerts for stolen vehicles and registration certificates, and to prevent the abuse and theft of registration documents and their recovery in the event of road accidents. There is a requirement for 'vehicle crime contact points' of the Member States to meet at least once a year.

Policy Implications

113. The measure requires Member States to enhance cooperation on vehicle crime but leaves the means open to Member States. It suggests one method

may be through concluding bilateral cooperation agreements, although to date this is not something that the UK has sought to do.

114. The instrument provides a framework for joining up Member States to share information to help determine emerging threats and formulate cost-effective methods to combat them. The UK has not had an operative single point of contact since April 2011. We therefore judge that it would be possible for the UK to cooperate with other Member States on an informal bilateral basis if participation in this measure ceased.

115. The UK has implemented this measure through administrative means. If the UK were to decide not to participate in this measure, there would be no requirement to repeal domestic legislation.

116. The Government considers the economic impacts of opting out of this measure to be negligible.

Fundamental rights analysis

117. This measure does not significantly engage citizens' fundamental rights, as it relates to cross-border co-operation in the field of tackling vehicle crime. The general obligation imposed on Member State contact points to share general and technical information concerning vehicle crime expressly excludes the exchange of personal data. This ensures that Member States do not share personal data outside the realms of their own data protection legislation.

118. Law enforcement authorities are to co-operate with Europol in relation to known perpetrators of vehicle crime. Fundamental rights may be engaged in this context, for example Article 7 (the right to respect for private and family life) and Article 8 (right to protection of personal data) of the Charter of Fundamental Rights of the European Union, (Articles 7 and 8 of the Charter correspond to the qualified right to private and family life contained within Article 8 of the European Convention on Human Rights).

119. Any engagement with these rights must be justified in accordance with article 52 of the Charter. The criteria for such a justification are the following: the interference must be provided for by law and respect the essence of the particular right in question; and the interference must comply with the requirements of necessity, proportionality and the pursuit of a legitimate objective.

120. The purpose of any information sharing is the tackling of cross border vehicle crime. This constitutes a legitimate objective for the purposes of Article 52.

121. The Government considers that the safeguards provided for the sharing of any information within the Network: that is the application of domestic and EU data protection law, satisfy the requirements of necessity and proportionality.

122. Overall, the Government considers that the measure complies with the principles of fundamental rights.

(57) Council Common Position 2005/69/JHA of 24 January 2005 on exchanging certain data with Interpol

123. This measure provides for the exchange of data with Interpol in relation to lost and stolen passports. It also provides that where a 'hit' on the Interpol lost and stolen database is made that every effort shall be made to verify that data.

Policy Implications

124. This measure aims to ensure that all EU Member States share a consistent level of Lost and Stolen Passport Data with Interpol. UK enforcement agencies have access to this information via Interpol. SOCA reports that in 2011, the UK Interpol Bureau (UKICB) created 4308 cases in their case management system where there had been a hit on the lost and stolen database. 2315 of these related to hits by foreign agencies on UK documents and 1993 cases related to UK Border Force hits on foreign documents.

125. If the UK were to decide not to participate in this measure, UK Lost and Stolen passport information would continue to be shared with Interpol through sections 33 and 34 of the Serious and Organised Crime and Police Act 2005 (SOCPA) and the UK would continue to have access to the relevant databases.

126. The Government considers the economic impacts of opting out of this measure to be negligible.

Fundamental rights analysis

127. The data shared under this measure relates only to those passports which have been reported as lost or stolen, and as a result the potential for a breach of fundamental rights is very low. Further, the data shared contains limited distinguishable personal information (for example passport numbers but not names).

128. The sharing of data relating to individuals has the potential to engage Articles 7 (respect for private and family life) and 8 (protection of personal data) of the Charter (which correspond to Article 8 of the ECHR). Any engagement with these rights must be justified in accordance with Article 52 of the Charter. The criteria for such a justification are the following: the interference must be provided for by law and respect the essence of the particular right in question; and the interference must comply with the requirements of necessity, proportionality and the pursuit of a legitimate aim.

129. The purpose of any information sharing is the prevention and detection of crime. This constitutes a legitimate objective for the purposes of Article 52.

130. The Government considers that the safeguards provided for the sharing of any information with Interpol: that is the application of domestic data protection law, satisfy the requirements of necessity and proportionality.

131. Overall, the Government considers that the measure complies with the principles of fundamental rights.

(60) Council Framework Decision 2005/222/JHA of 24 February 2005 on attacks against information systems

132. The measure sets out how Member States should tackle attacks on information systems, such as illegal access, data theft and damage. The measures seek to tackle cyber crime through legislative, law enforcement and public / private partnership measures. The instrument will be repealed and replaced by the EU Directive on attacks on information systems, which we have opted into (14436/10).

Fundamental rights analysis

133. Since the measure seeks to tackle cyber crime through legislative, law enforcement and public/private partnership measures, it engages the rights listed in Title VI (Justice) of the Charter.

134. Any interference with those rights can be justified for the purpose of preventing and detecting cyber crime. The measure is not prescriptive about how the aims are to be achieved and makes no rules relating to the procedure for enforcement, which accordingly remains within the discretion of the Member State. The safeguards provided in national law satisfy the requirements of necessity and proportionality.

135. As such, the Government considers that the measure complies with the principles of fundamental rights.

(66) Council Decision 2005/671/JHA of 20 September 2005 on the exchange of information and cooperation concerning terrorist offences

136. The decision relates to the provision of information concerning terrorist offences to Eurojust (numbers 35 and 37 of the list), Europol (number 95 of the list) and to other Member States. This includes designating a specialised service within the police service or law enforcement authorities to access, collect and make information available to Europol and Eurojust.

Policy Implications

137. The sharing of information in this area plays an important part in building cooperative relationships on Counter-Terrorism. It allows the UK to promote its operating practices to other Member States and receive information on terrorist offences. Continuing to share information is therefore important both operationally and in reputational terms.

138. Europol can currently only handle data marked as 'Restricted', which has a significant impact on the information which UK Counter Terrorism police networks share with them. In some circumstances we currently share higher classified information on a bilateral basis with other Member States. In addition

there is a healthy exchange of Counter Terrorism information between Member States liaison bureaux on a bilateral basis which does not include disclosure of material to Europol.

139. In most instances information would be exchanged regardless of UK participation in this measure, especially where it was deemed to be operationally important. This would be done on a bilateral or multi-lateral level depending on circumstances.

140. The UK has implemented this measure through administrative means. If the UK were to decide not to participate in this measure, there would be no requirement to repeal domestic legislation.

141. The Government considers the economic impacts of opting out of this measure to be negligible.

Fundamental rights analysis

142. Articles 7 (respect for private and family life) and 8 (protection of personal data) of the Charter are engaged by this measure where information is shared in relation to individuals. However, in practice, information is only shared in appropriate circumstances to detect or prevent crime, or otherwise protect the public in accordance with the principles of the Data Protection Act 1998 – and any interference with those rights can be justified for those purposes. The safeguards in place at domestic and EU level satisfy the requirements of necessity and proportionality.

143. As such, the Government considers that the measure complies with the principles of fundamental rights.

(46) 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

(65) Council Decision 2006/560/JHA of 24 July 2006 amending Decision 2003/170/JHA on the common use of liaison officers posted abroad by the law enforcement agencies of the Member States

144. The aim of this instrument is to promote cooperation between Member States in relation to the use of their Liaison Officers posted in third countries and international organisations. It provides that Liaison Officers should meet regularly and that they should respond to a request to exchange information from another Member State that does not have Liaison Officers as speedily as possible and in accordance with their national law.

145. The amending Decision allows Member States to request assistance from Europol (measure 95 on the list) Liaison Officers if they do not have a Liaison Officers in that country.

Policy Implications

146. The UK has a wide network of Liaison Officers - one of the biggest amongst Member States. However, to date SOCA and HMRC have neither received, nor made, any requests under this measure.
147. The obligations placed on Liaison Officers by this measure are all obligations that we would expect UK Liaison Officers to fulfil as standard practice. These expectations would remain if we did not participate in the measure. Should we no longer participate in this measure, the Government judges that future liaison and cooperation is likely to continue given the UK's reputation and wide Liaison Officers Network.
148. The UK has implemented this measure through administrative means. If the UK were to decide not to participate in this measure, no domestic legislation would need to be repealed.
149. The Government considers the economic impacts of opting out of this measure to be negligible.

Fundamental rights analysis

150. The instrument arguably engages Article 7 (respect for private and family life) and Article 8 (protection of personal data) of the Charter of Fundamental Rights because of the provisions relating to sharing information relating to serious criminal threats. These Articles correspond to the qualified right to a private and family life under Article 8 of the European Convention on Human Rights. Any engagement with these rights must be justified in accordance with Article 52 of the Charter. The criteria for such a justification are the following: the interference must be provided for by law and respect the essence of the particular right in question; and the interference must comply with the requirements of necessity, proportionality and the pursuit of a legitimate objective.
151. The purpose of this instrument is public safety and the maintenance of law and order. These purposes would constitute a legitimate objective for the purposes of Article 52.
152. The instrument states that information shall be supplied in accordance with national law. Our obligations to share data are enshrined in legislation, principally the Data Protection Act 1998 and the Government considers that those obligations comply with Article 8 of the ECHR and Article 7 and 8 of the Charter. On this basis the Government considers that this instrument complies with the principles of fundamental rights.

(37) Council Decision 2002/348/JHA of 25 April 2002 concerning security in connection with football matches with an international dimension

(72) 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

153. These instruments 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.

Policy Implications

154. The UK is the world leader in the field of football safety and security, and leads in the development of EU measures. Given the UK's influence, there may be reputational impact if we decided not to participate.

155. This instrument establishes a dedicated channel to facilitate policy cooperation and share intelligence on football supporters so that travelling fans are policed on their behaviour not their reputation. The UK has extensive legislation in this area (the Spectators Act 1989 as amended by the Football (Disorder) Act 2000). It is domestic legislation rather than this instrument that allows the UK to prevent individuals subject to football banning orders from leaving the UK when a relevant match or tournament is taking place. However, the measure has improved the functioning and effectiveness of the National Football Information Points.

156. If we decided not to participate we would need to retain the functions set out in the measure. We currently cooperate with non-EU states around Champions League games in countries outside the EU (Russia, Ukraine). It is possible that other Member States would look to continue sharing information if the UK decided not to participate in these instruments. However non-participation may result in some increased costs.

157. The UK has not implemented the instrument through legislation, although we consider ourselves to be fully compliant through existing domestic legislation.

158. The Government considers the economic impacts of opting out of this measure to be negligible.

Fundamental rights analysis

159. The instrument engages Article 7 (respect for private and family life) and Article 8 (protection of personal data) of the Charter of Fundamental Rights because of its information sharing provisions. These Articles correspond to the qualified right to a private and family life under Article 8 of the European Convention on Human Rights. Any engagement with these rights must be justified in accordance with Article 52 of the Charter. The criteria for such a justification are the following: the interference must be provided for by law and respect the essence of the particular right in question; and the interference must comply with the requirements of necessity, proportionality and the pursuit of a legitimate objective.

160. The purpose of this instrument is public safety and the maintenance of law and order. These purposes would constitute a legitimate objective for the purposes of Article 52.

161. The instrument states that information shall be supplied in accordance with national and international law. Our obligations to share data are enshrined in legislation, principally the Data Protection Act 1998 and the Government considers that those obligations comply with Article 8 of the ECHR and Article 7 and 8 of the Charter. On this basis the Government considers that this instrument complies with the principles of fundamental rights.

(79) Council Decision 2008/615/JHA of 23 June 2008 on stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime

(80) 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

162. Together these are known as the Prüm Council Decisions (Prüm).

163. Prüm requires Member States to allow the reciprocal searching of each others' databases for DNA Profiles, Vehicle Registration Data (VRD) and Dactyloscopic Images (Fingerprints).

164. For DNA and fingerprints the initial reply is a hit/no-hit. Personal data is not exchanged in this process. Prüm does not set out any requirements for following up any hits. For VRD personal data about the registered keeper will automatically be transmitted following a hit.

165. Prüm also contains provisions relating to the following areas:

- supply of data in relation to major events;
- supply of information in order to prevent terrorist offences;
- other measures for stepping up cross-border police cooperation.

Policy Implications

166. The implementation date for Chapters 3 (Major Events), 4 (Terrorist Offences), 5 (Other forms of Co-operation) and 6 (Data Protection) of Prüm was 26 August 2009. These provisions have been implemented. The deadline for Chapter 2 (DNA, Fingerprints and Vehicle Registration Data) of Council Decision 2008/616/JHA was 26 August 2011. Implementation of the Vehicle Registration Provisions requires secondary legislation which is yet to be laid. The Explanatory Memorandum of 9 January 2013 [COM (2012) 732] set out the current position regarding implementation for the UK and other Member States.

