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PROPOSAL

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date of receipt:	6 April 2022
To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union
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Subject:	Proposal for a COUNCIL DECISION on the position to be taken on behalf of the European Union vis-à-vis the United Kingdom of Great Britain and Northern Ireland regarding the determination under Article 540(2) 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, of the date from which personal data as referred to in Articles 530, 531, 534 and 536 of that Agreement may be supplied by Member States to the United Kingdom

Delegations will find attached document COM(2022) 158 final.

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EUROPEAN
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Proposal for a

COUNCIL DECISION

on the position to be taken on behalf of the European Union vis-à-vis the United Kingdom of Great Britain and Northern Ireland regarding the determination under Article 540(2) 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, of the date from which personal data as referred to in Articles 530, 531, 534 and 536 of that Agreement may be supplied by Member States to the United Kingdom

EXPLANATORY MEMORANDUM

1. SUBJECT MATTER OF THE PROPOSAL

This proposal concerns a decision of the Council, in order for the Union to make a declaration setting out the date from which Member States may supply personal data relating to DNA profiles and dactyloscopic data to the United Kingdom, in accordance with Article 540(2) 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 (hereafter: “United Kingdom”), of the other part (hereafter: “the Trade and Cooperation Agreement”).

2. CONTEXT OF THE PROPOSAL

2.1. The TCA

The Trade and Cooperation Agreement (hereafter: “TCA”) establishes the basis for a broad relationship between the Union and the United Kingdom, within an area of prosperity and good neighbourliness, characterised by close and peaceful relations based on cooperation, respectful of the Parties’ autonomy and sovereignty. It was provisionally applied since 1 January 2021 and entered into force on 1 May 2021.

The TCA provides for cooperation between the Parties on the automated comparison of DNA profiles, dactyloscopic data and vehicle registration data. Such cooperation may however begin only once the Union has verified that the United Kingdom has fulfilled the conditions set out in Article 539 of and Annex 39 to the TCA. Following an evaluation visit to the United Kingdom on 24 and 25 November 2021, the EU evaluation team concluded in its reports that the cooperation with the United Kingdom on DNA profiles and dactyloscopic data meets the relevant requirements. These reports were submitted to the Council on 17 March 2022.

The United Kingdom has so far not indicated that it is ready to be evaluated regarding vehicle registration data.

2.2. The envisaged act of the Union

Article 540(2) of the TCA provides that the Union is to determine the date from which Member States may supply personal data to the United Kingdom pursuant to Title II (‘Exchange of DNA, fingerprints and vehicle registration data’), on the basis of an overall evaluation report on the evaluation visit and, where applicable, a pilot run.

Pursuant to Annex 39 to the TCA, the Council is to decide on the basis of an evaluation whether the United Kingdom has met the required conditions for automated data exchange. The decision is to be based on an overall evaluation report, summarising the results of a relevant questionnaire, an evaluation visit and, where applicable, a pilot run.

That decision becomes binding, under international law, on the United Kingdom by way of a unilateral declaration by the Union, as is clear from Article 540(2) of the TCA. The unilateral declaration of the Union needs to be notified to the United Kingdom.

3. POSITION TO BE TAKEN ON THE UNION'S BEHALF

3.1. Background

The TCA makes it possible to cooperate on the automated comparison of DNA profiles, fingerprints and vehicle registration data. In order to take advantage of these possibilities, the United Kingdom first needed to undergo an evaluation.

Following an evaluation visit to the United Kingdom on 24 and 25 November 2021, the EU evaluation team concluded in its reports that the cooperation with the United Kingdom on DNA profiles and dactyloscopic data meets the relevant requirements. These reports were submitted to the Council on x March 2022 and paved the way for the Council to allow the Union to declare that Member States may supply personal data regarding DNA profiles and dactyloscopic data to the United Kingdom as referred to in Article 540(2) of the TCA.

3.2. Proposed position

In view of the above, the Commission proposes to set XXXXX as the date from which Member States may supply, to the United Kingdom, personal data regarding DNA profiles and dactyloscopic data as referred to in Articles 530, 531, 534 and 536 of the Trade and Cooperation Agreement.

During its membership of the Union, the United Kingdom participated in the exchange of DNA profiles and dactyloscopic data between Member States, in accordance with Council Decisions 2008/615/JHA¹ and 2008/616/JHA². In order to avoid a gap in the ongoing cooperation concerning DNA profiles and dactyloscopic data, the TCA provides for an interim period, during which Member States may supply such data to the United Kingdom pending the outcome of the evaluations provided for in Art 540(1) TCA. That interim period lasted initially until 30 September 2021 and was extended to 30 June 2022 by decision of the Specialised Committee on Law Enforcement and Judicial Cooperation of 28 September 2021³. It may however not be further extended. Therefore, to avoid a gap in the ongoing cooperation, the Union will have to make the required unilateral declaration by 30 June 2022.

