



# **Brexit Preparedness seminar on police and judicial cooperation in criminal matters**

Council Working Party

(Article 50 Format)

20 December 2018

# No deal scenario

- UK becomes a third country on 30/03/2019
- EU acquis ceases to apply to UK; no transition period and no specific conditions for UK
- EU legal bases no longer applicable to the ongoing procedures
- UK to be disconnected from all networks/information systems/databases at withdrawal date (29/03/2019 midnight)
- Contingency – fall-back instruments and unilateral measures to mitigate the negative impact
- Aim of contingency is not to replicate status quo

# Exchange of security relevant data (1)

## Disconnection & stock of data

- What is being done?
  - Mapping of systems/databases/networks; planning and preparation for disconnection
  - Mapping of fall-backs (multilateral international instruments)
- Disconnection of UK from EU systems, databases and networks at withdrawal
- In the area of security and criminal law: SIS II, Europol Information System, Eurodac, Eurojust, ECRIS, EMCDDA, and Prüm (in case UK gets connected before withdrawal)

# Exchange of security relevant data (2)

## Disconnection & stock of data

- UK data remaining in EU systems, databases, networks – no general obligation to delete the data, but:
  - the UK may request to remove the data, if owner of the data
  - personal data protection rules apply to personal data – case by case analysis to determine if further storage and processing is possible in line with EU data protection rules
- Specific case: SIS alerts – law enforcement action based on non-updated data would involve serious risk to fundamental rights
- Therefore, UK SIS alerts need to be deleted; eu-LISA is preparing for the removal

# Exchange of security relevant data (3)

## Disconnection & stock of data

- MS data in UK systems: as of the date of withdrawal, UK's national data protection rules will apply
- Pending exchanges based on EU acquis and not finalized by the withdrawal date are discontinued
- Member States are advised to:
  - Finalise pending exchanges before withdrawal date
  - Examine if an alternative framework (international law, national law) may be used; a valid legal basis is a prerequisite to process data (Article 8 Police Directive)
  - Reach out to all concerned law enforcement & judicial authorities to inform them

# Europol

- UK no longer participates in Europol and is to be treated like a third country with no operational agreement; exchanges possible on an ad-hoc basis
- Europol can continue to receive data from UK (Articles 17 & 23 Europol Regulation)
- Transfer of non-personal data to UK possible under Article 23
- No systematic transfer of personal data to UK possible, but:
  - Transfers on a case-by-case basis can be authorised by the executive director (Article 25(5))
  - Sets of transfers can be authorised by Management Board in agreement with EDPS for a period of one year (Article 25(6)); this can be renewed
- EU Policy cycle - UK may no longer be in the lead (driver or co-driver) for EU policy cycle priorities (applies also in transition); Member States need to replace the UK by 29 March 2019

# Operational police cooperation

- Operational cross-border cooperation based on EU law discontinues
- Operations to be finalised and planned in advance taking withdrawal date into account
- Alternative framework – Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters from 2001 (CETS 182)

# Fall-backs

EU instrument	Possible fall-back
SIS	System of Interpol notices
PNR	None, but: <ul style="list-style-type: none"><li>- Directive 2016/681 applies to flights coming into EU from UK</li><li>- transfers to UK PIU possible on a case-by-case basis (Article 11)</li></ul>
Europol	Cooperation with UK as third country + Interpol
Swedish Initiative	Interpol; existing bilateral channels

# Fall-backs

EU instrument	Possible fall-back
Eurodac	None; UK not part of Dublin system anymore
Prüm	UK not connected yet; no fall-back
FIU	Financial Action Task Force (FATF), Council of Europe Warsaw Convention (CETS 198) and Egmont Secure Web
ARO	Camden Asset Recovery Inter-agency Network (CARIN)
EMCDDA	United Nations Office for Drugs and Crime (UNODC)

# Judicial cooperation in criminal matters (1)

## EU instruments on judicial cooperation in criminal matters

Ex: European Arrest Warrant, transfer of prisoners, Supervision orders, freezing and confiscations, European Investigation Order, joint investigation teams, ECRIS requests

## EU law not applicable after the withdrawal date

- Handling of ongoing procedures?
- Fall-back for cooperation requests introduced after the withdrawal date?
- ECRIS – see slides 8-10

# Judicial cooperation in criminal matters (2)

## The special case of ongoing proceedings and pending requests

- EU law no longer applies
- What to do? Finalise/continue/discontinue cooperation?
  - This is a matter for national law, in the light of applicable international law

