

# EXPLANATORY MEMORANDUM FOR EUROPEAN UNION LEGISLATION

6102/19 [COM(2019) final]

## **Recommendation for a COUNCIL DECISION authorising the opening of negotiations in view of an agreement between the European Union and the United States of America on cross-border access to electronic evidence for judicial cooperation in criminal matters.**

Submitted by the Home Office on 21 February 2019

### **SUBJECT MATTER**

1. This Explanatory Memorandum (EM) relates to a recommendation to the EU Council to authorise the Commission to enter into negotiations, on behalf of the European Union and its Member States, on an agreement between the European Union and the United States of America on cross-border access to electronic evidence for judicial cooperation in criminal matters. This includes adopting negotiating directives and appointing the Commission (supported by a Special Committee appointed by the Council of Ministers) as negotiator, pursuant to Article 218 of the Treaty for the Functioning of the European Union (TFEU).
2. Currently, EU Member States and the USA request cross-border evidence through Mutual Legal Assistance, under an agreement signed on 25 June 2003 and entered into force on 1 February 2010. The UK does not participate in this agreement, having opted out in 2014, but instead has its own bilateral treaty with the US<sup>1</sup>. A joint review of the EU agreement took place in 2016, which confirmed the use and value of the agreement as a tool. However, it is not considered to be adapted to the dynamic nature of electronic evidence, as it is a slow and often costly process. Direct cooperation with US service providers has developed as an alternative channel, but this is limited to non-content data, is voluntary (in US law), and creates some level of legal uncertainty. Until the introduction of the Clarifying Lawful Overseas Use of Data (CLOUD) Act 2018, US service providers were generally prohibited from disclosing content data in response to a lawful foreign order.
3. The Commissions' E-Evidence proposals (see EM of 3 May 2018) currently under negotiation provide a mechanism for obtaining electronic evidence directly from service providers established in another jurisdiction, where a provider is offering services in the EU. For non-EU service providers, where there is no presence in the EU, a legal representative will need to be appointed in at least one Member State against whom production orders will be enforced (a similar model applies to EU-based providers who offer services in another EU state than the one it is established in). According to the negotiating directives as drafted, the three main objectives will be for the proposed agreement:
  - i. To set common rules and address conflicts of law for orders on content and non-content data
  - ii. Allow for a transfer of electronic evidence directly on a reciprocal basis by a service provider to a requesting authority

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- iii. Ensure respect of fundamental rights, freedoms and general principles of EU law
4. In the USA, major service providers are bound by the obligations in the Stored Communications Act 1986, and the Clarifying Lawful Overseas Use of Data (CLOUD) Act 2018. The latter amends the former to oblige providers to comply with US orders to disclose content as well as non-content data, regardless of where such data is stored. The CLOUD Act also allows the conclusion of executive agreements with foreign governments, on the basis of which US service providers would be able to deliver content data directly to them. Some conditions apply, regarding the sharing of US citizens' data, and that the foreign country in question has sufficient protections in place. The EU intends to negotiate such a data access agreement with the US, and this Council Decision is intended to provide a mandate to do so.
5. A parallel recommendation has been published regarding the negotiations on a Second Additional Protocol to the Council of Europe Convention on Cyber-Crime. A separate EM has been sent to cover this negotiation.

### **SCRUTINY HISTORY**

6. This is a new proposal so there has been no previous scrutiny.

### **MINISTERIAL RESPONSIBILITY**

7. The Home Secretary has responsibility for policy relating to international criminal justice cooperation. The Foreign Secretary has overall responsibility for the Government's relationship with the EU, and the USA.

### **INTEREST OF THE DEVOLVED ADMINISTRATIONS**

8. The Devolved Administrations (and Gibraltar) have been consulted in the preparation of this EM.

### **LEGAL AND PROCEDURAL ISSUES**

#### 9. Legal Basis

The Commission have not cited a substantive legal base for this proposal. However, the opening of negotiations and adoption of negotiating directives have their procedural legal base in Article 218(3) and (4) of the Treaty on the Functioning of the European Union (TFEU). It is clear from the EU Commission's accompanying explanations that we would expect to see a Justice and Home Affairs (JHA) legal base underpin future decisions on Signature and Conclusion of this agreement. We will also seek the addition of a substantive JHA legal base to this Council Decision.

