

**STANDARD FORM OF EXPLANATORY MEMORANDUM FOR EUROPEAN UNION  
LEGISLATION AND DOCUMENTS**

6110/19  
COM(2019) 71 final

**Recommendation for a COUNCIL DECISION authorising the participation in negotiations on a second Additional Protocol to the Council of Europe Convention on Cybercrime (CETS No. 185)**

**and**

6110/19 ADD 1  
COM(2019) 71 final

**ANNEX to the Recommendation for a COUNCIL DECISION authorising the participation in negotiations on a second Additional Protocol to the Council of Europe Convention on Cybercrime (CETS No. 185)**

Submitted by Home Office on 20 February 2019

**SUBJECT MATTER**

1. This Explanatory Memorandum (EM) relates to a recommendation for a Council Decision to authorise the Commission to participate in negotiations, on behalf of the Union, on a Second Additional Protocol to the Council of Europe Cybercrime ('Budapest') Convention. This includes adopting negotiating directives and appointing the Commission as negotiator in accordance with the negotiating directives outlined in the proposal, pursuant to Article 218 of the Treaty for the Functioning of the European Union (TFEU).
2. The Cybercrime ('Budapest') Convention Committee approved the Terms of Reference (ToRs), in June 2017, for the preparation of the second additional protocol during the period September 2017 to December 2019. The ToRs set out the elements for consideration and possible inclusion in the protocol. These focus, particularly, on increasing the capacity of national judicial and police authorities to access more effectively and quickly electronic evidence for the purposes of investigating serious crime. These include: provisions for more effective mutual legal assistance; enabling direct cooperation with service providers in other jurisdictions to provide cross-border access to specific types of information (subscriber) and requests (emergency and preservation); and provisions on safeguards, including data protection requirements. Negotiation on specific provisions is at varying stages of development.
3. The proposal sets out, in broad terms, the grounds on which the Commission considers the Union to have exclusive competence and that it should therefore participate in negotiations of the Second Additional Protocol on behalf of the Union and its Member States. Reference is made to common rules that have been adopted by the EU and where the Commission considers, in relation to

the provisions for the Second Additional Protocol, there is overlap with EU legislation or to a large extent they are covered by EU law. These include instruments relating to: law enforcement and judicial cooperation in criminal matters: procedural rights of suspects and accused persons; and EU proposals on cross-border access to electronic evidence 2018. To note on the latter, the UK will be bound by the Directive, but did not opt-in to the Regulation. In addition, in the proposal the Commission makes reference to EU Treaties relating to the protection of personal data and the Charter of Fundamental Rights of the EU.

4. The Commission specifies that as the final version of the Second Additional Protocol may affect the common rules, referred to in paragraph 3 above, or may alter their scope, by virtue of Article 3(2) of the TFEU, the Union has exclusive competence for the negotiation. The Commission also sets out that as the content of the protocol falls within EU policies and competences, the protocol requires EU participation in the negotiations. Therefore, as provided for by Article 17(1) of the TFEU, the Commission has a general role in representing the EU and should therefore be authorised by the Council as negotiator for the Union and its Member States.
5. A parallel recommendation has been published regarding negotiations for 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. 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 and policy relating to tackling cybercrime.

## **INTEREST OF THE DEVOLVED ADMINISTRATIONS**

8. Scottish Ministers, Welsh Government Ministers and Northern Ireland have an interest and the Devolved Administrations have been consulted in the preparation of this EM.