# Judicial cooperation in criminal matters (3)

## - legal framework after withdrawal date

### Fall-back

- National law
- International Conventions (in particular from the Council of Europe on extradition, mutual legal assistance, confiscation, transfer of prisoners)
- N.B. previous bilateral agreements do not revive

## Fall-back CoE instruments for EU27 and UK (4)

EU instrument	Possible fall-back: CoE conventions and protocols
European Arrest Warrant	CoE Convention on Extradition 4 protocols (3 ratified by UK, limited ratification by EU27 MS of all protocols)
Mutual Legal Assistance	CoE Convention on Mutual Assistance in Criminal Matters (3 protocols ratified by UK, 2 <sup>nd</sup> and 3 <sup>rd</sup> not by all EU27). CoE Convention on Cybercrime (Ratified by UK and 25 of EU27 MS)
European Freezing and Confiscation Order	CoE Convention on Laundering, search, seizure and confiscation of the proceeds of crime CoE Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (ratified by UK, but only 17 of EU27 MS)
Transfer of Prisoners	CoE Convention on the transfer of sentenced persons Two protocols (1 ratified by UK, 24 of EU27 MS)
ECRIS	CoE Convention on Mutual Assistance in Criminal Matters
Joint Investigation Teams	2nd Protocol CoE Convention on Mutual Assistance in Criminal Matters (ratified by UK, 23 of EU27 MS)
Eurojust and EJM	Cooperation with UK as third country

# Judicial cooperation in criminal matters (5)

## - EUROJUST

- No participation in EUROJUST – UK is a third country (no national member, no participation in governance or operational cooperation)
- No access to Case Management System
- No exchange of operational personal data
- Possible future cooperation with UK: as for other third countries, according to EUROJUST's legal framework.

# Judicial cooperation in criminal matters (6)

- What is being done to address the issues

- **Member States:**
  - Make an inventory of and assess impact on pending and ongoing cooperation procedures and ECRIS requests
  - Assess fall-back, national and applicable international legal framework
  - Assess need for ratification of existing international conventions
- **EU:** Prepare disconnection from the ECRIS system
- **Stakeholders:** Eurojust and European Judicial Network preparations

# Data protection (1)

## Key issues

- Transfers of personal data from the EU to the UK will become subject to the rules in **Chapter V of the Law enforcement Directive (LED)** and **Chapter V of the Europol Regulation** on international transfers
- For personal data originating from the UK that would be kept in EU databases but no longer updated, data quality issues could arise

# Data protection (2)

## Law Enforcement Directive (LED) – Toolbox for transfers

- LED provides a broad toolbox for data transfers to third countries, such as:
  - **Legally binding instrument** providing appropriate safeguards
  - **Self-assessment** by transferring authority **that appropriate safeguards exist**; requires information of DPA about categories of data
- In addition, LED provides direct statutory bases for data transfers (so-called **derogations**), e.g. on the following grounds:
  - Protection of **vital interests**
  - Prevention of an **immediate or serious threat to public security** of a MS/third country
  - In an **individual case** for the purposes of criminal law enforcement, including the safeguarding against and the prevention of threats to public security, unless fundamental rights of individual override public interest (**balancing**)

# Data protection (3)

## Law Enforcement Directive – General conditions for transfers

LED imposes a number of general conditions for any data transfer:

- **Necessary** for the purpose of fighting crime (Article 1(1))
- Transfers only **to competent law enforcement authorities**
- In case of personal data originating from another Member State, need for prior authorisation from that Member State (unless urgency)
- **Documentation** of transfers (Art. 37(2), 38(3), 39(4))
- Transfers must **not** result in **undermining the level of protection** ensured by the LED

Same conditions apply to so-called **onward transfers**, which in addition must be subject to prior authorisation by transferring authority/another competent authority of same MS

# Data protection (4)

## - What additional action is required?

### Stakeholders:

- **Agencies:** Prepare for disconnection and change of rules for data transfer to UK

### Member States:

- Try to finalize ongoing procedures before withdrawal date
- Consider whether to request the UK to remove the data from its systems
- Work together with eu-LISA on the disconnection and further processing/deletion of UK data
- Sensitize law enforcement and border authorities on UK alerts in SIS

# Background and reference information

- Brexit preparedness notice on data protection

[https://ec.europa.eu/info/sites/info/files/file\\_import/data\\_protection\\_en.pdf](https://ec.europa.eu/info/sites/info/files/file_import/data_protection_en.pdf)