#### 10. European Parliament Procedure

None. The European Parliament is only required to consent to the conclusion of an international agreement.

#### 11. Voting procedure

Qualified Majority Voting.

#### 12. Impact on United Kingdom Law

We will assess the impact as part of our opt-in considerations.

### 13. Application to Gibraltar

If the UK opts in, Gibraltar will be bound by this negotiating mandate.

### 14. Fundamental Rights Analysis

The proposed agreement is intended to facilitate reciprocal disclosure and cross-border transfer of personal data for use overseas in investigating and prosecuting crime. It therefore engages the privacy rights of individuals within the European Union whose data may be transferred, and other rights relating to the protection of personal data, as protected under Art 8 ECHR and Art 8 of the Charter. Further, the rights of those subject to investigation or prosecution are also likely to be engaged in the same way that they are engaged by purely domestic investigative measures. These rights including procedural rights enshrined in Article 47 of the Charter and Article 6 of the ECHR.

## **APPLICATION TO THE EUROPEAN ECONOMIC AREA**

15. This does not apply to the EEA countries.

## **SUBSIDIARITY**

16. The UK is currently undertaking a competence analysis for this measure, which will determine any concerns regarding subsidiarity.

## **POLICY IMPLICATIONS**

17. On 23 June 2016, the UK voted to leave the EU. On 29 March 2017, the Government triggered Article 50 of the TEU to begin the process of exit. Until 29 March 2019, the UK remains a full member of the EU and all the rights and obligations of EU membership remain in force. During this period, the Government will also continue to negotiate, implement, and apply EU legislation.

## **UK participation**

18. Whilst the draft Council Decision does not cite a Justice and Home Affairs (JHA) legal base, the usual practice is for the Council to add a substantive legal base to the Commission proposal (in relation to Council Decisions authorising negotiating mandates) during the course of Council considerations. The addition of a JHA legal base would clarify that the UK's opt-in applies. Nonetheless, in accordance with Protocol No 21 on the position of the UK and Ireland in respect of the area of Freedom, Security and Justice annexed to the Treaty on the Functioning of the European Union, the UK's opt-in applies to this Decision.

19. In accordance with the Withdrawal Agreement, as this Council Decision is not an amending, repealing or building upon measure, the UK's JHA opt-in will not apply during the proposed Implementation Period. Accordingly, the Government intends to communicate any JHA opt-in decision on the proposal to the EU before 29 March.

20. The Government is committed to taking all opt-in decisions on a case-by-case basis, putting the national interest at the heart of the decision-making process. When taking an opt-in decision, the Government will consider:

- a. its earlier decision not to participate in the proposed EU e-evidence regulation;
- b. what impact, if any, this proposed negotiation would have on the UK's ability to finalise its own agreement with the USA.

21. The UK has not opted into the E-evidence Regulation and is therefore not bound by it. It is, however, bound by the terms of the Directive. The Regulation creates the new legally binding European Production Order and the European Preservation Order, the mechanisms by which a competent authority can make a request to a service provider outside its jurisdiction. The Directive aims to harmonise Members States' approaches to the obligations that they impose on service providers, making it mandatory for service providers to designate a legal representative in the Union to receive, comply with and enforce decisions aimed at gathering evidence by competent national authorities in criminal proceedings. It is the Regulation that creates the legal mechanism by which EU Member States can compel service providers from other countries to surrender their data.
22. The Government supports efforts to make cross-border access to data more efficient and more useful, particularly where this can improve security cooperation, prevent crime and terrorism, and close legal gaps. The UK is already in the process of negotiating its own, reciprocal UK-US Data Access Agreement, a bilateral treaty that enables US companies to comply with lawful orders from UK authorities for the production of electronic communications without any conflict of law. The Agreement will fulfil many of the objectives sought by the EU-US negotiating mandate, but through solely bilateral mechanisms, such as those established in the Crime (Overseas Production Order) Act, which recently received Royal Assent.

#### **CONSULTATION**

23. None undertaken

#### **IMPACT ASSESSMENT**

24. None undertaken

#### **FINANCIAL IMPLICATIONS**

25. No financial implications

#### **TIMETABLE**

26. The Presidency are intending to seek adoption of this Council Decision at the June JHA Council.

A handwritten signature in blue ink that reads "Nick Hurd".

**Rt Hon Nick Hurd  
Minister for Policing and Fire  
Home Office**