## **LEGAL AND PROCEDURAL ISSUES**

9.
  - i. Legal basis  
The proposal does not cite a substantive legal base for the draft Council Decision. However, the appropriate procedural basis is cited as Article 218 of the TFEU. It is clear from the instruments cited by the EU Commission that we would expect to see a Justice and Home Affairs (JHA) legal base such as article

82(1) (judicial cooperation in criminal matters) to underpin this proposal. As this is a recommendation from the EU Council we can seek to get this amended.

ii. The European Parliament Procedure

The European Parliament does not have a role in this EU negotiating mandate process.

iii. Voting procedure

Qualified majority voting.

iv. Impact on United Kingdom Law

There is unlikely to be any impact on UK law.

v. Application to Gibraltar

Gibraltar is not a member of the Cybercrime ('Budapest') Convention and would not therefore be bound by the Second Additional Protocol to the Cybercrime ('Budapest') Convention.

vi. Fundamental rights analysis

The proposed Second Additional Protocol could result in interference with fundamental rights, including those relating to the right to respect for private and family life, privacy and the protection of personal data (Article 8 of the Charter; Article 8 ECHR) and the right to freedom of expression (including press freedoms) (Article 11 of the Charter, Article 10 ECHR). Further, since the Second Additional Protocol relates to the investigation and prosecution of crime it is likely to engage rights enjoyed by those accused or suspected of crime, namely the right to a fair trial and the presumption of innocence (Articles 47 and 48 of the Charter and Article 6 of the ECHR) and the right to liberty (Article 6 of the Charter, Article 5 of the ECHR). The proposed negotiating directives (annexed to the recommendation) would require the Commission to ensure appropriate fundamental rights safeguards, and that the final Second Additional Protocol is compatible with EU data protection law and EU law relating to procedural safeguards in criminal proceedings.

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

10. This recommendation for an EU negotiating mandate will not extend to the European Economic Area countries.

## **SUBSIDIARITY**

11. Subsidiarity will be considered further on the back of our competence analysis (see paragraph 15 (c) below).

## **POLICY IMPLICATIONS (including Exit implications where appropriate)**

12. On 23 June 2016, the EU referendum took place and the people of the United Kingdom voted to leave the European Union. Until exit negotiations are concluded, the UK remains a full member of the European Union and all the

rights and obligations of EU membership remain in force. During this period the Government will continue to negotiate, implement and apply EU legislation.

13. 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. 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.
14. In accordance with the Withdrawal Agreement, as this Council Decision is not an amending, repealing or building measure, the UK's JHA opt-in will not apply during the Implementation Period. Accordingly, the Government intends to communicate any decision to opt in to the proposal to the EU before 29 March.
15. 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. Whether the UK wishes to negotiate the Second Additional Protocol to the Cybercrime ('Budapest') Convention in our own right during the Implementation Period
  - c. Whether and to what extent the Government agrees with the Commission's claims that the Union has exclusive external competence as regards the anticipated subject matter of the proposal. To this end, we are undertaking a competence analysis.
16. More broadly, the Government recognises the importance of the Cybercrime ('Budapest') Convention framework as an international forum and instrument in delivering cooperation and practical mechanisms on cybercrime. This will become more important as we exit from the EU. To ensure the progress and effective outcomes of the Second Additional Protocol to the Cybercrime ('Budapest') Convention, the UK maintains its position that all participating states need to be mindful of the requirement to accommodate the different systems and processes of a wide range of states (beyond just EU Member State participants).

## **CONSULTATION**

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

## **IMPACT ASSESSMENT**

18. Not applicable.

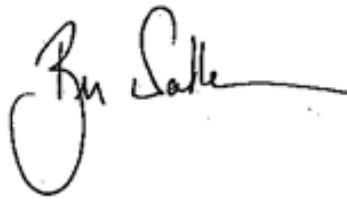
## **FINANCIAL IMPLICATIONS**

19. There are no financial implications applicable to this recommendation for an EU negotiating mandate.

## **TIMETABLE**

20. The intention of the EU Commission is to seek to adopt this EU negotiating mandate at the Justice and Home Affairs Council in June.

## **MINISTERIAL NAME AND SIGNATURE**

A handwritten signature in black ink, appearing to read "Ben Wallace". The signature is written in a cursive style with a large initial "B" and a long horizontal stroke at the end.

**Rt Hon Ben Wallace MP**

**Minister of State for Security and Economic Crime**