167. Implementation of the technical requirements is likely to be a lengthy process that may collectively take at least three years to implement. Software development is required and the costs are subject to change. The Government, in its original 2007 communications with Parliament, suggested that Prüm would cost £31m to implement. This figure is likely to have increased since 2007. The Government has stated on a number of occasions that the UK will not be in a position to implement Prüm by 1 December 2014. We are also concerned that Prüm's current technical requirements are out of date and that it would be better

to see whether there is a more modern solution that allows better exchange of information, for example producing fewer false positives or requiring less human intervention.

168. The UK has the largest DNA database in the EU. This may result in the UK receiving a disproportionate number of requests from other EU states.

169. In February 2011 James Brokenshire wrote to the Scrutiny Committees stating that he expected work to concentrate on the Vehicle Registration Data and DNA elements of Prüm and that the Government intended to apply for EU funding to assist with this. The Minister's Explanatory Memorandum of 9 January 2013 [COM (2012) 732] stated that a successful bid had been made for European Commission funding to start work on the DNA element of Prüm.

Fundamental rights analysis

170. The provisions on terrorist offences, cross-border police co-operation and data exchange of the Prüm Council Decisions engage Articles 7 (respect for private and family life) and 8 (protection of personal data) of the Charter of Fundamental Rights. These Articles correspond to the qualified right to a private and family life under Article 8 of the European Convention on Human Rights. In addition, the provisions relating to major events engage Article 12 (freedom of assembly and of association) of the Charter, (which corresponds with Article 11 of the ECHR).

171. The purpose of the Prüm Council Decisions, including the provisions around exchange of data is the prevention, detection, investigation and prosecution of terrorism and other serious crimes. This constitutes a legitimate objective for the purposes of Article 52 of the Charter.

172. Under Prüm a Member State may send unidentified DNA crime scene profiles and unidentified fingerprint latents to be searched against the databases of other Member States. Neither unidentified crime scene profiles nor unidentified latents are personal data. The reply sent in response to such requests is a hit/no hit with a reference number. It does not contain any personal information. The process by which a Member State asks to identify the person to whom the hit relates (ie send personal information) is not, formally, part of the Prüm process, although it is a consequence of the Prüm process.

173. Prüm also allows anonymised reference profiles of known individuals who have been required to provide a DNA profile or fingerprints because they have been arrested for the first time to be sent to other Member States for searching against their databases. This is done so that a Member State may check whether any of its unidentified crime scene profiles match another Member State's new reference profiles. The process through which new reference profiles or fingerprints are sent requires less data to be sent and less processing capacity than the alternative, which is for a Member State to send all of its unidentified crime scene profiles and latents to all Member States on a regular basis.

174. The Government considers that the safeguards set out in the Council Decisions satisfy the requirements of necessity and proportionality. As such, the Government considers that the measure complies with the principles of fundamental rights.

(81) 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

175. The instrument is designed to provide a legal framework for Member States to provide law enforcement assistance (equipment or operational support) to one another in order to deal with man-made crisis situations, e.g. terrorist attack, hi-jacking, hostage-taking etc.

176. The obligations imposed by the measure are:

- To ensure that officers of the assisting special intervention unit shall be authorised to operate in a supporting capacity in the UK;
- To ensure that officers of the assisting special intervention unit take all necessary measures to provide the requested assistance in so far as they operate under the responsibility, authority and direction of the requesting Member State and in accordance with the law of both the requesting MS and their own law;
- To ensure that the provisions on civil and criminal liability set out in the Prüm Decision apply when officers of one Member State operate in another Member State;
- To ensure that the UK bears any operational costs incurred by the requested Member State;
- That the Council compiles an up-to-date record of the competent authorities of the Member States and informs Member States of any relevant changes.

Policy Implications

177. Administrative measures have been taken to implement this measure and the obligations set out in the instrument are broadly met by existing domestic legislation. For example, Section 26 of the Police Act 1996 provides for the deployment of UK officers overseas with the consent of the Secretary of State, and Section 76A of Regulation of Investigatory Powers Act 2000 provides for foreign officers to conduct surveillance in the UK if part of an authorised investigation and no UK officers are available to do so.

178. The instrument allows for bilateral arrangements to continue that are compatible with its objectives. If we decide not to participate we could continue to receive requests and provide assistance on a bilateral basis.

179. The Government considers the economic impacts of opting out of this measure to be negligible.

Fundamental rights analysis

180. It is possible that certain fundamental rights of individuals, for example, Article 6 (right to liberty and security) of the EU Charter may be engaged by the actions of law enforcement officers of another Member State acting under this measure. Article 6 of the Charter corresponds to Article 5 of the ECHR. As the aim of this measure is to provide law enforcement assistance in order to deal with man-made crisis situations, this constitutes a legitimate objective for the purposes of Article 52 of the Charter.

181. Any action taken by law enforcement officers which might interfere with fundamental rights will generally be in accordance with the law and will be proportionate and necessary in the circumstances of each individual case. However, the measure provides that the Prüm decision will apply so that any such actions are subject to appropriate civil and criminal legal process and therefore officers will be fully accountable should their actions not be compliant with the law. Therefore, this measure is compliant with Article 47 of the EU Charter (right to an effective remedy and to a fair trial) – which correspond to Article 6 and 13 of the ECHR. On this basis, the Government considers that the measure complies with the principles of fundamental rights.

(84) Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime

182. The measure requires Member States to have legislation in place to counter organised crime (e.g. to make it a criminal offence to participate in a criminal organisation in the Member States of the European Union), the commissioning of organised crime, including minimum and maximum imprisonment penalties. It aims to enhance police and judicial cooperation in serious criminal matters with cross border dimensions.

Policy Implications

183. The UK is committed to fighting serious and organised crime. This instrument sets a minimum standard for Member States in order to support efforts against organised crime. Therefore any decision to cease participation in this measure may carry reputational risks.

184. However, the UK fulfils the minimum standard and did so in advance of the instrument. The UK has a high standard of domestic legislation and a firmly established commitment to tackling organised crime threats, neither of which are impacted by this instrument. Our obligations in this measure are met through:

- The Proceeds of Crime Act 2002
- Crime and Justice Act 2003
- Serious Organised Crime and Police Act 2005
- Serious Crime Act 2007
- Regulation of Investigatory Powers Act 2000
- Police and Criminal Evidence Act 1984
- Customs and Excise Management Act 1979
- Borders, Citizenship and Immigration Act 2009
- Extradition Act 2003

185. There would be no requirement to repeal any domestic legislation if the UK were to decide not to participate in this measure.

186. The Government considers the economic impacts of opting out of this measure to be negligible.

Fundamental rights analysis

187. There are a number of fundamental rights that may be engaged by legislation to tackle organised crime, for example, Articles 6 (right to liberty and security); 20 (equality before the law); 47 (right to an effective remedy and to a fair trial); 48 (presumption of innocence and right of defence); 49 (legality and proportionality of criminal offences and penalties); Article 50 (not to be tried or punished twice in criminal proceedings for the same criminal offence).

188. Any engagement with these rights must be justified in accordance with Article 52 of the Charter. The criteria for such a justification are the following: the interference must be provided for by law and respect the essence of the particular right in question; and the interference must comply with the requirements of necessity, proportionality and the pursuit of a legitimate objective.

189. The purpose of this instrument is to ensure minimum standards in terms of sentences for organised criminals – this helps to ensure public safety and the maintenance of law and order. These purposes would constitute a legitimate objective for the purposes of Article 52.

190. The safeguards provided in domestic law for those subject to the operative provisions of this instrument satisfy the requirements of necessity and proportionality.

191. On this basis, the Government considers that this instrument complies with the principles of fundamental rights.

(86) Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law

192. The Framework Decision calls on Member States to take necessary measures to ensure that criminal law is implemented in order to safeguard citizens from racism and xenophobia.

193. The key Articles contained within the instrument cover the creation of criminal offences when committed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent of national or ethnic origin relating to:

- Publicly inciting violence or hatred;

- Publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity, war crimes and crimes against peace when carried out in a manner likely to incite to violence or hatred; and
- Aiding and abetting in the commission of any of the above conduct

194. It also calls upon Member States to ensure that these offences are punishable by criminal penalties of at least 1 to 3 years imprisonment. For offences that fall outside of those listed above; racist and xenophobic motivation should be considered an aggravating circumstance, or alternatively be taken into consideration by the courts when determining penalties.

Policy Implications

195. The UK is considered a world leader in tackling hate crime and has been active in working with other Member States to share its experience and learning in addressing the issues and promoting the use of its legislation. Any decision to cease participation in this measure may therefore have an effect on the UK's reputation.

196. The UK uses existing domestic legislation and the common law to comply with the provisions of the Framework Decision and no new offences have been created by the instrument. The relevant domestic legislation covered by this instrument are:

- Part 3 and 3A of the Public Order Act 1986 cover offences concerning racism and xenophobia, in England and Wales, the Public Order (Northern Ireland) Order 1987 covers these offences in Northern Ireland and in Scotland offences of this kind are contained in common law (Article 1).
- The Accessories and Abettors Act 1861 covers instigation, aiding and abetting In Scotland the Criminal Procedures (Scotland) Act 1995 covers these offences. (Article 2).
- The Public Order Act 1986 covers criminal penalties in England and Wales for offences contained in Articles 1 and 2, the Public Order (Northern Ireland) Order 1987 covers those penalties in Northern Ireland, and in Scotland these penalties are contained within common law (Article 3).
- The Crime and Disorder Act 1998 covers racist and xenophobic motivation and The Criminal Justice Act 2003 allows for the increase of sentences for offences with a racial or religious aggravation in England and Wales. The Criminal Justice (No.2) (Northern Ireland) Order 2004 has the combined effect of these two pieces of legislation and covers motivation and offences carried out in Northern Ireland and Separate legislation exists in Scotland to tackle hate-related crime (Article 4).

197. The UK has no specific criminal offence of condoning denying or grossly trivialising crimes of genocide, crimes against humanity, war crimes and crimes against peace when carried out in a manner likely to incite to violence or hatred. This is likely to amount to an offence under existing UK legislation around incitement to hatred. However, new legislation would be required to create this specific offence in UK law.

198. The UK is signatory to other international agreements (for example the Cybercrime Convention on racism and xenophobia; which is focussed on combating crimes committed through the use of computer systems; and the UN Committee for the Elimination of Racial Discrimination).

199. The Government considers the economic impacts of opting out of this measure to be negligible.

Fundamental rights analysis

200. The Framework Decision may engage Article 11 of the Charter of Fundamental Rights (freedom of expression and information) – which corresponds to Article 10 of the ECHR.

201. Article 10(2) of the ECHR confirms that the exercise of the right to freedom of expression may be subject to such restrictions and penalties as are prescribed by law and necessary in a democratic society, in the pursuit of specified legitimate aims, which include the prevention of crime and the protection of the rights of others. Any engagement with Charter rights must be justified in accordance with Article 52 of the Charter. The criteria for such a justification are the following: the interference must be provided for by law and respect the essence of the particular right in question; and the interference must comply with the requirements of necessity, proportionality and the pursuit of a legitimate objective.

202. Article 7 of this instrument provides that it shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles, including freedom of expression and association, and further it shall not have the effect of requiring Member States to take measures in contradiction to fundamental principles relating to freedom of expression or association.

203. The purpose of this measure is to safeguard citizens from racism and xenophobia, which constitutes a legitimate objective for the purposes of Article 52 of the Charter and Article 10(2) of the ECHR. The safeguards provided by the instrument therefore satisfy the requirements of necessity and proportionality.

204. As such the Government considers that this instrument complies with the principles of fundamental rights.

(93) 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

(94) 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

205. These instruments 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.
206. 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.
207. 2009/315/JHA sets out the legal requirements concerning the transfer of information. 2009/316/JHA states that information shall be transmitted electronically.

Policy Implications

208. The instruments require each Member State to set up one or more Central Authorities. The UK expects to designate the existing Central Authority, which is the UK Central Authority for the Exchange of Criminal Records based at the ACPO Criminal Records Office (UKCA-ECR).
209. Criminal Record Exchange through these measures has allowed much more information to be obtained on EU offenders in the UK and on UK nationals convicted elsewhere in the EU. This has allowed the police to build a fuller picture of offending by UK nationals and allowed the courts to be aware of the previous offending on EU nationals being prosecuted. The previous conviction information can be used for bail, bad character and sentencing as well as by the prison and probation service when dealing with the offender once sentenced. This may lead to increased downstream criminal justice costs.
210. The UK has implemented this measure through administrative means. If the UK were to decide not to participate in these measures, there would be no requirement to repeal domestic legislation.
211. The direct cost of running the UKCA-ECR is £750,000 per annum; and implementation costs for ECRIS are £250,000.
212. Article 22 of the 1959 Council of Europe Convention on Mutual Assistance in Criminal Matters is the default legal agreement should we cease participation in the measures. The 1959 Convention provides that convictions of non-nationals should be sent to the country of nationality at least once a year and allows letters of request, issued by prosecuting authorities (in England and Wales the Crown Prosecution Service) to be made for previous convictions of EU nationals being prosecuted here.
213. If Member States are unwilling to revert to paper methods, the amount of information received in response to requests concerning EU nationals being prosecuted in the UK and on UK nationals convicted overseas is likely to decrease. In addition, it is likely that results would be received more slowly.

