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COVER NOTE

From:	Secretary-General of the European Commission, signed by Ms Martine DEPREZ, Director
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To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union

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Subject:	Recommendation for a COUNCIL DECISION authorising the opening of negotiations for an agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, in respect of Gibraltar

Delegations will find attached document COM(2021) 411 final.

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Brussels, 20.7.2021
COM(2021) 411 final

Recommendation for a

COUNCIL DECISION

authorising the opening of negotiations for an agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, in respect of Gibraltar

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE RECOMMENDATION

With this recommendation, the Commission recommends that the Council authorise the opening of negotiations for an agreement between the Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, in respect of the British Overseas Territory of Gibraltar, to nominate the Commission as Union negotiator and to address directives to the negotiator [and designate a special committee in consultation with which the negotiations must be conducted].

2. BACKGROUND

On 1 February 2020, the United Kingdom withdrew from the European Union and from the European Atomic Energy Community (Euratom).

The arrangements for the withdrawal are set out in the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland ('the United Kingdom') from the European Union and the European Atomic Energy Community ('the Withdrawal Agreement')¹ including a Protocol on the specific arrangements in respect of the British Overseas Territory of Gibraltar (hereafter "Gibraltar"). The Withdrawal Agreement entered into force on 1 February 2020 and provided for a transition period during which Union law² applied to and in the United Kingdom in accordance with that Agreement. This period ended on 31 December 2020. The Agreement and the Protocol were applicable to Gibraltar according to Article 3.1.a) of the Withdrawal Agreement. The implementation of the Protocol on Gibraltar was supervised by the Specialised Committee on the Protocol on Gibraltar where Spain had an active role. With the exception of Article 1, the Protocol has ceased to apply in Gibraltar after the end of the transition period.

During this transition period, the European Union, Euratom and the United Kingdom concluded a Trade and Cooperation Agreement, which was concluded by the Union on the basis of Council Decision (EU) 2021/689³ and provisionally applied from on 1 January 2021⁴. It entered into force on 1 May 2021. That Agreement neither applies nor produces any effect in Gibraltar, which is excluded from its territorial scope.

Furthermore, Euratom and the United Kingdom concluded an Agreement for Cooperation on the Safe and Peaceful Uses of Nuclear Energy, which was provisionally applicable as of 1

¹ OJ L 29, 31.1.2020, p. 7.

² As defined in Article 2 of the Withdrawal Agreement.

³ Council Decision (EU) 2021/689 of 29 April 2021 on the conclusion, on behalf of the Union, of the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, and of the Agreement between the European Union and the United Kingdom of Great Britain and Northern Ireland concerning security procedures for exchanging and protecting classified information (OJ L 149, 30.04.2021, p.2).

⁴ Council Decision (EU) 2020/2252 of 29 December 2020 on the signing, on behalf of the Union, and on provisional application of the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, and of the Agreement between the European Union and the United Kingdom of Great Britain and Northern Ireland concerning security procedures for exchanging and protecting classified information (OJ L444, 31.12.2020, p.2).

January 2021⁵ and entered into force on 1 May 2021⁶. This agreement is not applicable to Gibraltar.

3. THE EU-UK AGREEMENT ON GIBRALTAR

In the statements to the minutes of the European Council meeting of 25 November 2018, the following declaration of the European Council and of the Commission was included: ‘After the United Kingdom leaves the Union, Gibraltar will not be included in the territorial scope of the agreements to be concluded between the Union and the United Kingdom. However, this does not preclude the possibility to have separate agreements between the Union and the United Kingdom in respect of Gibraltar. Without prejudice to the competences of the Union and in full respect of the territorial integrity of its Member States as guaranteed by Article 4(2) of the Treaty on European Union, those separate agreements will require a prior agreement of the Kingdom of Spain.’

In addition, the following declaration of the Commission was attached to the Council decision on the signature of the Trade and Cooperation Agreement between the European Union, Euratom and the United Kingdom: ‘Following the Joint Declaration of the European Council and of the European Commission on the territorial scope of agreements to be concluded between the Union and the United Kingdom of 25 November 2018, the agreement to be signed between the Union and the United Kingdom on 30 December 2020 does not include Gibraltar. This does not preclude the possibility to have separate agreements between the Union and the United Kingdom in respect of Gibraltar. The Commission stands ready to examine any request from Spain, in agreement with the United Kingdom, to initiate the procedure for the negotiation of such separate agreements should they be compatible with Union law and the Union interests.’