4. LEGAL BASIS

4.1. Procedural legal basis

4.1.1. Principles

Article 218(9) of the TFEU provides for decisions establishing '*the positions to be adopted on the Union's behalf in a body set up by an agreement, when that body is called upon to adopt acts having legal effects, with the exception of acts supplementing or amending the institutional framework of the agreement.*'

¹ Council Decision 2008/615/JHA of 23 June 2008 on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime (OJ L210, 6.8.2008, p. 1).

² Council Decision 2008/616/JHA of 23 June 2008 on the implementation of Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime (OJ L210, 6.8.2008, p. 12).

³ Decision No 1/2021 of the Specialised Committee established by Article 8(1)(r) 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, of 28 September 2021 as regards the extension of the period referred to in Article 540(3) during which DNA profiles and dactyloscopic data can be exchanged with the United Kingdom [2021/1946] (Pursuant to Rule 9(2) of Annex 1 of the Trade and Cooperation Agreement, the Secretariat shall record any decision or recommendation under a serial number and with a reference to the date of its adoption.) (OJ L 397, 10.11.2021, p. 32).

The concept of ‘*acts having legal effects*’ includes acts that have legal effects by virtue of the rules of international law governing the body in question. It also includes instruments that do not have a binding effect under international law, but that are ‘*capable of decisively influencing the content of the legislation adopted by the EU legislature*’⁴.

4.1.2. Application to the present case

Article 540(1) and (2) of the TCA provides that where the United Kingdom has met the conditions set out in Article 539 and Annex 39 of the TCA, the Union shall determine the date or dates from which Member States may supply, to the United Kingdom, personal data regarding DNA profiles and dactyloscopic data. Whilst such determination is a unilateral act of the Union and not an act to be adopted by any of the bodies set up by the TCA, it nevertheless produces legal effects. Therefore, the Union position underlying that determination should be established in accordance with Article 218(9) TFEU, applied by analogy.

The legal effects of the declaration are binding under international law and fall completely on the Union, as a party to the TCA. Therefore, in accordance with Article 3(2) TFEU, the Union has exclusive competence in this matter.

The determination of the relevant date as referred to in Article 540(2) of the TCA does not lead to the framework of that agreement being supplemented or amended.

4.2. Substantive legal basis

4.2.1. Principles

The substantive legal basis for a decision under Article 218(9) TFEU depends primarily on the objective and content of the envisaged act in respect of which a position is taken on the Union’s behalf. If the envisaged act pursues two aims or has two components and if one of those aims or components is identifiable as the main one, whereas the other is merely incidental, the decision under Article 218(9) TFEU must be founded on a single substantive legal basis, namely that required by the main or predominant aim or component.

With regard to an envisaged act that simultaneously pursues a number of objectives, or that has several components, which are inseparably linked without one being incidental to the other, the substantive legal basis of a decision under Article 218(9) TFEU will have to include, exceptionally, the various corresponding legal bases.

4.2.2. Application to the present case

The determination of the date or dates referred to in Article 540(2) of the Trade and Cooperation Agreement pursues objectives and has components in the area of data protection and police cooperation.

Therefore, the substantive legal basis of the proposed decision is Article 16(2) and Article 87(2)(a) TFEU.

The Trade and Cooperation Agreement is binding on all the Member States by virtue of Decision (EU) 2021/689⁵, which is based on Article 217 TFEU as its substantive legal basis.

⁴ Judgment of the Court of Justice of 7 October 2014, *Germany v. Council*, C-399/12, ECLI:EU:C:2014:2258, paragraphs 61 to 64.

⁵ 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

4.3. Conclusion

The legal basis of the proposed decision should be Articles 16(2) and 87(2)(a) TFEU, in conjunction with Article 218(9) TFEU.

and Northern Ireland concerning security procedures for exchanging and protecting classified information, OJ L 149, 30.4.2021, p. 2.