Whilst 2009/315/JHA requires replies to requests involving criminal proceedings to be made in 10 days, there are no required timescales in the 1959 convention.

214. Irish authorities have reported that approximately 12,000 criminal offences are committed in Ireland by UK nationals each year, some of which are serious offences. 2009/315/JHA requires the Irish authorities to inform us of these offences and they will be exchanged electronically under the arrangements of 2009/316/JHA. Under the arrangements of the 1959 Council of Europe Convention we were not notified of such convictions.

Fundamental rights analysis

215. The provisions of these Council Decisions engage Articles 7 (respect for private and family life) and 8 (protection of personal data) of the Charter of Fundamental Rights. They do this because the information being transmitted has the potential to affect an individual's private life and because the information transmitted is sensitive personal data.

216. Any engagement with these rights must be justified in accordance with Article 52 of the Charter. The criteria for such a justification are the following: the interference must be provided for by law and respect the essence of the particular right in question; and the interference must comply with the requirements of necessity, proportionality and the pursuit of a legitimate objective.

217. Measure 2009/315/JHA states that information received about an individual being prosecuted in another EU Member State should only be used for the purposes for which it was obtained or for preventing an immediate and serious threat to public security. This constitutes a legitimate objective for the purposes of Article 52 of the Charter of Fundamental Rights.

218. In addition, information is only transmitted through the offices of a central authority in each Member State. The central authority is able to mediate between prosecutors and other Member States to ensure that information is only requested for legitimate purposes under the law. The Government considers that the safeguards set out in the Council Decisions satisfy the requirements of necessity and proportionality.

219. The previous conviction information can be used for bail, bad character and sentencing as well as by the prison and probation service when dealing with the offender once sentenced. The Government considers that criminal record exchange for these purposes constitutes a legitimate objective for the purposes of Article 52 of the Charter of Fundamental Rights.

220. On this basis, the Government considers that this instrument complies with the principles of fundamental rights.

(98) Council Decision 2009/902/JHA of 30 November 2009 setting up a European Crime Prevention Network (EUCPN) and repealing Decision 2001/427/JHA

221. The EUCPN was set up to facilitate and promote the exchange of crime prevention measures and best practice amongst EU Member States' law enforcement authorities and national organisations, with a particular focus on reducing 'volume crime' (juvenile, urban and drug related). This best practice information exchange is facilitated through a public access website operated and managed by the EUCPN Secretariat. It is governed by a Board of National Representatives made up of representatives from each EU Member State. In addition, the EUCPN organises an annual Best Practice Conference which includes the European Crime Prevention Award.

Policy Implications

222. The EUCPN is a mechanism for sharing best practice in crime prevention. The UK is an active participant in quarterly Board meetings; however attendance from other Member States is inconsistent.

223. The annual Best Practice Conference and European Crime Prevention Awards are well attended with practitioners, policy makers and the police from Member States regularly in attendance to present their projects. UK projects have won the European Crime Prevention Award on two occasions (2004 and 2008).

224. The UK has implemented this measure through administrative means. If the UK were to decide not to participate in this measure, there would be no requirement to repeal domestic legislation.

225. The Government considers the economic impacts of opting out of this measure to be negligible.

Fundamental rights analysis

226. No fundamental issues arise. The EUCPN is a mechanism for exchanging crime prevention data. Personal data is not exchanged through this Network. The measure does not require action which would affect the rights of individuals. As such the Government considers that these instruments comply with the principles of fundamental rights.

(99) Council Framework Decision 2009/905/JHA of 30 November 2009 on accreditation of forensic service providers carrying out laboratory activities

227. The measure focuses on the quality standards to apply to forensic science laboratories involved in DNA profiling and fingerprint development. This is to ensure that the results of the activities carried out by accredited forensic science providers in one Member State are recognised as being equally reliable by the authorities responsible for the prevention, detection and investigation of criminal offences, within any other Member State.

Policy Implications

228. The Forensic Science Regulator and the Forensic Science Advisory Council agree with the standards in the instrument and they are replicated in the Regulator's Codes of Practice and Conduct. From a UK perspective, the quality standards delivered by the instrument can be achieved without statutory direction at EU level. The UK benefits from the exchange of science evidence and intelligence and the quality received from other Member States is being driven up.
229. It is likely that the instrument is interpreted and implemented differently across Member States as relevant terms are not defined within it (such as the definition of Laboratory). The forensic science delivery models and criminal justice systems also differ substantially across Member States. If the UK did not participate the Regulator would still push for UK laboratories to work to the standards set out in the instrument. The role of the Regulator is to provide strong, independent regulation of quality standards and the UK keeps under review the approach to regulation to ensure that robust quality standards are ensured now and for the future.
230. The Regulator has received support and co-operation for his quality standards from the laboratories, professional bodies, prosecuting authorities, the judiciary and ACPO. To date he is satisfied that he has not been hindered in his role in dealing with complaints and quality issues. The Regulator has recently advised the UK government to consider a statutory basis for the role in domestic legislation. A consultation on this is planned to determine the future basis for regulation.
231. The UK has currently implemented this measure through administrative means. If the UK were to decide not to participate in this measure, there would be no requirement to repeal domestic legislation.
232. The Government considers the economic impacts of opting out of this measure to be negligible.

Fundamental rights analysis

233. This does not engage fundamental rights as relates to the standards of forensic laboratory activities. It does not affect the procedural rights of defendants, witnesses or victims and no information is exchanged under the measure. On this basis, the Government considers that this instrument complies with the principles of fundamental rights.

(102) Agreement on extradition between the European Union and the United States of America

(103) Council Decision 2009/933/CFSP of 30 November 2009 on the extension, on behalf of the European Union, of the territorial scope of the Agreement on extradition between the European Union and the United States of America

234. The EU-US Extradition Agreement was proposed as part of a counter-terrorism package at a Justice and Home Affairs Council in September 2001

and entered into force on 1 February 2010. The US and each of the Member States (including the UK) agreed changes to pre-existing bilateral extradition treaties to ensure that those treaties reflected the terms of the EU-US Agreement.

235. Council Decision 2009/933/CFSP extended, on behalf of the EU, the territorial scope of the EU-US Agreement to the Netherlands Antilles and Aruba.

Policy Implications

236. The UK-US Extradition Agreement, which was signed on 31 March 2003, was amended to take into account the terms of the EU-US Agreement by way of an instrument dated 25 June 2003. If the UK were to no longer participate in the overarching EU-US instrument, the pre-existing UK-US bilateral treaty would remain in force. The amendments to that treaty set out in the Instrument could be maintained by agreement between the UK and US (Article 6(b) of the Instrument makes that clear). As a result, non-participation would not be significant from an operational perspective.

237. The amendments to the UK-US bilateral extradition treaty set out in the instrument represent modest improvements so far as wider UK interests are concerned.

238. If we were to opt out of the EU-US Extradition Agreement, it is unlikely that the UK's bilateral relationship with the US would be affected as we work closely on extradition issues already, with JHA attachés in Washington and London respectively.

239. The Government considers the economic impacts of opting out of this measure to be negligible.

Fundamental rights analysis

240. The provisions of the EU-US Agreement are largely technical and procedural, for example relating to the transmission of requests and supporting documents and how to handle competing requests for extradition. It is not considered that such provisions engage articles of the Charter or ECHR.

241. Certain articles may, however, engage some articles of the Charter or ECHR. For example, Article 4(4) of the Agreement states that where the offence has been committed outside the territory of the requesting State, extradition shall be granted if the laws of the requested State provide for the punishment of an offence committed outside its territory in similar circumstances. Given that extradition entails arrest, potential detention and transfer abroad, this provision may engage a number of articles of the Charter, including Article 6 (right to liberty and security) and Article 7 (respect for private and family life). However, there are safeguards in place to ensure fundamental rights are protected. The Agreement is clear that extradition shall be granted subject to the other applicable requirements for extradition; viz. as set out in the bilateral US-Member State treaty, which will of course have been drafted and entered into

bearing in mind the provisions of the ECHR and the other international law and EU law obligations of the States.

242. On this basis, the Government considers that this instrument complies with the principles of fundamental rights.

(134) Council Decision 2003/169/JHA of 27 February 2003 determining which provisions of the 1995 Convention on simplified extradition procedures between the Member States of the European Union and of the 1996 Convention relating to extradition between the Member States of the European Union constitute developments of the Schengen acquis in accordance with the Agreement concerning the Republic of Iceland's and the Kingdom of Norway's association with the implementation, application and development of the Schengen acquis.

243. This measure sets out which of the provisions of the 1995 and 1996 Extradition Conventions constitute developments of the Schengen acquis. It also associates Iceland and Norway with those provisions.

Policy Implications

244. The 1995 and 1996 Extradition Conventions and the provisions of the Schengen Convention on extradition were from 1 January 2004 replaced by the EAW in relations between the Member States. However, that was without prejudice to their application in relations between Member States and third States such as Norway and Iceland.

245. The provisions of the 1995 and 1996 Extradition Conventions which are designated as Schengen building by this Council Decision will, however, 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. A Council Decision to conclude that agreement is still pending, as not all Member States have made notifications and declarations that they have completed the necessary constitutional steps. Although it is likely, we can not be certain if the 2006 surrender agreement with Norway and Iceland will be concluded before December 2014.

246. If the agreement is not concluded and brought into force before December 2014 and the UK chooses to opt out of this measure, the Schengen building provisions of the 1995 and 1996 Extradition Conventions will cease to apply to extraditions between the UK and Norway and Iceland and we believe we would revert to the 1957 Council of Europe Convention (ECE) that they supplement.

247. If the agreement is concluded before December 2014 there would be no impact on extradition between the UK and Norway/Iceland as the Schengen-relevant provisions of the 1995 and 1996 Extradition Conventions would be replaced.

248. The Government considers the economic impacts of opting out of this measure to be negligible.

Fundamental rights analysis

249. This instrument contains no substantive provisions. On this basis, the Government considers that this instrument complies with the principles of fundamental rights.

SCRUTINY HISTORY

250. There has been extensive and regular scrutiny by both Houses since the mid 1990s.

251. This is one of five Explanatory Memoranda related to the 2014 Decision.

MINISTERIAL RESPONSIBILITY

252. The measures detailed in this Explanatory Memorandum are the responsibility of the Home Secretary. The Foreign Secretary has overall responsibility for the UK's relations with the EU.

INTEREST OF THE DEVOLVED ADMINISTRATIONS

253. While policing and criminal justice are devolved issues, any decision will be binding for the Devolved Administrations and Gibraltar. The Government is continuing to engage with the Devolved Administrations and Gibraltar on this issue.

LEGAL AND PROCEDURAL ISSUES

254. The UK would be exercising a Treaty right by choosing to opt out of the measures covered in this EM and by seeking to re-participate in certain measures. Protocol 36 also establishes the processes for the Commission and Council to consider the UK's applications to re-participate in measures.

255. For non-Schengen measures, the Commission may seek to set conditions to be met for the UK's re-participation in a measure. If it considers that the conditions have not been met, the matter can be referred by the UK to the Council who must decide on the UK's application by way of a Qualified Majority.

APPLICATION TO THE EUROPEAN ECONOMIC AREA

256. Not applicable.

SUBSIDIARITY

257. This EM relates to measures that have already been adopted. The UK would have considered subsidiarity for each of the measures at the time that the measure were drafted and adopted. It would have been concluded at the time that the operative provisions in the measures were more effectively and appropriately undertaken at EU level.

POLICY IMPLICATIONS

258. If the Government does decide to exercise the opt-out, cooperation with other Member States could take a number of forms. The Home Secretary said in her statement of 15 October that ‘we will consider not just opt-ins and opt-outs but the other opportunities and options that are available’.
259. Firstly, the Government could apply to rejoin measures within the scope of the 2014 decision.
260. Secondly, the Government believes that in some cases it would be possible to rely on pre-existing Council of Europe Conventions or bilateral treaties. For example, if the EIO is not adopted and entered into force before 1 December 2014 and the Government did not opt back in to the EU MLA Convention 2000, we believe that most forms of cooperation would continue on the basis of the 1959 Council of Europe Convention on Mutual Assistance in Criminal Matters (and its Protocols). Indeed, as not all Member States have implemented EU MLA Convention 2000 the impact on our MLA relations with those States would be largely negligible.
261. Thirdly, in some cases it may be possible to negotiate bilateral treaties with each Member State or with the EU that would effectively replace the instruments in question. The position of the other Member States depends on whether the EU has exclusive competence in that area. That requires a measure by measure analysis.
262. If there is no exclusive competence in relation to third pillar measures, the other Member States will not require any permission or authorisation from the EU institutions. If there is exclusive competence in a particular third pillar area, while the UK is free to enter into international commitments after the block opt-out, the other Member States will require authorisation and agreement from the EU. But in principle, bilateral or multilateral agreements – either with the Member States individually or collectively – would be legally possible with such authorisation.
263. Fourthly, in some cases there may simply be no need for any such agreement to be in place in order for there to be cooperation.