The Kingdom of Spain and the United Kingdom reached an understanding on a possible framework for an agreement on Gibraltar and on 31 December 2020, the Kingdom of Spain invited the Commission to initiate, on the basis of this understanding, the procedure for the negotiation of such agreement at Union level.

In line with the statement to the minutes of the European Council meeting of 25 November 2018 on the territorial scope of agreements to be concluded between the Union and the United Kingdom, the envisaged agreement ‘will require a prior agreement of the Kingdom of Spain’. Given that Spain, as the neighbouring Member State and as the Member State that will be entrusted with the application and implementation of certain provisions of the future agreement, will be particularly affected by the agreement, the Commission will maintain close contacts with the Spanish authorities throughout the negotiations and take their views duly into account.

The envisaged agreement should take into account the special political, legal and geographical circumstances of Gibraltar according to International law.

The conclusion of such an agreement would be beneficial in view of Gibraltar’s geographical proximity and economic interdependence with the Union.

The envisaged agreement aims at establishing a new relationship between the Union and the United Kingdom in respect of Gibraltar that removes physical barriers to the circulation of persons and goods to contribute to shared prosperity within the region.

⁵ See footnote 4.

⁶ OJ L 150, 30.4.2021, p. 1. Corrigendum OJ L 178, 20.5.2021.

In relation with the **circulation of persons**, the aim of the agreement is to remove the current physical structures while nevertheless maintaining that Gibraltar would not become part of the Schengen area without control at internal borders nor of the Customs Union.

To ensure a full protection of the Schengen area, external border control and surveillance would take place at Gibraltar port, airport and waters carried out by Spain applying the relevant EU rules. The Border Crossing points to be established at port and airport would allow the application of the relevant EU legislation including the implementation and use of databases necessary for border checks⁷. Spanish border guards would have all necessary powers to perform border controls and surveillance and the ensuing obligations, including with respect to acting on alerts in the databases (for example to refuse entry). In case of alerts, including refusal of entry and arrest, Spain would take follow up actions and – if necessary – UK authorities in respect of Gibraltar would assist and facilitate the implementation of the alert, such as the transfer of the person or object concerned to the authorities of Spain.

The exercise of these functions by Spain would be subject to regular verification in the form of Schengen evaluations.

Time spent in Gibraltar would be calculated as time spent in the Schengen area for the purpose of the calculation of authorised stay. UK nationals other than those resident in Gibraltar at the time of signature of the agreement would be treated as third country nationals for the purposes of entry and stay in Gibraltar. Persons resident in Gibraltar would still be considered third country nationals for the purpose of Union law, but they would have the right to visa-free access to the Schengen area for up to 90 days in any 180-day period in line with the relevant provisions of applicable Union law. They would be exempt from stamping⁸, the Entry and Exit System⁹ and ETIAS¹⁰. Furthermore, persons legally resident in Gibraltar would not be denied entry in the territory of Gibraltar.

As the vast majority of border crossings will continue to take place over the external land border, the carrying out of border checks and surveillance by Spain would be complemented by further specific cooperation arrangements ('safeguard measures') designed to ensure the security of the Schengen area without control at the internal borders in an equivalent manner. They would enable to mitigate the irregular migration and security risks, including any risks emerging from facilitations in the flow of goods or relaxation of customs procedures, and ensure an equivalent protection of that external land border and of the Schengen area at large.

⁷ Such as the Schengen Information System (SIS) in line with Regulation (EC) No 1986/2006, Regulation (EC) No 1987/2006, Council Decision 2007/533/JHA, the Visa Information System (VIS) in line Regulation (EC) No 767/2008, the Entry Exit System (EES) in line with Regulation (EU) 2017/2226, European Travel Information and Authorisation System (ETIAS) in line with Regulation (EU) 2018/1240. The interoperability regulations are also relevant (namely, Regulation (EU) 2019/817 and Regulation (EU) 2019/818).