Proposal for a

COUNCIL DECISION

on the position to be taken on behalf of the European Union vis-à-vis the United Kingdom of Great Britain and Northern Ireland regarding the determination under Article 540(2) 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, of the date from which personal data as referred to in Articles 530, 531, 534 and 536 of that Agreement may be supplied by Member States to the United Kingdom

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 16(2) and Article 87(2) point (a), in conjunction with Article 218(9) thereof,

Having regard to 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 information⁶,

Having regard to the proposal from the European Commission,

Whereas:

- (1) 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 (hereafter: ‘the United Kingdom’), of the other part⁷ (‘the Trade and Cooperation Agreement’) provides for reciprocal cooperation between the competent law enforcement authorities of the Member States, on the one side, and the United Kingdom, on the other side, concerning the automated comparison of DNA profiles, dactyloscopic data and vehicle registration data. As a prerequisite for such cooperation, the United Kingdom first needs to take the necessary implementing measures and undergo an evaluation by the Union.
- (2) On the basis of an overall evaluation report, summarising the results of a relevant questionnaire, an evaluation visit and, where applicable, a pilot run, the Union is to determine the date or dates from which such data may be supplied by Member States to the United Kingdom pursuant to the Trade and Cooperation Agreement.
- (3) By letter of 23 July 2021, the United Kingdom informed the Commission, through the Specialised Committee on Law Enforcement and Judicial Cooperation, that it had implemented the obligations imposed under Title II of Part 3 of the Trade and Cooperation Agreement in respect of DNA profiles and dactyloscopic data. The United Kingdom also made declarations and designations in accordance with Article

⁶ OJ L 149, 30.4.2021, p. 2.

⁷ OJ L 149, 30.4.2021, p. 10.

22 of Chapter 0 of Annex 39 of the the Trade and Cooperation Agreement and expressed its readiness to be evaluated for the exchange of data between the United Kingdom and Member States on DNA profiles and dactyloscopic data.

- (4) The Commission sent the United Kingdom, on 14 October 2021, questionnaires relating to the automatic exchange of DNA profiles and dactyloscopic data. The United Kingdom provided the Commission, on 8 November 2021, with its answers to these questionnaires. These answers were provided to the evaluation team, and submitted to the Council Working Party on JHA Information Exchange and the Council Working Party on the United Kingdom on 11 November 2021.
- (5) In line with Chapter 4 of Annex 39 of the the Trade and Cooperation Agreement, the Council decided, on 9 November 2021, that no pilot run was required in respect of DNA profiles and dactyloscopic data.
- (6) On 24 and 25 November 2021, the United Kingdom underwent an evaluation with regard to searching and comparing DNA profiles and dactyloscopic data. The evaluation report regarding DNA profiles concluded that, based on the outcome of the ex ante evaluation, the implementation of the automated comparison of DNA-profiles and the related information flow can be considered as successfully concluded in the UK, both at legal and at technical level. The evaluation report regarding dactyloscopic data concluded that, based on the outcome of the ex ante evaluation, the implementation of the automated dactyloscopic data application and the related automated dactyloscopic data information flow can be considered as successfully concluded in the UK, both at legal and at technical level.
- (7) In line with Article 5 of Chapter 4 of Annex 39 to the Trade and Cooperation Agreement, the evaluation reports, summarising the results of the questionnaires and the evaluation visit, were presented to the Council on 17 March 2022.
- (8) Since the United Kingdom fulfilled the conditions set out in Article 539 and Annex 39 of the Trade and Cooperation Agreement, the Union should, pursuant to Article 540(2) of the Trade and Cooperation Agreement, determine the date or dates from which Member States may supply, to the United Kingdom, personal data regarding DNA profiles and dactyloscopic data as referred to in Articles 530, 531, 534 and 536 of the the Trade and Cooperation Agreement. The Union should notify the United Kingdom of this position in the Specialised Committee on Law Enforcement and Judicial Cooperation.
- (9) The Trade and Cooperation Agreement is binding on all the Member States by virtue of Council Decision (EU) 2021/689, which is based on Article 217 TFEU as its substantive legal basis.
- (10) Denmark and Ireland are bound by Article 540 of the Trade and Cooperation Agreement by virtue of Council Decision (EU) 2021/689 and are therefore taking part in the adoption and application of this Decision which implements the Trade and Cooperation Agreement,

HAS ADOPTED THIS DECISION:

Article 1

The position to be expressed on the Union's behalf in respect of the date or dates from which personal data regarding DNA profiles and dactyloscopic data as referred to in Articles 530, 531, 534 and 536 of the Trade and Cooperation Agreement may be supplied by Member

States to the United Kingdom shall be based on the draft unilateral declaration of the Union attached to this Decision.

Article 2

The United Kingdom shall be notified of the Union's position established in Article 1 in the Specialised Committee on Law Enforcement and Judicial Cooperation.

Article 3

This Decision is addressed to the Commission.

Done at Brussels,

*For the Council
The President*