CONSULTATION

264. The Devolved Administrations, Foreign and Commonwealth Office and the Ministry of Justice have been consulted in preparing this EM.

IMPACT ASSESSMENT

265. At his appearance before the European Scrutiny Committee on 28 November, James Brokenshire gave an undertaking that the Government will provide an Impact Assessment on the final package of measures that the Government wishes to rejoin, should the Government decide to exercise the opt-out.

FINANCIAL IMPLICATIONS

266. The Council may adopt a Decision determining that the UK shall bear the direct financial consequences, if any, necessarily and unavoidably incurred as a result of the cessation of its participation in the third pillar acts. The UK will participate in this Decision. The Government considers this to be a high threshold to meet.

TIMETABLE

267. A final decision as to whether the UK will accept ECJ jurisdiction over all third pillar measures must be taken by 31 May 2014. This decision will take effect on 1 December 2014.

268. This is one of several Explanatory Memoranda to be submitted on the 2014 decision. In December 2012, the Home and Justice Secretaries agreed to provide Explanatory Memoranda on the following areas:

- Schengen measures;
- Measures for which the Justice Secretary is responsible;
- Measures for which the Home Secretary is responsible (1) – EU agencies, mutual legal assistance, drugs, proceeds of crime;
- Measures for which the Home Secretary is responsible (2) – extradition, crime (including cyber and organised crime), fraud and counterfeiting, databases and automated information exchange, and all others; and
- Measures for which the Chancellor of the Exchequer, Foreign Secretary and Transport Secretary have responsibility.

The Rt. Hon. Theresa May MP

Home Secretary

EXPLANATORY MEMORANDUM (EM) ON ARTICLE 10(4) OF PROTOCOL 36 TO THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION (TFEU) - THE '2014 DECISION'

Ministry of Justice measures

4/13

Submitted by the Ministry of Justice on July 2013

1. In accordance with Article 10(4) of Protocol 36 to the Treaties the UK must, by 31 May 2014, decide whether to accept Commission enforcement powers and Court of Justice of the European Union jurisdiction over all EU police and criminal justice measures adopted before 1 December 2009 or to opt out of these measures. The decision to remain bound or opt out must be taken en masse. Protocol 36 to the Treaties does permit the UK to apply to rejoin individual measures if it chooses to opt out en masse.
2. This EM relates to a number of measures within the scope of the 2014 decision for which the Justice Secretary is responsible. This EM should be considered in line with others submitted on the 2014 decision.
3. This EM provides further information about the Ministry of Justice measures which remain in force and are within the scope of the 2014 opt-out decision (numbers 9, 24, 26, 29, 34, 47, 49, 59, 83, 85, 88, 90, 92, 97, 107, 119 on the list of 15 October 2012, a copy of which was placed in the House Library). The measures are listed in order; however, where measures cover similar substantive areas we have chosen to group them accordingly.

(9) Convention of 26 May 1997 on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union

(49) Council Decision 2003/642/JHA of 22 July 2003 concerning the application to Gibraltar of the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union

3. The Convention of 26 May 1997 is designed to set minimum standards for public sector corruption offences and requires Member States to ensure that corruption involving public officials of both the EU and Member States is criminalised and that such offences attract a minimum maximum penalty. The 2003 Council Decision makes the Convention applicable to Gibraltar.
4. The purpose of this Convention is to enhance levels of ethical conduct in EU institutions and EU Member States' public administrations and to improve levels of security of EU funding and to support enhanced efficiency of deployment thereof. In turn, this supports the sustained development of Member States' commercial, financial and private interests within the EU.

Policy implications

5. The UK has implemented this Convention through the Bribery Act 2010.
6. The UK meets the standards of the Convention and, in line with domestic policy, would continue to do so if the UK chose not to participate in this EU instrument.
7. No legislative measures would be required if the UK were to leave the instrument.
8. Current Government analysis estimates the economic impact of non-participation in these measures to be negligible.

Fundamental Rights Analysis

9. The requirement in the Convention to create criminal offences in national law and to prosecute and punish by way of criminal penalties (including minimum maximum sentences) engages Article 5 (right to liberty and security) and Article 6 (the right to a fair trial) of the European Convention on Human Rights (ECHR) and its equivalent Articles in the EU Charter of Fundamental Rights: Article 6 (right to liberty and security), Article 47 (right to an effective remedy and a fair trial), Article 48 (presumption of innocence and right of defence), and Article 49 (principles of legality and proportionality of criminal offences and penalties). Article 10 of the Convention also engages Article 50 of the Charter (right not to be tried or punished twice in criminal proceedings for the same criminal offence). It is a minimum standards measure which must be implemented in national law. Nothing in the measure requires Member States to implement contrary to fundamental rights. The Government, therefore, considers that this instrument complies with and is consistent with the principles of fundamental rights.

(47) Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector

10. This Framework Decision is designed to set minimum standards for private sector corruption offences and requires Member States to ensure that both giving (active) and receiving (passive) bribes in the private sector amount to criminal offences in all Member States and that these offences incur effective, proportionate and dissuasive penalties.

Policy implications

11. The UK has implemented this Framework Decision through the Bribery Act 2010.
12. The UK meets the standards of the Framework Decision and, in line with domestic policy, would continue to do so if we were to decide not to participate. No legislative measures would be required if we were to leave the instrument.
13. Current Government analysis estimates the economic impact of non-participation in these measures to be negligible.

Fundamental Rights Analysis

14. The requirement in the Framework Decision to create criminal offences in national law and to prosecute and punish by way of criminal penalties (including minimum maximum sentences) engages Article 5 (right to liberty and security) and Article 6 (the right to a fair trial) of the ECHR and its equivalent Articles in the EU Charter of Fundamental Rights: Article 6 (right to liberty and security), Article 47 (right to an effective remedy and a fair trial), Article 48 (presumption of innocence and right of defence), and Article 49 (principles of legality and proportionality of criminal offences and penalties). It is a minimum standards measure which must be implemented in national law. Nothing in the measure requires Member States to implement contrary to fundamental rights. The Government, therefore, considers that this instrument complies with and is consistent with the principles of fundamental rights.

(24) Council Framework Decision 2000/383/JHA of 29 May 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro

(34) Council Framework Decision 2001/888/JHA of 6 December 2001 amending Framework Decision 2000/383/JHA on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro

15. These Framework Decisions are designed to ensure that the euro is appropriately protected against counterfeiting by the criminal law of the EU Member States. They require each Member State to have minimum standards of criminal law in relation to counterfeiting of the euro and other currencies. Member States must also ensure corresponding criminal penalties, including a minimum maximum sentence of at least 8 years for some of the crimes, and to recognise convictions from other Member States during sentencing for the purposes of establishing habitual criminality.

16. The number of counterfeit euros found in the UK has been falling since 2007. Most counterfeit euros are detected in Member States where the euro has been adopted as currency. In 2010, 0.06% of counterfeit euros were detected in the UK; this figure was the same in 2011.

Policy implications

17. These measures aim to raise standards amongst Member States to those already largely existent in the UK.

18. These measures aim to provide a framework ensuring that national authorities can effectively address counterfeiting on the part of individuals and legal persons and to deter organised crime. This has potential benefits in terms of financial security for institutions, individual citizens and businesses across the EU.

19. The UK has extensive legislation in this area, for example through existing provisions in the Forgery and Counterfeiting Act 1981, which contains a maximum sentence of 10 years for counterfeiting offences. As such, the UK

meets the standards of these measures and, in line with domestic policy, would continue to do so if we chose not to participate in the EU instrument. The Framework Decision creates obligations for all currencies with some particular measures on the euro. If the UK were to decide not to participate in these measures, UK citizens and businesses would continue to benefit from the increased financial security that the measures aim to facilitate in those participating EU Member States.

20. No legislative changes would be required if the UK were to decide not to participate in this instrument.
21. The European Commission published a proposal for a new Directive to protect the euro and other currencies against counterfeiting by criminal law on 6 February 2013, which will repeal and replace these Framework Decisions. This was subject to the UK's opt-in Protocol (Protocol 21) and the Government made a Written Ministerial Statement (WMS) in the House of Commons on 10 May, repeated in the House of Lords on 13 May, confirming that the UK has decided not to opt in to this new measure.
22. Current Government analysis estimates the economic impact of non-participation in these measures to be negligible.

Fundamental Rights Analysis

23. The requirement in the Framework Decision to create criminal offences in national law and to prosecute and punish by way of criminal penalties (including minimum maximum sentences) engages Article 5 (right to liberty and security) and Article 6 (the right to a fair trial) of the ECHR and its equivalent Articles in the EU Charter of Fundamental Rights: Article 6 (right to liberty and security), Article 47 (right to an effective remedy and a fair trial), Article 48 (presumption of innocence and right of defence), and Article 49 (principles of legality and proportionality of criminal offences and penalties). It is a minimum standards measure which must be implemented in national law. Nothing in the measure requires Member States to implement contrary to fundamental rights. The Government, therefore, considers that this instrument complies with and is consistent with the principles of fundamental rights.

(26) 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)

24. This measure establishes a single, independent joint secretariat for the joint supervisory data protection bodies (JSB) set up under the Europol Convention, the Convention on the Use of Information Technology for Customs Purposes and the Schengen Convention (numbers 95, 100, 120 and 121 respectively).

Policy implications

25. The instrument has been in force since 1 September 2001. There was no legislation necessary in order to implement the instrument.
26. The secretariat provides administrative support to the supervisory data protection bodies. Overhead costs of the secretariat are met by the general budget of the Council, except those matters that relate to implementation of the Europol Convention, which are met by Europol.
27. Any decision on participation in this Framework Decision should be considered in line with decisions on participation in the Second Generation Schengen Information System (SIS II), the Customs Information System (CIS) and Europol Conventions themselves (numbers 128, 100 and 95 respectively). These are covered in the Home Office Explanatory Memorandum.
28. Current Government analysis estimates the economic impact of non-participation in these measures to be negligible.

Fundamental Rights Analysis

29. This measure, in its own right, does not impact on fundamental rights.

(29) Council Framework Decision 2001/413/JHA of 28 May 2001 combating fraud and counterfeiting of non-cash means of payment

30. This Framework Decision is designed to ensure that fraud and counterfeiting involving all forms of non-cash means of payment (e.g. credit card and cheques) are criminal offences in all Member States, supported by effective, proportionate and dissuasive sanctions.

Policy implications

31. This measure provides a framework to prosecute both individuals and legal persons and to deter organised crime, which aims to increase protection for citizens throughout the EU.
32. The UK was compliant before the Framework Decision was agreed, through existing provisions in various existing Acts, including the Theft Act 1968, Forgery and Counterfeiting Act 1981, and Computer Misuse Act 1990. As such, the UK meets the standards in domestic legislation and would continue to do so if the UK were no longer to participate in the EU instrument.
33. No legislative measures would be required if the UK were to decide not to participate in this instrument.
34. Current Government analysis estimates the economic impact of non-participation in this measure to be negligible.

Fundamental Rights Analysis

35. The requirement in the Framework Decision to create criminal offences in national law and to prosecute and punish by way of criminal penalties (including minimum maximum sentences) engages Article 5 (right to liberty and security) and Article 6 (the right to a fair trial) of the ECHR and its equivalent Articles in the EU Charter of Fundamental Rights: Article 6 (right to liberty and security), Article 47 (right to an effective remedy and a fair trial), Article 48 (presumption of innocence and right of defence), and Article 49 (principles of legality and proportionality of criminal offences and penalties). It is a minimum standards measure which must be implemented in national law. Nothing in the measure requires Member States to implement contrary to fundamental rights. The Government, therefore, considers that this instrument complies with and is consistent with the principles of fundamental rights.

(59) Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties

36. This Framework Decision requires Member States to collect financial penalties (of over €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).

37. 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.

38. The first cases to be sent to and received from Member States were in 2010, recorded by the Central Authority for England and Wales. Between June 2010 to September 2012, England and Wales received 393 cases from other Member States, with a total value of just over £90,000 and an average value of approximately £240 per penalty. We have no reliable estimates of the cost of financial penalty collection.

39. There were 126 outgoing penalties from England and Wales to other Member States between December 2010 and October 2012. The total value of the outgoing penalties in this period was approximately £50,000, with an average value of approximately £400 per penalty.

Policy Implications

40. This Framework Decision was implemented into England, Wales and Northern Ireland law in 2009, through the Criminal Justice and Immigration Act 2008. There was a minor amendment made through the Criminal Procedure Rules 2011. In Scotland the Framework Decision was implemented by the Mutual Recognition of Criminal Financial Penalties in the European Union (Scotland) Order (SSI 2009/342).

41. This Framework Decision ensures that offenders are not able to escape justice simply because they do not live in the Member State where they offend. As such, participation in the measure could have reputational benefits.

42. As of 27 July 2012, 23 other Member States had implemented this instrument. The full extent to which this instrument will be used, number of incoming / outgoing financial penalties and average values in the future will not be truly evident until all Member States have implemented and are using this measure.
43. Non-participation in this measure may result in a loss in revenue from foregone financial penalty income. However, these must be weighed against the enforcement costs of the financial penalty. There are no reliable estimates of these costs/benefits though they are unlikely to be substantial at current volumes. However, the future volume is dependent on awareness and use by other Member States.
44. If the UK were not to participate in this instrument, we would need to repeal the domestic legislation.