⁸ Article 11 of Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ L 77, 23.3.2016, p. 1).

⁹ Regulation (EU) 2017/2226 of the European Parliament and of the Council of 30 November 2017 establishing an Entry/Exit System (EES) to register entry and exit data and refusal of entry data of third-country nationals crossing the external borders of the Member States and determining the conditions for access to the EES for law enforcement purposes, and amending the Convention implementing the Schengen Agreement and Regulations (EC) No 767/2008 and (EU) No 1077/2011 (OJ L 327, 9.12.2017, p. 20).

¹⁰ Regulation (EU) 2018/1240 of the European Parliament and of the Council of 12 September 2018 establishing a European Travel Information and Authorisation System (ETIAS) and amending Regulations (EU) No 1077/2011, (EU) No 515/2014, (EU) 2016/399, (EU) 2016/1624 and (EU) 2017/2226 (OJ L 236, 19.9.2018, p. 1).

The safeguard measures would concern inter alia police and judicial cooperation, data protection, return of irregular migrants and prevention of irregular migration, arrangements on the responsibility for applicants for international protection, alignment of visa and residence permit policy.

More specifically, the safeguard measures would at least consist in the following:

- Rules establishing that Spain, in cooperation with the UK, would be responsible for the examination of applications for international protection submitted in Gibraltar in line with applicable Union law, including the use of the Eurodac system to fingerprint asylum applicants and those apprehended while trying to cross the border irregularly. Where necessary, UK authorities in respect of Gibraltar would have to assist and facilitate the Spanish authorities in exercising their tasks. As a consequence of this set-up, the movement of applicants for international protection between the territory of the Member States and Dublin Associated Countries, on the one hand, and Gibraltar, on the other hand, should not result in a cessation of responsibility under the Dublin Regulation¹¹.
- Rules ensuring the obligation on Spain, in cooperation with the UK, to return illegally staying third country nationals from the territory of Gibraltar, including at the border, and to take all necessary measures to enforce such returns in line with the applicable Union law. Where necessary, UK authorities in respect of Gibraltar would have to assist and facilitate the Spanish authorities in exercising their tasks.
- Rules ensuring that migrant smuggling is punishable by Gibraltar law as a criminal offence.
- Rules ensuring the application in Gibraltar airport of Union law on carriers' liability¹².
- Rules ensuring the application of the Advance Passenger Information (API) Directive¹³ in Gibraltar port and airport.
- Rules providing that Spain would be exclusively competent for issuing short-stay visas in respect of Gibraltar and in line with the applicable EU rules.
- Rules providing that Spain would be exclusively competent for issuing long-stay visas and residence permits to third country nationals in respect of Gibraltar. While the conditions for granting long-stay visas and residence permits would be established under Gibraltar law, Spain would issue such documents applying the relevant provisions and procedures under EU law and in the appropriate format. Residence permits would be clearly marked as valid for Gibraltar¹⁴. Spain would conduct the necessary checks in IT databases and may refuse to issue a long-stay visa or residence permit on the basis of an alert in the Schengen Information System (SIS). Other Member States or Schengen Associated Countries having entered alerts in SIS would be consulted by Spain and would have the right to oppose the issue of a long-stay visa or residence

¹¹ Regulation (EU) 604/2013

¹² Article 26 of the Convention Implementing the Schengen Agreement and Directive 2001/51/EC

¹³ Article 26 of the Convention Implementing the Schengen Agreement and Directive 2004/82/EC

¹⁴ Such residence permits would not fall under the scope of Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents or the other EU legal migration Directives.

permit. In case a long-stay visa or residence permit is issued, Member States or Schengen Associated Countries would not be obliged to remove alerts for refusal of entry from the SIS.