Fundamental Rights Analysis

45. The Framework Decision engages Article 7 (right to respect for private and family life) and Article 8 (protection of personal data) of the Charter of Fundamental Rights. This Article corresponds to the qualified right to a private and family life under Article 8 of the European Convention on Human Rights.
46. Article 7 of the measure (grounds for non-recognition and non-enforcement) engages Article 6 (right to a fair trial) of the European Convention on Human Rights and Article 47 (right to an effective remedy and a fair trial), Article 48 (presumption of innocence and right of defence), Article 49 (principles of legality and proportionality of criminal offences and penalties), and Article 50 (right not to be tried or punished twice in criminal proceedings for the same criminal offence) of the Charter of Fundamental Rights. The lack of protection for people tried in absentia was corrected by another measure in 2009 (2009/299/JHA).
47. Any limitation on these rights must be justified in accordance with Article 52 of the Charter, and in particular must be provided for by law and respect the essence of the particular right in question; and the interference must comply with the requirements of necessity and proportionality. The instrument aims to ensure the maintenance of law and order. This purpose would constitute a legitimate objective for the purposes of Article 52.
48. Recital 5 provides that nothing in the Framework Decision may be interpreted as prohibiting a refusal to execute a decision when there are reasons to believe that the financial penalty has the purpose of punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation. In this respect it engages and complies with Article 21 of the Charter (non-discrimination).
49. The rights of defendants are adequately protected by this instrument as it does not oblige a fine to be enforced against an individual in breach of his/her Convention rights (potentially engaging the second limb of Article 48 of the Charter (presumption of innocence and right of defence)). Article 3 of the measure provides that the Framework Decision shall not have the effect of

amending the obligation to respect fundamental rights. Article 20(3) provides that breach of the ECHR may be treated as a ground of refusal.

50. The Government therefore considers that this instrument complies with and is consistent with the principles of fundamental rights.

(83) 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

51. 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".

Policy Implications

52. In England and Wales and Northern Ireland, the implementing legislation for this measure is the Coroners and Justice Act 2009. In Scotland, it has been implemented through the Criminal Justice and Licensing (Scotland) Act 2010.

53. When judges know about the defendant's previous criminality, it can result in longer and more appropriate prison sentences. Information on previous convictions can also be used by prosecutors to resist bail applications; for example, where an individual has a history of convictions (in the EU) for violence or sexual offences and may reoffend whilst on bail.

54. The principle of taking into account overseas convictions in the same way as domestic ones exists in UK domestic law. The Criminal Justice Act 2003 allows courts to take into account criminal convictions from other jurisdictions; the principle of taking into account overseas convictions in the same way as domestic convictions exists in common law. As such, the UK meets the standards of these measures and would continue to do so if the UK were no longer to participate in this instrument.

55. If we were to exercise the opt-out and not rejoin this instrument, other Member States would not be bound to take into account previous convictions from UK courts.

56. Current Government analysis estimates the economic impact of non-participation in this measure to be negligible.

Fundamental Rights Analysis

57. The measure engages Article 6 (right to a fair trial) of the European Convention on Human Rights. It also engages Article 7 (right to respect for private and family life), Article 8 (protection of personal data), Article 47 (right to an effective remedy and a fair trial), Article 48 (presumption of innocence and right of defence, and Article 49 (principles of legality and proportionality of criminal offences and penalties) of the Charter of Fundamental Rights. Article 1(2) of the measure provides that the Framework Decision shall not have the effect of amending the

obligation to respect fundamental rights and recital 12 indicates that the Framework Decision respects fundamental rights and observes the principles reflected in the Charter of Fundamental Rights. Nothing in it requires Member States to derogate from the principles of fundamental rights.

58. Any limitation on these rights must be justified in accordance with Article 52 of the Charter, and in particular must be provided for by law and respect the essence of the particular right in question; and the interference must comply with the requirements of necessity and proportionality. The instrument aims to ensure public safety and the maintenance of law and order. These purposes would constitute a legitimate objective for the purposes of Article 52.

59. The Government, therefore, considers that this instrument complies with and is consistent with the principles of fundamental rights.

(85) 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

60. The Framework Decision provides for Member States to facilitate the transfer of eligible Foreign National Offenders (FNOs) who are EU nationals to be returned to serve their sentence in their home country without their consent, within an appropriate timeframe. An eligible prisoner is one who has more than six months to serve on their sentence and is being transferred to their state of nationality in which they normally live, or where they are transferred to their state of nationality to which they would otherwise be deported on release. 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 EU Member States to be returned to serve their sentences in the UK.

61. The total prison population (as at 31 March 2013) stands at 83,769 of which 10,725 are FNOs, representing 13% of the total prison population. 38% (4,058) of the FNO population are EU nationals.

Policy Implications

62. The UK has implemented the Framework Decision through the Repatriation of Prisoners Act 1984 (as amended).

63. It is Government policy to reduce the number of FNOs in UK prisons. The UK is already party to a number of international prisoner transfer arrangements, such as the Council of Europe Convention on the Transfer of Sentenced Persons Additional Protocol, implemented by all but 6 EU Member States, which provide for transfer without the consent of the prisoner. This Framework Decision builds on and extends the scope of these arrangements - the key difference is that it restricts the circumstances under which the consent of the prisoner and the executing State (the State to which transfer is sought) is required.

64. However, as domestic legislation is necessary to enable the UK to transfer prisoners under existing international arrangements, there would be no need to repeal any domestic legislation if the UK decided to exercise the opt-out and not to rejoin this measure.
65. Non-participation in the Framework Decision could lead to foregone savings to the UK in the form of current and future prison places. The extent to which these are cashable will depend on various assumptions including growth in prisoner volumes, successful appeals against transfer and whether prison closures take place as a result of a reduction in prison places occupied by foreign nationals.

Fundamental Rights Analysis

66. The measure engages Article 4 (prohibition of torture and inhuman or degrading treatment or punishment), Article 6 (right to liberty and security), Article 7 (right to respect for private and family life), and Article 8 (protection of personal data) of the Charter of Fundamental Rights of the European Union. These Articles correspond to the rights to protection against inhuman treatment under Article 3, the right to liberty and security under Article 5, and a private and family life under Article 8 of the European Convention on Human Rights.
67. It also engages Article 6 (right to a fair trial) of the European Convention on Human Rights and Article 47 (right to an effective remedy and a fair trial), Article 48 (presumption of innocence and right of defence), Article 49 (principles of legality and proportionality of criminal offences and penalties), and Article 50 of the Charter (right not to be tried or punished twice in criminal proceedings for the same criminal offence) of the Charter of Fundamental Rights, for example in Article 9 of the measure (grounds for non-recognition and non-enforcement).
68. Any limitation on qualified rights must be justified in accordance with Article 52 of the Charter and in particular must be provided for by law and respect the essence of the particular right in question; and the interference must comply with the requirements of necessity and proportionality. The instrument aims to ensure public safety and the maintenance of law and order. These purposes would constitute a legitimate objective for the purposes of Article 52.
69. The Framework Decision provides for the transfer of prisoners without their consent. It “should be implemented and applied in a manner which allows general principles of equality, fairness and reasonableness to be respected” (recital (6)) and provides for representations against transfer (Article 6(3)). Article 3(4) of the measure provides that the Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights. Recital (13) provides that nothing in the Framework Decision may be interpreted as prohibiting a refusal to execute a decision when there are reasons to believe that the sentence was imposed for the purpose of punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation. In this respect it engages and complies with Article 21 of the Charter (non-discrimination). Prisoners will also continue to be able to seek judicial review against transfer.

70. The Government, therefore, considers that this instrument complies with and is consistent with the principles of fundamental rights.

(88) 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

71. This Framework Decision provides a basis for the mutual recognition and supervision of suspended sentences, licence conditions and alternative sanctions (community sentences) where a person has been sentenced in one Member State but is ordinarily and lawfully resident in another; or he/she wishes to go to another Member State (e.g. to work) and that State is willing to consider supervising the sentence.

Policy Implications

72. This measure was due to be implemented on 6 December 2011 but has not been implemented by the UK at this time.

73. Transfers of sentences enable offenders to be rehabilitated in their country of residence. However there is a lack of clear understanding about how this measure will operate in practice.

74. As this instrument has not been implemented in the UK, no legislative measures would be required if we were to leave the instrument.

75. Based on usage of similar previous agreements, such as the 1964 Council of Europe Convention on the supervision of conditionally released offenders, it is likely that the number of cases affected will be small across the UK. At this stage we are not aware of how other Member States are making use of this Framework Decision as few Member States have as yet implemented the measure. As of 13 November 2012, seven other Member States had implemented this instrument. The full extent to which this instrument will be used, number of transfers and general effectiveness of the measure in the future will not be truly evident until all Member States have implemented and are using it.

76. As indicated above, usage of similar previous agreements suggest that it is likely that the numbers affected will be small across the UK. However, with changing patterns of migration, we cannot be sure of future volumes. Furthermore, there are likely to be different practices amongst Member States as to what happens in the event of a breach of Community Orders. Some Member States will enforce orders transferred to them and have the right to do so, but the Framework Decision allows a Member State to refuse to enforce in many cases should they so wish. This may lead to uneven application across the EU. For these reasons, it is very difficult to quantify the financial costs of participating in this measure.

Fundamental Rights Analysis

77. The measure engages Article 7 (respect for private and family life) and Article 8 (protection of personal data) of the Charter of Fundamental Rights. These Articles correspond to the qualified right to a private and family life under Article 8 of the European Convention on Human Rights. It also engages Article 45 (freedom of movement and of residence) of the Charter.
78. Transfer under this measure of a probation order to an offender's home state requires that person's consent so there will be no interference with the protection of their data or with Article 8 of the European Convention on Human Rights.
79. It also engages, through Article 9 of the measure (grounds for non-recognition and non-enforcement), Article 6 (right to a fair trial) of the European Convention on Human Rights and Article 47 (right to an effective remedy and a fair trial), Article 48 (presumption of innocence and right of defence), Article 49 (principles of legality and proportionality of criminal offences and penalties), and Article 50 (right not to be tried or punished twice in criminal proceedings for the same criminal offence) of the Charter of Fundamental Rights.
80. Article 1(4) of the Framework Decision provides that it shall not have the effect of modifying the obligation to respect fundamental rights and recital (5) provides that the Framework Decision respects fundamental rights and that nothing in the Framework Decision may be interpreted as prohibiting a refusal to recognise a judgment and/or supervise a probation measure or alternative sanction if there are reasons to believe that the probation measure or alternative sanction was imposed to punish a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation. In this respect it engages and complies with Article 21 of the Charter (non-discrimination).
81. Any limitation on these rights must be justified in accordance with Article 52 of the Charter and in particular must be provided for by law and respect the essence of the particular right in question; and the interference must comply with the requirements of necessity and proportionality. The instrument aims to ensure public safety and the maintenance of law and order. These purposes would constitute a legitimate objective for the purposes of Article 52.
82. The Government, therefore, considers that this instrument complies with and is consistent with the principles of fundamental rights.

(90) 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

83. The purpose of the Framework Decision is to encourage the cross-border exchange of law enforcement information by establishing a common level of privacy protection and a high 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", which in the UK includes police, the Serious Organised Crime Agency (SOCA) and many government departments. The Framework Decision relates only to personal data processed in the

framework of police and judicial cooperation in criminal matters and it aims to balance the rights of data subjects with the need to protect the public.

Policy Implications

84. The UK has implemented this Framework Decision through the Data Protection Act 1998.
85. Participation in this instrument could enhance the UK's reputation as it signals commitment to data protection in the area of police cooperation and judicial cooperation in criminal matters.
86. While the Data Protection Act 1998 transposed the Data Protection Directive 95/46/EC (a former first pillar measure), the UK chose to extend its scope to cover all processing of personal data. As such, domestic legislation was already compliant with this Framework Decision prior to its adoption. The UK therefore meets the standards of the Framework Decision as a matter of domestic law and would continue to do so if we were to decide not to participate in this instrument. However, by not participating in this instrument, there is a risk that the UK may not be able to exchange personal data in this area with other Member States.
87. The European Commission published a proposal for a Police and Criminal Justice Data Protection Directive on 25 January 2012, which will repeal and replace this Framework Decision. The Directive, which the UK participates in, is currently subject to negotiations in the Council. Depending on when these negotiations conclude, this Framework Decision may no longer be within the scope of the 2014 decision.
88. Current Government analysis estimates the economic impacts of non-participation in this measure to be negligible.

Fundamental Rights Analysis

89. This measure engages Article 7 (respect for private and family life) and Article 8 (protection of personal data) of the Charter of Fundamental Rights. These Articles correspond to the qualified right to a private and family life under Article 8 of the European Convention on Human Rights.
90. Any limitation on these rights must be justified in accordance with Article 52 of the Charter and in particular must be provided for by law and respect the essence of the particular right in question; and the interference must comply with the requirements of necessity and proportionality. The instrument aims to ensure public safety and the maintenance of law and order. These purposes would constitute a legitimate objective for the purposes of Article 52.
91. Other potentially affected fundamental rights enshrined in the Charter are the prohibition of any discrimination amongst others grounds, such as race, ethnic origin, genetic features, religion or belief, political opinion, disability or sexual orientation (Article 21); and the right to an effective remedy before a tribunal and a fair trial (Article 47).

92. The Government considers that this instrument complies with and is consistent with the principles of fundamental rights.

(92) 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

93. There are several EU instruments 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 instrument are those concerning the European Arrest Warrant (number 41 on the list), mutual recognition of confiscation orders (number 68), mutual recognition of financial penalties (number 59 on the list), prisoner transfer agreement (number 85 on the list), and the mutual recognition of judgments and probation decisions (number 88 on the list). The European Arrest Warrant and the Mutual Recognition of Confiscation Orders are included in the Home Office Explanatory Memoranda.

94. The Framework Decision does not create a new right to try a person in their absence. The aim of the instrument is to clarify the circumstances in which a foreign judgment, order, warrant or financial penalty, which has been made in a person's absence, can be recognised and therefore executed in another Member State.

Policy Implications

95. The UK has not implemented all of the underlying measures that this Framework Decision amends; therefore we have not fully implemented this measure. However, we have implemented this Framework Decision in regards to the underlying measures that we have implemented. For the purposes of the EAW we have not needed to make any amendments to the Extradition Act 2003, as section 20 deals with convictions in absence. Similarly, the Act governing implementation of the Framework Decision on prisoner transfers, the Repatriation of Prisoners Act 1984 (as amended) already contains sufficient provisions to implement this Framework Decision. In order to implement the Framework Decision on Mutual Recognition of Financial Penalties, in England and Wales, changes were made in Rule 52.10 of the Criminal Procedure Rules 2011.

96. This Framework Decision ensures that fewer criminals will be able to evade justice by arguing that their conviction was unfair, and by preventing Member States from declining to recognise judgments and judicial decisions from other Member States. The Framework Decision also provides a specific ground for refusal for the enforcement of an EAW and other decisions flowing from instruments of mutual recognition where a person has been tried in his absence. For example, it ensures that a judge in the executing Member State can refuse

an EAW if the person did not appear at the trial unless certain procedural safeguards were met in the case.

97. This Framework Decision amends other Framework Decisions. It should, therefore, be considered in conjunction with those other Framework Decisions.

98. Current Government analysis estimates the economic impact of non-participation in these measures to be negligible.

Fundamental Rights Analysis

99. The measure engages Article 6 (right to a fair trial) and Article 8 (right to respect for private and family life) of the European Convention on Human Rights. It also engages Article 7 (right to respect for private and family life), Article 8 (protection of personal data), Article 47 (right to an effective remedy and a fair trial), Article 48 (presumption of innocence and right of defence), and Article 49 (principles of legality and proportionality of criminal offences and penalties) of the Charter.

100. Article 1(1) states that the object of the Framework Decision is to enhance the procedural rights of persons subject to criminal proceedings. Article 1(2) of the measure provides that the Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights.

101. The Government, therefore, considers that this instrument complies with and is consistent with the principles of fundamental rights.

(97) 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

102. 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 Member State until such time as their trial takes place. The Framework Decision does not oblige Member States to release suspects or defendants on bail. 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 pending trial according to national law.

Policy Implications

103. The measure had an implementation date of 1 December 2012. The UK has not implemented this measure.

104. Although there is as yet no evidence available for its use, it is predicted that incoming ESOs could have an impact on operational resources within police forces, because of the need to monitor suspects. There may also be an impact

when taking steps to return those suspects not willing to surrender voluntarily when required, by means of an EAW (number 41 on the list). However, there could also be a potential converse impact where suspects who might otherwise have been held within the UK on remand or under supervised bail are returned to their home Member State.

105. The Government estimates that approximately 15% of EU national suspects held in UK jails are not permanent residents of the UK, and therefore could be eligible to apply for an ESO if available. A number of suspects who are currently bailed here could be added to this group. Approximately 56% of potentially eligible Britons held on remand abroad are not permanent residents of that country and therefore could be eligible to apply for an ESO if available. A further number bailed abroad might be added to this group.
106. As the implementation date for this instrument has only recently passed it is not possible to know how other Member States are using it and what impacts will be evidenced. The true extent to which this instrument will be used, number of transfers and general effectiveness of the measure will not be evident until all Member States have implemented and are using it.
107. As this instrument has not been implemented in the UK, no legislative changes would be required if we were to decide not to participate in this instrument.
108. Non-participation in the ESO could lead to foregone savings to the UK from transferring foreign suspects to the EU Member State where they are resident whilst they are awaiting trial. Savings would take the form of fewer prison places taken up with remanded suspects. However, any savings must be weighed against the costs of receiving UK nationals back.

Fundamental Rights Analysis

109. This Framework Decision engages Article 6 (right to liberty and security), Article 7 (respect for private and family life), Article 8 (protection of personal data), and Article 45 (freedom of movement and of residence) of the Charter of Fundamental Rights. It also engages the corresponding rights in the ECHR: Article 5 (right to liberty and security) and Article 8 (right to respect for private and family life). Recital (4) provides that the Framework Decision should aim at enhancing the right to liberty and the presumption of innocence.
110. Article 5 of the measure states that the Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights.
111. Article 15 of the measure (grounds for non-recognition and non-enforcement) engages Article 6 (right to a fair trial) of the European Convention on Human Rights and Article 47 (right to an effective remedy and a fair trial), Article 48 (presumption of innocence and right of defence), Article 49 (principles of legality and proportionality of criminal offences and penalties), and Article 50 of the Charter (right not to be tried or punished twice in criminal proceedings for the same criminal offence) of Fundamental Rights.

112. Recital 16 provides that the Framework Decision respects fundamental rights and that nothing in the Framework Decision may be interpreted as prohibiting a refusal to execute a decision when there are reasons to believe that the financial penalty has the purpose of punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation. In this respect it engages and complies with Article 21 of the Charter (non-discrimination).
113. The Government, therefore, considers that this instrument complies with and is consistent with the principles of fundamental rights.

(107) Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal matters

114. This Framework Decision aims to provide a framework of non-mandatory procedural guidance for Member States to put in place in order to protect against the possibility of parallel proceedings on the same matters being taken in different Member States.
115. Where a Member State becomes aware of alternative proceedings operating in another Member State, they are compelled by this Framework Decision to discuss the matter and try and resolve the conflicting proceedings. Where an agreement cannot be reached, the Framework Decision provides for the matter to be referred to Eurojust where appropriate. Member States are not obliged by this instrument to resolve this dispute, nor heed the advice of Eurojust.

Policy Implications

116. The measure has an implementation date of 15 June 2011. The UK has not fully implemented this measure, although we are largely compliant through existing UK practice.
117. The Framework Decision offers a degree of codification to resolve potential conflicts of jurisdiction and the application of the principles that should be commonly applied between Member States and could raise standards where this is not currently the case.
118. Much of the Framework Decision represents best practice which is already well established in the UK and is for most practical purposes reflected in current Crown Prosecution Service guidance.
119. As domestic practice meets the standards of these measures, no legislative measures would be required if the UK were to leave this instrument. Whilst other Member States would no longer be compelled to try to resolve a conflict of jurisdiction where one was evident, they may of course choose to do so as a matter of domestic policy.
120. Current Government analysis estimates the economic impact of non-participation in these measures to be negligible.

Fundamental Rights Analysis

121. This Framework Decision engages Article 6 of the ECHR (the right to a fair trial) and its equivalent Articles in the Charter of Fundamental Rights: Article 6 (right to liberty and security), Article 47 (right to an effective remedy and a fair trial), Article 48 (presumption of innocence and right of defence), Article 49 (principles of legality and proportionality of criminal offences and penalties), and Article 50 (right not to be tried or punished twice in criminal proceedings for the same criminal offence). It also engages Article 8 of the ECHR (right to respect for private and family life) and Article 7 (respect for private and family life) and Article 8 (protection of personal data) of the Charter.
122. Any limitation on these rights must be justified in accordance with Article 52 of the Charter and in particular must be provided for by law and respect the essence of the particular right in question; and the interference must comply with the requirements of necessity and proportionality. The instrument aims to ensure public safety and the maintenance of law and order. These purposes would constitute a legitimate objective for the purposes of Article 52.
123. The Government considers that this instrument complies with and is consistent with the principles of fundamental rights.

(119) SCH/Com-ex (99) 11 rev 2 (agreement on cooperation in proceedings for road traffic offences)

The Ministry of Justice has responsibility for this measure; however it is also a 'Schengen measure' and has therefore been included in the Explanatory memorandum of 'Schengen measures' submitted by the Home Office.

SCRUTINY HISTORY

124. There has been extensive and regular scrutiny by both Houses since the mid 1990s.
125. This is one of five Explanatory Memoranda related to the 2014 Decision.

MINISTERIAL RESPONSIBILITY

126. The measures detailed in this Explanatory Memorandum are the responsibility of the Justice Secretary. The Foreign Secretary has overall responsibility for the UK's relations with the EU.

INTEREST OF THE DEVOLVED ADMINISTRATIONS

127. While policing and criminal justice are devolved issues, any decision will be binding for the Devolved Administrations and Gibraltar. The Government is continuing to engage with the Devolved Administrations and Gibraltar on this issue.

LEGAL AND PROCEDURAL ISSUES

128. The UK would be exercising a Treaty right by choosing to opt out of the measures covered in this EM and by seeking to re-participate in certain measures. The Treaties also establish the processes for the Commission and Council to consider the UK's applications to re-participate in measures.

129. For non-Schengen measures, the Commission may seek to set conditions to be met for the UK's re-participation in a measure. If it considers that the conditions have not been met, the matter can be referred by the UK to the Council who must decide on the UK's application by way of a Qualified Majority.

APPLICATION TO THE EUROPEAN ECONOMIC AREA

130. Not applicable.

SUBSIDIARITY

131. This EM relates to measures that have already been adopted. The UK would have considered subsidiarity for each of the measures at the time that the measures were drafted and adopted. It would have been concluded at the time that the operative provisions in the measures were more effectively and appropriately undertaken at EU level.

POLICY IMPLICATIONS

132. If the Government does decide to exercise the opt-out, cooperation with other Member States could take a number of forms. The Home Secretary said in her statement of 15 October that *'we will consider not just opt-ins and opt-outs but the other opportunities and options that are available'*.

133. Firstly, the Government could apply to rejoin measures within the scope of the 2014 decision.

134. Secondly, the Government believes that in some cases it would be possible to rely on pre-existing Council of Europe Conventions or bilateral treaties. For example, if the European Investigation Order is not adopted and entered into force before 1 December 2014 and the Government did not opt back in to the EU Mutual Legal Assistance (MLA) Convention 2000, we believe that most forms of cooperation would continue on the basis of the 1959 Council of Europe Convention on Mutual Assistance in Criminal Matters (and its Protocols). Indeed, as not all Member States have ratified the EU's MLA Convention and its Protocol the impact on our MLA relations with those States would be largely negligible.

135. Thirdly, in some cases it may be possible to negotiate bilateral treaties with each Member State or with the EU that would effectively replace the instruments in question. The position of the other Member States depends on whether the EU has exclusive competence in that area. That requires a measure by measure analysis.

136. If there is no exclusive competence in relation to third pillar measures, the other Member States will not require any permission or authorisation from the EU

institutions. If there is exclusive competence in a particular third pillar area, while the UK is free to enter into international commitments after the block opt-out, the other Member States will require authorisation and agreement from the EU. But in principle, bilateral or multilateral agreements - either with the Member States individually or collectively – would be legally possible with such authorisation.

137. Fourthly, in some cases there may simply be no need for any such agreement to be in place in order for there to be cooperation.

IMPACT ASSESSMENT

138. At his appearance before the European Scrutiny Committee on 28 November, James Brokenshire gave an undertaking that the Government will provide an Impact Assessment on the final package of measures that the Government wishes to rejoin, should the Government decide to exercise the opt-out.

FINANCIAL IMPLICATIONS

139. The Council may adopt a Decision determining that the UK shall bear the direct financial consequences, if any, necessarily and unavoidably incurred as a result of the cessation of its participation in the third pillar acts. The UK will participate in this Decision. The Government considers this to be a high threshold to meet.

TIMETABLE

140. A final decision as to whether the UK will accept ECJ jurisdiction over all third pillar measures must be taken by 31 May 2014. This decision will take effect on 1 December 2014.

141. This is one of several Explanatory Memoranda to be submitted on the 2014 decision. In December 2012, the Home and Justice Secretaries agreed to provide Explanatory Memoranda on the following areas:

- Schengen measures;
- Measures for which the Justice Secretary is responsible;
- Measures for which the Home Secretary is responsible (1) – EU agencies, mutual legal assistance, drugs, proceeds of crime;
- Measures for which the Home Secretary is responsible (2) – extradition, crime (including cyber and organised crime), fraud and counterfeiting, databases and automated information exchange, and all others; and
- Measures for which the Chancellor of the Exchequer, Foreign Secretary and Transport Secretary have responsibility.