- Rules on the exchange of relevant operational information between the UK authorities in respect of Gibraltar and those of the Member States, including information on criminal records and information on wanted and missing persons and objects, both upon request and spontaneously.
- Rules on cooperation between the UK authorities in respect of Gibraltar and Europol and Eurojust in line with arrangements for the cooperation with third countries set out in relevant Union legislation.
- Rules providing for the possibility of cross border operational police cooperation.
- Rules obliging the UK in respect of Gibraltar to require PNR data in respect of all incoming flights to Gibraltar airport to be made available to the Spanish authorities in line with the PNR directive¹⁵.
- Rules requiring the performance of enhanced police checks in the areas near the external land border between Spain and Gibraltar, for both law enforcement and migration purposes.
- Rules on firearms, explosive precursors and drugs.
- An obligation on the UK in respect of Gibraltar to ensure that persons who would otherwise be refused entry into the Schengen area, inter alia on grounds of being considered a threat to public policy or internal security, are prevented and prohibited from leaving the territory of Gibraltar and entering the Schengen area. The agreement would establish a pre-notification or pre-authorisation scheme for Gibraltar residents in order to allow travel beyond Gibraltar in to the Schengen area.
- A legal framework allowing for effective judicial cooperation in criminal matters in key areas, which should include at least provisions that ensure the application of relevant Council of Europe Conventions on extradition, mutual legal assistance and asset freezing and confiscation and their Additional Protocols, to Gibraltar.

The agreement would also include specific rules requiring that the acquisition and maintenance of the right to reside in Gibraltar would be conditional upon having a real connection to Gibraltar.

The agreement would provide for an obligation for the parties to ensure that their laws allow crossing between the Union and Gibraltar without checks at a border crossing point. It will be assessed at a later stage, whether and if so, to what extent, the Union may have to amend relevant Union legislation to comply with that obligation or to achieve the operation of the aforementioned safeguards.

The agreement would provide for a mechanism whereby future relevant developments of Union law in the field of circulation of persons can – where necessary – be reflected in adaptations to the agreement. The agreement should also include a provision according to which the agreement may be terminated by the Union in case the adaptation is not effected. It

¹⁵ Directive (EU) 2016/681

would also provide for a mechanism to evaluate the implementation of the part on circulation of persons of the agreement. When applying this mechanism, the Commission will seek from Member States, particularly Spain as the neighbouring Member State and as the Member State responsible for the implementation of the Schengen checks, an opinion on the feasibility of continuing with the agreement. These opinions will be duly taken into consideration. Finally, the agreement would foresee a mechanism to evaluate the implementation of this part of the agreement and the possibility for each party, after an initial four years of implementation, and without prejudice to the general termination provisions, to decide on whether to continue or terminate the agreement.

In relation with the **movement of goods**, the aim of the envisaged agreement is to remove the physical barriers, including any physical infrastructure or control post and related checks and controls for goods, between Gibraltar and the Union for the free circulation of goods. In order to protect the integrity of the Union's Single Market and Customs Union and the Union's financial interests, this could be achieved if a customs union, in accordance with Article XXIV of the GATT 1994, is established between the Union and the United Kingdom in respect of Gibraltar and the full application of the Union acquis on the single market for goods to and in Gibraltar is ensured, together with tax and customs cooperation, an alignment of the taxation system of Gibraltar for goods with the system of Spain, appropriate checks and controls in Gibraltar, a monitoring by the Union and the Spanish authorities of the related activities of the competent authorities in respect of Gibraltar, the possibility for the Union to unilaterally take appropriate measures, the adequate attribution to the Union's budget of customs duties and arrangements to counter fraud and any other illegal activity affecting the financial interests of the Union and to combat money laundering and terrorist financing.

The envisaged agreement would also cover the fields of **transport, environment and climate, social security coordination and citizens' rights** to the extent necessary to contribute to the objective of shared prosperity in the region.

Finally, the envisaged agreement would include a solid **governance** structure that ensures the correct implementation of the agreement and the autonomy of the European Union, including termination and suspension clauses. The envisaged agreement should establish a governing body responsible for managing and supervising the implementation and operation of the envisaged agreement, facilitating the resolution of disputes. The governing body should take decisions and make recommendations concerning its evolution. Member States, particularly Spain, should be part of the delegation representing the Union in the governing body.

In implementing the provisions of the agreement, including on suspension and termination, the Commission will take due account of the specific position of Spain, as the neighbouring Member State and as the Member State responsible for the implementation of certain parts of the agreement, as regards its application, implementation and termination. In this context, Spain and any other Member State may request the Commission to trigger the application of the clauses of the agreement on suspension and termination.