**THE RIGHT HONOURABLE CHRIS GRAYLING MP
LORD CHANCELLOR AND SECRETARY OF STATE FOR JUSTICE**

EXPLANATORY MEMORANDUM (EM) ON ARTICLE 10(4) OF PROTOCOL 36 TO THE TREATY ON EUROPEAN UNION AND THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION (TFEU) - THE '2014 DECISION'

Measures that are the responsibility of HM Treasury, HMRC, Department for Transport and Foreign & Commonwealth Office.

5/13

Submitted by the Foreign and Commonwealth Office on July

1. In accordance with Article 10(4) of Protocol 36 to the Treaties the UK must, by 31 May 2014, decide whether to accept Commission enforcement powers and Court of Justice of the European Union jurisdiction over all EU police and criminal justice measures adopted before 1 December 2009 or to opt out of these measures. The decision to remain bound or opt out must be taken en masse. Protocol 36 to the Treaties permits the UK to apply to rejoin individual measures if it chooses to opt out en masse.
2. The majority of the measures within the scope of the 2014 decision fall under the responsibility of the Home Office and the Ministry of Justice.
3. This Explanatory Memorandum provides further information about the small number of measures led by the Foreign and Commonwealth Office, HM Treasury, HM Revenue and Customs and the Department for Transport which are within the scope of the 2014 opt-out decision (numbers 1, 8, 12, 14, 15, 53, 55, 61, 63, 71, 75, 78, 100, 109 on the list of 15 October 2012, a copy of which was placed in the Library of the House). This Explanatory Memorandum generally lists the measures in order; however, where measures cover similar substantive areas we have chosen to group them accordingly.

(1) Council Act of 26 July 1995 drawing up the Convention on the protection of the European Communities' financial interests

(8) Council Act of 27 September 1996 drawing up a Protocol to the Convention on the protection of the European Communities' financial interests

(12) Council Act of 19 June 1997 drawing up the Second Protocol of the Convention on the protection of the European Communities

(Lead Department – HM Treasury)

4. The Convention established a common definition of fraud affecting EU expenditure and revenue, and sets out principles for cooperation and jurisdiction in the field of protecting the financial interests of the EU. It compels all Member States to take the necessary measures (including adapting their national laws) to

ensure that all acts of fraud and corruption affecting both expenditure and revenue of the EU budget receive adequate punishment including custodial sentence if the offence is of a serious nature, to discourage and act as a form of deterrence to potential criminals.

POLICY IMPLICATIONS

5. A First Protocol (or 'Corruption Protocol') to the Convention aimed primarily at acts of corruption involving national and EU officials and impact the EU's financial interests, was signed on 27 September 1996. A Second Protocol, signed on 19 June 1997, imposes sanctions on legal persons, and extends legislation concerning money laundering to the protection of EU financial interests.
6. The Convention, the 1st Protocol and a further Protocol (on the role of the European Court of Justice in this context) entered into force on 17 October 2002 following ratification by the then 15 Member States. The second protocol entered into force on 19 May 2009.
7. The UK notified the Commission on the completion of constitutional requirements for adopting the instruments on 11 October 1999. The Convention only requires Member States to adapt their national laws to penalise acts of corruption against the EU budget by EU officials and officials of other Member States.
8. The Government strongly supports efforts to reduce fraud in the EU Budget and welcomes legislation which protects EU funds and reduces fraud against its budget, especially at a time when public resources are scarce.
9. This Convention and its Protocols are due to be replaced by a new Directive on the Fight against Fraud to the Union's Financial Interests by means of Criminal Law, which was published by the Commission on 23 July 2012. The draft Directive is currently subject to negotiations in the Council.

FUNDAMENTAL RIGHTS ANALYSIS

10. These measures require the UK to criminalise (and conduct the necessary investigations into) certain conduct relating to fraudulent activity with regards to EU financial interests. The measures therefore engage rights to a fair trial (Articles 48 to 50 of the EU Charter and Article 6 of the ECHR) and rights to liberty (Article 6 of the EU Charter and Article 5 of the ECHR). They also potentially engage rights to private and family life and data protection rights (as a result of the investigatory process) in addition to rights to personal property (as a result of the possible confiscation of any proceeds of fraudulent activity). The Instruments and the Charter contain provisions ensuring that in implementing those rights, related procedural protections and limitations on the restrictions of those rights are upheld.

(14) Council Act of 18 December 1997 drawing up the Convention on mutual assistance and co-operation between customs administrations ('Naples II').

(Lead Department – HMRC)

11. 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, and "controlled deliveries".
12. Controlled deliveries involve keeping consignments of drugs and other prohibited goods under surveillance until they reach their final destination. They enable customs officers to discover more about the criminal organisation involved in the smuggling operation. This increases the likelihood of identifying the principals behind the smuggling, and is an effective method for disrupting criminal gangs.
13. Naples II also permits joint investigations, enabling law enforcement officers from more than one Member State to work together in carrying out investigations which require simultaneous action in the territories of the Member States concerned.

POLICY IMPLICATIONS

14. Naples II is regularly used by HM Revenue and Customs and Border Force to share information about drugs smuggling, money laundering and other forms of cross-border crime. Information shared between the UK and customs authorities in other EU Member States regularly results in the seizure of prohibited goods, including class A drugs.
15. Currently, there are upwards of 2000 instances of usage of the Naples II Convention per year across HMRC and Border Force. In practice this means it is used by law enforcement officers on a daily basis. This includes information-sharing with other Member States, and other assistance such as controlled deliveries.
16. In 2011, information shared between the UK and law enforcement agencies in other EU Member States under the Naples II Convention resulted in the seizure 1.2 tonnes of cocaine (the biggest cocaine seizure in the UK to date) and the arrest of an international drug smuggling gang. Information sharing, surveillance and controlled deliveries under Naples II also assisted 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. Information given to other Member States can have positive law enforcement outcomes for the UK; for example, if it enables other Member States' customs services to intercept Class A drugs and other prohibited goods that are destined for the UK.
17. If the UK were to decide to exercise the opt-out and not rejoin this instrument there are some alternative options for co-operation, but these are limited and less comprehensive than the Naples II Convention. For criminal matters, information in evidential format for use in court could be sought from other Member States using a mutual legal assistance measure. Some information could be exchanged

under the Council Framework Decision (2006/960/JHA – number 69 on the list of measures) which allows for the exchange of information and intelligence between law enforcement authorities. Non-participation in Naples II would remove the legal basis for joint operations with other EU customs authorities. Therefore, unless effective alternative arrangements could be negotiated with other EU Member States, the UK would lose the ability to co-ordinate joint investigations, surveillance operations and controlled deliveries with other EU customs authorities.

18. The UK has implemented this measure through existing UK legislation. The Convention was designated as a Community Treaty using provisions in the European Communities Act 1972 and the UK gave effect to it through existing UK legislation, in particular Section 9 of the Customs and Excise Management Act 1979. If the UK were to decide not to participate in this measure, there would be no requirement to repeal domestic legislation, although the existing designation Statutory Instrument (the European Communities (Definition of Treaties) (The Convention on Mutual Assistance and Co-operation between Customs Administrations (Naples II)) Order 2001) would become obsolete.

FUNDAMENTAL RIGHTS ANALYSIS

19. The Naples II Convention potentially engages Article 8 of the Charter of Fundamental Rights (protection of personal data). However, Article 25 of the Naples II Convention contains appropriate data protection safeguards for the protection of personal data. Data shared under the Naples II Convention has to be treated in accordance with the requirements of the Data Protection Directive which is implemented in the UK by the Data Protection Act 1998. It is only to be shared for the purposes of preventing and detecting infringements of national customs provisions, and prosecuting and punishing infringements of EU and national customs provisions. The Government therefore considers that this measure complies with and is consistent with the principles of fundamental rights.

(15) Council Act of 17 June 1998 drawing up the Convention on Driving Disqualifications

(Lead Department – Department for Transport)

20. By virtue of the EU driving licence directives (in particular Directive 2006/126/EC), EEA drivers who are disqualified from driving in the country of residence that issued their driving licence are also disqualified from obtaining another licence in any other EEA country. The 1998 Convention on Driving Disqualifications is additional to EU rules on driving licences; the Convention enables international cooperation between EU Member States to allow Member States to take into account a disqualification imposed in other Member States. In the absence of this Convention, there would be no requirement on Member States to recognise the disqualifications of one of their residents imposed for a driving offence in another Member State.
21. The Mutual Recognition of Driving Disqualifications (Great Britain and Ireland) Regulations 2008 allow driving disqualifications imposed on Great Britain

residents for serious driving offences committed in Ireland to be recognised in Great Britain. While the Crime (International Cooperation) Act 2003 applies in Northern Ireland, separate implementing Regulations were made for that jurisdiction.

22. The Convention covers five main types of behaviour. These are: reckless or dangerous driving (whether or not resulting in death, injury or serious risk); wilful failure to carry out the obligation placed on drivers after being involved in road accidents (hit and run accidents); driving a vehicle while under influence of alcohol or other substances which affect or diminish the mental and physical abilities of a driver, refusal to submit to alcohol and drug tests; driving a vehicle faster than the permitted speed; driving whilst disqualified. In addition, there is a sixth category: driving disqualifications of 6 months or more arising from a road traffic offence are recognised, as well as disqualifications of less than 6 months if determined bilaterally between Member States. (Ireland and UK do not propose to recognise any sixth category offences of less than 6 months.)

POLICY IMPLICATIONS

23. To enter into force, the Convention requires ratification by all Member States. To date, only the UK, Ireland, Spain, Slovenia and Malta have ratified the Convention. As such, the Convention is not yet in force.
24. The UK and Ireland chose to make an early application declaration; in doing so the UK and Ireland are able to make use of the Convention, but in the absence of any jurisdiction by the Court of Justice of the EU. The UK's early application declaration was made in October 2009 and came into force on 28 January 2010. This early application declaration enabled the UK and Ireland to enter into an agreement regarding the mutual recognition of driving disqualifications. Spain, Slovenia and Malta did not make use of the early application declaration and as such the Convention will only apply to them once all Member States have ratified.
25. In the UK, Primary Legislation was passed to implement the Convention through the Crime (International Cooperation) Act 2003. A Commencement Order and Regulations were made on 19 November 2008 — the effect of which was to commence the provisions of the 2003 Act in relation to Ireland only.
26. In 2006, UK and Irish ministers have affirmed a commitment that the UK and Ireland should work to recognise one another's driving disqualifications. Although the Convention is not in force, it contains a provision allowing States to apply it early amongst States which have made the relevant declaration. Full implementation between UK and Ireland was achieved in early 2010.
27. As this was done under the auspices of the Convention, disqualifications are only recognised if having arisen from conduct falling within scope of the Convention and where the disqualification arises for a specific offence (medical disqualifications and "totting up" or points disqualifications are excluded).
28. If UK were not to participate in this measure, but wished to continue its mutual recognition arrangements with Ireland, a new bilateral treaty with Ireland would

be required and domestic legislation would need to be amended. If UK were not to participate in mutual recognition of driving disqualifications at all, consideration would be needed as to whether domestic legislation should be repealed.

29. If the UK decided to remain bound by this measure and other Member States made an early application declaration, or if for some reason, the Convention were to enter into force more generally, the UK would need to commence the relevant provisions of the 2003 Act in relation to the other EU Member States. This action would require new secondary legislation using the vires of the 2003 Act. There is no date for the Convention applying automatically to all signatory or ratifying states.
30. The Government considers there would be cost implications if the UK were to participate in this measure if it ever came into force on an EU wide basis. Our best estimates are ten-year costs of £31 million. There would be a road safety benefit in ensuring that driving disqualifications were recognised internationally but this isn't easily quantifiable.
31. Regardless of the decision, Great Britain, Northern Ireland and the Republic of Ireland are keen to continue with the mutual recognition arrangements.

FUNDAMENTAL RIGHTS ANALYSIS

32. These measures potentially engage Article 47 (right to an effective remedy and a fair trial) of the Charter of Fundamental Rights, which is similar to Article 6 ECHR (right to a fair trial). The Convention contains provisions to ensure that when the State of offence gives a notification to a state of residence, evidence is provided to show that the person has had an adequate opportunity to defend himself. In addition, the Convention permits the State of residence to refuse to recognise a disqualification when not satisfied of this. Implementing legislation in the UK provides a right for a UK driver to appeal to the courts against recognition of a driving disqualification imposed in another jurisdiction. The Government therefore considers that this instrument complies with and is consistent with the principles of fundamental rights.

(53) (55) (61) (63) (71) (75) (78) (109) Agreements between the European Union and Bosnia and Herzegovina, Norway, the Former Yugoslav Republic of Macedonia, Ukraine, Iceland, the United States of America, Switzerland and the Russian Federation (signed but not implemented) on security procedures for the exchange of classified information and Agreement between the Government of the Russian Federation and the European Union on the protection of classified information.

(Lead Department – Foreign & Commonwealth Office)

33. Where the Council of the European Union determines that there is a need to exchange EU classified information with a third State (or an international organisation) an appropriate legal framework is required. To that end, the Council negotiates and concludes agreements with third States concerning security

procedures for exchanging and protecting classified information, which are known as 'Security of Information Agreements'. Since the Council first established its Security Regulations in 2001 (Council Decision 2001/264/EC of 19 March 2001, since replaced by Council Decision 2011/292/EU of 31 March 2011) it has negotiated a number of Security of Information Agreements with third States, a number of which fall within the scope of the 2014 decision. These are as follows:

- (53) Bosnia-Herzegovina — Council Decision 2004/731/EC of 26 July 2004
- (55) Norway — Council Decision of 2004/843/CFSP 26 July 2004
- (61) Former Yugoslav Republic of Macedonia — Council Decision 2005/296/CFSP, JHA of 24 January 2005
- (63) Ukraine — Council Decision 2005/481/CFSP of 13 June 2005
- (71) Iceland — Council Decision 2006/467/CFSP of 21 November 2005
- (75) United States of America — Council Decision 2007/274/JHA of 23 April 2007
- (78) Switzerland — Council Decision 2008/568/CFSP of 24 June 2005
- (109) Russia — Council Decision 2010/348/EC of 17 November 2009

34. Security of Information Agreements have a similar style and content, as they are based on a template which is approved by Member States in the Council Security Committee. Whilst each Agreement is tailored to meet the particular circumstances of exchanges with an individual State, they typically cover the following common subjects: a jointly agreed description of what is meant by 'classified information'; an understanding of the EU Institutions to which the Agreement will apply; a commitment that each Party will protect classified information exchanged between them to equivalent security standards; restrictions on how such classified information will be accessed, used, and disclosed; mechanisms for providing security assurances in respect of personnel who require access to classified information; a commitment to provide mutual assistance with regard to the security of classified information; procedures on how each Party will exchange classified information; who in each Party is responsible for overseeing the implementation of the Agreement; a commitment that both Parties establish procedures to be followed in the event of the loss or compromise of classified material; details on how future security implementing arrangements will be established; details as to how the Agreement will enter into force and can be amended; and details as to how the Agreement can be terminated.

35. The Agreement with the Russian Federation contains more detail for each of the provisions, and additional provisions addressing equivalent classification markings and limitations on who can receive correspondence between the EU and Russia.

36. The Agreement with the United States of America also departs slightly from the template by including additional provisions addressing: equivalent classification markings; the security of facilities handling classified information; contractor access to classified information; and some measures on how classified information can be downgraded and declassified.

37. EU classified information includes reports from the EU Intelligence Analysis Centre (which is part of the European External Action Service (EEAS)) and other sensitive collaborative work with Member States. This information brings together an assessment of threats and analysis and can give an overview of EU intelligence. The EU shares EU classified information with third parties to support shared policies, including to contribute to the effectiveness of Common Security and Defence Policy missions and operations.

POLICY IMPLICATIONS

38. Security of Information Agreements establish the rules and mechanisms by which EU classified information is shared with third Parties. They therefore act to ensure such information is handled and protected appropriately by both Parties. These Agreements provide the legal and procedural mechanisms needed to facilitate such exchanges; they do not compel either Party to exchange classified information with the other.

39. These agreements cover EU classified information which the UK may have generated or contributed to. These agreements would allow the UK to contribute to EU classified information shared in support of EU relationships with the States listed, to access EU material being shared by the EU with these third States, and to access the material from these third States being shared with the EU. The information received by the EU from third States is used to inform EU policy development. If EU classified information is considered for release to a third State the principle of 'originator consent' applies, meaning that any contributor to the information should be consulted to establish if there are any concerns or security objections to release of the information to a third State.

40. Member State national classified information is not within scope of these Agreements, so UK classified information that has been exchanged with the EU cannot be shared with a third State under the Agreement. UK departments and agencies are able to control the release of UK classified information to the EU independently of these measures, as well as retain all discretion over what information is shared and input into the EU. Similarly, these agreements do not impact on the ability of the UK to exchange UK classified data directly with any third country.

41. The UK has provided information and gained sight of information from other Member States and third parties under these agreements. The quantity of information exchanged between the EU and the third States listed is relatively low at present, but the trajectory is for these exchanges to increase, especially on security issues and on the Middle East.

42. Our discussions with the Security Departments of the different EU Institutions have confirmed that if the UK decided not to participate in these agreements, UK material could not be used in assessments sent to third States (resulting in a loss of influence) and the UK would not be able to see material being sent to the EU by third States. UK staff members working in the Intelligence Centre would face operational and logistical constraints on access to this information.

43. To our knowledge only small quantities of classified information are currently shared with third countries under these agreements. If the UK decided not to participate in the agreement, we would continue to be able to exchange UK classified data directly with any third country. There would be no requirement to repeal domestic legislation as these are EU agreements concerning the exchange of EU classified material and as such did not require implementation by Member States.

44. There are no UK financial implications associated with these agreements.

FUNDAMENTAL RIGHTS ANALYSIS

45. These measures potentially engage Article 8 (protection of personal data) of the Charter of Fundamental Rights, to the extent that they are used to transfer personal data (this is unlikely but not inconceivable). Article 8 of the Charter is linked to Article 7 of the Charter (right to respect for private and family life, home and communications) as well as Articles 16 TFEU and 39 TEU, Article 8 ECHR (which is the direct equivalent to Article 7 of the Charter) and the Convention of the Council of Europe of 28 January 1981 for the protection of individuals with regard to automatic processing of personal data. Any engagement with this right must be justified in accordance with Article 52 of the Charter. Nothing in the measures requires the EU to act contrary to fundamental rights and the processing of personal data by EU bodies is in addition subject to Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data. The Government, therefore, considers that this instrument complies with and is consistent with fundamental rights.

(100) Council Decision 2009/917/JHA of 30 November 2009 on the use of information technology for customs purposes (Customs Information System)

(Lead Department – HMRC)

46. 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.

47. For the purposes of the Council Decision, CIS is an umbrella term for the CIS database and the customs files identification database (‘FIDE’).

48. The aim of CIS, including FIDE, is to assist in preventing, investigating and prosecuting serious contraventions of national laws by making information available more rapidly, thereby increasing the effectiveness of the co-operation and control procedures of the Member States.

49. Customs services and agencies with customs criminal responsibilities can enter and view data, including personal data, for the purpose of sighting and reporting, discreet surveillance, specific checks, and strategic or operational analysis. Data on the system falls into the following categories: commodities; means of transport; businesses; persons; fraud trends; availability of expertise; items or cash detained, seized or confiscated. Nominal data is only included if there are real indications that the person has committed, is committing or will commit serious contraventions of national laws; and cash data for the purpose of strategic or operational analysis only.

POLICY IMPLICATIONS

50. These information systems support Member States' activity under the Naples II Convention, which is the general legal base under which Member States' customs authorities and related agencies co-operate and communicate with each other in real-time on customs criminal matters. For example, asking each other to put suspected consignments of drugs or weapons under surveillance, carrying out joint operations and investigations, and communicating operational information.

51. There is no other secure information-sharing system that connects the same users and stores the same information. There are some alternative information exchange services, covered by the Naples II Convention, but their scope and coverage is not as extensive as CIS. There are some long-established information exchange services (accessible via the same portal as CIS) and a secure email system that rely on the Naples II Convention, rather than CIS. If the UK decided not to participate in this measure but continued to participate in the Naples II Convention, it could continue to use these.

52. Commission records show, as of 31 August 2012, the total number of active cases on the CIS database was 302, up from 259 a year earlier. The UK was responsible for 26 of the entries in 2011 and 18 in 2012. The number on FIDE was 1,735, up from 274 a year earlier. The UK has not yet included any data on FIDE.

53. CIS and FIDE are fully funded by the European Commission. This is because the systems referred to in this Explanatory Memorandum are technically similar to CIS and FIDE systems that exist (under different legislation) for information-sharing on matters of EU competence, such as combating customs duty fraud. Though the Commission provides technical support for all the associated systems, the user populations are partitioned and the Commission cannot view or use data shared under Council Decision 917/09.

54. The UK has implemented this measure through administrative means. If the UK were to decide not to participate in this measure, no domestic legislation would need to be repealed.

FUNDAMENTAL RIGHTS ANALYSIS

55. Council Decision 2009/917/JHA respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. The Council Decision contains specific articles on personal data protection (Articles 20 to 26).

SCRUTINY HISTORY

56. There has been scrutiny of each of the measures contained in this Explanatory Memorandum.

MINISTERIAL RESPONSIBILITY

57. The measures detailed in this Explanatory Memorandum are the responsibility of the Chancellor of the Exchequer, Foreign Secretary and Transport Secretary. The Foreign Secretary has responsibility for the UK's overall relationship with the EU.

INTEREST OF THE DEVOLVED ADMINISTRATIONS

58. While policing and criminal justice are devolved issues, any decision will be binding for the Devolved Administrations and Gibraltar. The Government is continuing to engage with the Devolved Administrations and Gibraltar on this issue.

LEGAL AND PROCEDURAL ISSUES

59. The UK would be exercising a Treaty right by choosing to opt out of the measures covered in this EM and by seeking to re-participate in certain measures. The Treaties also establish the processes for the Commission and Council to consider the UK's applications to re-participate in measures.

60. For non-Schengen measures, the Commission may seek to set conditions to be met for the UK's re-participation in a measure. If it considers that the conditions have not been met, the matter can be referred by the UK to the Council who must decide on the UK's application by way of a Qualified Majority.

APPLICATION TO THE EUROPEAN ECONOMIC AREA

61. Measure 55 applies to the European Union and Norway (but not to other EEA countries). Measure 71 applies to the European Union and Iceland (but not to other EEA countries). None of the other measures in this EM apply to the European Economic Area.

SUBSIDIARITY

62. This EM relates to measures that have already been adopted. The UK would have considered subsidiarity for each of the measures at the time that the measures were drafted and adopted. It would have been concluded at the time that the operative provisions in the measures were more effectively and appropriately undertaken at EU level.

POLICY IMPLICATIONS

63. If the Government does decide to exercise the opt-out, cooperation with other Member States could take a number of forms. The Home Secretary said in her statement of 15 October that *'we will consider not just opt-ins and opt-outs but the other opportunities and options that are available'*.
64. First, the Government could apply to rejoin measures within the scope of the 2014 decision.
65. Secondly, the Government believes that in some cases it would be possible to rely on pre-existing Council of Europe Conventions or bilateral treaties. For example, if the European Investigation Order is not adopted and entered into force before 1 December 2014 and the Government did not opt back in to the EU MLA Convention 2000, we believe that most forms of cooperation would continue on the basis of the 1959 Council of Europe Convention on Mutual Assistance in Criminal Matters (and its Protocols). Indeed, as not all Member States have implemented EU Mutual Legal Assistance Convention 2000 the impact on our MLA relations with those States would be largely negligible.
66. Thirdly, in some cases it may be possible to negotiate bilateral treaties with each Member State or with the EU that would effectively replace the instruments in question. The position of the other Member States depends on whether the EU has exclusive competence in that area. That requires a measure by measure analysis.
67. If there is no exclusive competence in relation to third pillar measures, the other Member States will not require any permission or authorisation from the EU institutions. If there is exclusive competence in a particular third pillar area, while the UK is free to enter into international commitments after the block opt-out, the other Member States will require authorisation and agreement from the EU. But in principle, bilateral or multilateral agreements — either with the Member States individually or collectively — would be legally possible with such authorisation.
68. Fourthly, in some cases there may simply be no need for any such agreement to be in place in order for there to be cooperation.

CONSULTATION

69. The Devolved Administrations, HMRC, HM Treasury, the Department for Transport, the Home Office and the Ministry of Justice have been consulted in preparing this EM.

IMPACT ASSESSMENT

70. At his appearance before the European Scrutiny Committee on 28 November, James Brokenshire gave an undertaking that the Government will provide an

Impact Assessment on the final package of measures that the Government wishes to rejoin, should the Government decide to exercise the opt-out.

FINANCIAL IMPLICATIONS

71. The Council may adopt a Decision determining that the UK shall bear the direct financial consequences, if any, necessarily and unavoidably incurred as a result of the cessation of its participation in the third pillar acts. The UK will participate in this Decision. The Government considers this to be a high threshold to meet.

TIMETABLE

72. A final decision as to whether the UK will accept ECJ jurisdiction over all third pillar measures must be taken by 31 May 2014. This decision will take effect on 1 December 2014.

73. This is one of several Explanatory Memoranda to be submitted on the 2014 decision. In December 2012, the Home and Justice Secretaries agreed to provide Explanatory Memoranda on the following areas:

- Schengen measures;
- Measures for which the Justice Secretary is responsible;
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- Measures for which the Chancellor of the Exchequer, Foreign Secretary and Transport Secretary have responsibility.

**The Rt Hon David Lidington
MINISTER FOR EUROPE**



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ISBN 978-0-10-186712-2



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