The Commission will conduct the negotiations in line with the negotiating directives set out in the annex to the Decision and in consultation with a special committee appointed by the Council and in permanent and direct contact with the Spanish Authorities.

The Commission will, in a timely manner, keep the European Parliament fully informed of the negotiations.

4. LEGAL BASIS

The procedural legal basis for a decision authorising the opening of negotiations of an agreement between the Union and a third country and addressing directives to the negotiator is Article 218(3) and (4) TFEU. In addition, insofar as the agreement would also be negotiated on behalf of Euratom because the annex to the decision contains negotiating directives regarding matters falling under the Euratom Treaty, the legal basis of the decision should include Article 101 of the Treaty establishing the European Atomic Energy Community ('EAEC').

The legal basis of the recommended decision should therefore be Article 218(3) and (4) TFEU and Article 101 EAEC. The substantive legal basis for the signature and conclusion of the new agreement can only be determined at the end of the negotiations, in light of its contents.

Recommendation for a

COUNCIL DECISION

authorising the opening of negotiations for an agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, in respect of Gibraltar

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 218(3) and (4) thereof,

Having regard to the Treaty establishing the European Atomic Energy Community, and in particular Article 101 thereof,

Having regard to the recommendation from the European Commission,

Whereas:

- (1) On 1 February 2020, the United Kingdom of Great Britain and Northern Ireland ('the United Kingdom') withdrew from the European Union and the European Atomic Energy Community ('Euratom').
- (2) The Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community provided the arrangements for the orderly withdrawal of the United Kingdom, including a Protocol on the specific arrangements in respect of Gibraltar. According to Article 3(1)(a) of the Agreement, Union law applied to and in the United Kingdom during a transition period which ended on 31 December 2020. The Protocol, with the exception of its Article 1, has ceased to apply in Gibraltar after the end of the transition period.
- (3) The European Union and Euratom, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, concluded a Trade and Cooperation Agreement, which was concluded by the Union on the basis of Council Decision (EU) 2021/689 and provisionally applied from 1 January 2021. It entered into force on 1 May 2021. The Agreement neither applies nor produces any effect in Gibraltar, which is excluded from its territorial scope.
- (4) At the European Council meeting of 25 November 2018 a statement was made to the minutes of that meeting establishing the possibility to have separate agreements between the Union and the United Kingdom of Great Britain and Northern Ireland in respect of Gibraltar, without prejudice to the competences of the Union and in full respect of the territorial integrity of its Member States as guaranteed by Article 4(2) of the Treaty on European Union, and that those separate agreements will require a prior agreement of the Kingdom of Spain.
- (5) On 31 December 2020, the Kingdom of Spain conveyed their desire that the Union establish a broad and balanced arrangement with regard to Gibraltar based on the understanding reached with the UK on a possible framework for an agreement on Gibraltar.

- (6) It appears beneficial to conclude such an Agreement in view of Gibraltar's geographical proximity and economic interdependence with the Union.
- (7) Negotiations should therefore be opened with a view to concluding an agreement between the Union and Euratom, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, in respect of Gibraltar. The Commission should be nominated as the Union negotiator.
- (8) The agreement should be without prejudice to the issues of sovereignty and jurisdiction and should not affect the legal position of the Kingdom of Spain with regard to sovereignty and jurisdiction in respect of Gibraltar.
- (9) The agreement should respect the territorial integrity of its Member States as guaranteed by Article 4(2) of the Treaty on European Union,

HAS ADOPTED THIS DECISION:

Article 1

The Commission is hereby authorised to negotiate an agreement with the United Kingdom of Great Britain and Northern Ireland in respect of the British Overseas Territory of Gibraltar.

The negotiations shall be conducted on the basis of the negotiating directives of the Council set out in the Annex to this Decision.

The negotiations shall be conducted in consultation with the Working Party on the United Kingdom

Article 2

The Commission is hereby nominated as the Union negotiator.

Article 3

This Decision is addressed to the Commission.

Done at Brussels,

*For the Council
The President*