EUROPEAN
COMMISSION

Brussels, 26.11.2021
COM(2021) 745 final

2021/0389 (NLE)

Proposal for a

COUNCIL DECISION

on the position to be taken on behalf of the European Union in the Partnership Council established by 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, regarding the extension of the interim period referred to in Article 552(11) of that Agreement during which the United Kingdom may derogate from the obligation to delete Passenger Name Record data of passengers after their departure from the United Kingdom

EXPLANATORY MEMORANDUM

1. SUBJECT MATTER OF THE PROPOSAL

This proposal concerns the decision establishing the position to be taken on behalf of the European Union in the Partnership Council in connection with Article 552(13) 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".

The Trade and Cooperation Agreement makes it possible for Passenger Name Record ("PNR") data relating to passengers on flights between the Union and United Kingdom to be transferred to, processed and used by the United Kingdom. The Trade and Cooperation Agreement requires the United Kingdom to delete PNR data received pursuant to the Trade and Cooperation Agreement after passengers' departure from the country, unless a risk assessment indicates the need to retain such PNR data.

However, the Trade and Cooperation Agreement provides for a derogation to that requirement on a temporary basis, for an interim period of one year, i.e. until 31 December 2021, recognising the special circumstances that the United Kingdom has to make certain technical adjustments in order to transform the PNR processing systems which it operated whilst Union law applied to it and which, when carried out, would enable PNR data to be deleted in accordance with the Trade and Cooperation Agreement.

The derogation is coupled with a process whereby the United Kingdom provides to the Specialised Committee on Law Enforcement and Judicial Cooperation established by the Trade and Cooperation Agreement a report from an independent administrative body, including an annex by the United Kingdom supervisory authority for data protection, as to whether the additional data protection safeguards that apply during the interim period have been applied effectively and an assessment of whether these special circumstances persist, together with a description of the efforts made to transform the PNR processing systems of the United Kingdom into systems which would enable PNR data to be deleted after the passengers' departure. The Specialised Committee on Law Enforcement and Judicial Cooperation considered this report and assessment provided by the United Kingdom in its meeting on 19 October 2021. Pursuant to Article 552(13), second sentence, of the Trade and Cooperation Agreement, where the above-mentioned special circumstances persist, the Partnership Council shall extend the interim period for one year, i.e. until 31 December 2022.

2. CONTEXT OF THE PROPOSAL

2.1. The Trade and Cooperation Agreement between the Union and the United Kingdom

The Trade and Cooperation Agreement 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. The Trade and Cooperation Agreement entered into force on 1 May 2021 and was provisionally applied since 1 January 2021.

2.2. The Partnership Council

The Trade and Cooperation Agreement sets up a number of joint bodies, including the Partnership Council, which is a "body set up by an agreement" in the sense of Article 218(9) of the Treaty on the Functioning of the European Union (TFEU).

2.3. The envisaged act of the Partnership Council

Article 552(4) of the Trade and Cooperation Agreement provides that the United Kingdom shall delete the PNR data of passengers after their departure from the country, unless a risk assessment indicates the need to retain such PNR data. This duty follows from the 2017 EU case law on the international transfer of PNR data from the Union to third countries.[1]

Article 552(11) of the Trade and Cooperation Agreement provides that the United Kingdom may derogate from paragraph 4 of that article on a temporary basis for an interim period, pending the implementation by the United Kingdom of technical adjustments to their PNR processing systems as soon as possible. During the interim period, the United Kingdom competent authority is obliged to prevent the use of the PNR data that is to be deleted by applying a number specific additional safeguards to that PNR data.

Article 552(10) of the Trade and Cooperation Agreement provides that paragraph 11 of that article applies due to the special circumstances that prevent the United Kingdom from making the technical adjustments necessary to transform the PNR processing systems which the United Kingdom operated whilst Union law applied to it into systems which would enable PNR data to be deleted in accordance with paragraph 4 of that article.

Article 552(12) of the Trade and Cooperation Agreement provides that the United Kingdom shall provide to the Specialised Committee on Law Enforcement and Judicial Cooperation, nine months after the entry into force of that agreement, a report from the independent administrative body referred to in paragraph 7 of that article, including an opinion by the United Kingdom supervisory authority referred to in Article 525(3) of the Trade and Cooperation Agreement, as to whether the additional data protection safeguards have been effectively applied and an assessment of the United Kingdom of whether the special circumstances referred to in Article 552(10) of the Trade and Cooperation Agreement persist, together with a description of the efforts made to transform the PNR processing systems of the United Kingdom into systems which would enable PNR data to be deleted in accordance with paragraph 4 of that article.

Article 552(13), second sentence of the Trade and Cooperation Agreement provides that where the special circumstances referred to in paragraph 10 of that article persist, the Partnership Council shall extend the interim period referred to in paragraph 11 of that article for one year.

The decision of the Partnership Council to extend the interim period may take any form. The decisions of the co-chairs of the Partnership Council shall be taken by mutual consent (see Article 1(2) of Annex 1 of the Trade and Cooperation Agreement). The decision should be taken before the end of the interim period, i.e. before 1 January 2022.

[1] Opinion 1/15 of the Court of Justice, 26 July 2017.

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

3.1. Background

On 1 October 2021, the United Kingdom submitted to the Specialised Committee on Law Enforcement and Judicial Cooperation an assessment pursuant to Article 552(12)(b) of the Trade and Cooperation Agreement.

The assessment by the United Kingdom concludes that the special circumstances in respect of the United Kingdom's PNR data processing systems persist. The United Kingdom is in the specific situation that it has to adapt a PNR data processing system configured for compliance with Union law applying to Member States into a system configured to meet the requirements of the Trade and Cooperation Agreement and that there was not sufficient time before the entry into force of the Trade and Cooperation Agreement to make the necessary adaptations to a complex PNR data procession system. The requirements of the Trade and Cooperation Agreement reflect the 2017 case law by the Court of Justice on the international transfer of PNR data from the Union to third countries (Opinion 1/15).

The United Kingdom's current PNR processing system was developed in 2004 and adapted in 2016 to be in conformity with Directive (EU) 2016/681 of 27 April 2016 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime.[2] As such, the operation of the United Kingdom's PNR processing system was designed, like those of other Member States, to retain all PNR data for a period of five years in order to respond to duly reasoned requests in specific cases at any time during those five years. It was not designed to delete PNR data of passengers after their departure from the United Kingdom, as the Trade and Cooperation Agreement requires.

Moreover, the United Kingdom's current risk assessment process has been designed, like those of other Member States, to identify individuals whose data corresponds to objective targeting rules or other pre-determined criteria for the purpose of conducting security and border control checks. It was not designed to determine whether there is a need to retain specific PNR data after a passenger's departure from the United Kingdom.

In its assessment, submitted on 1 October 2021 pursuant to Article 552(12)(b) of the Trade and Cooperation Agreement, the United Kingdom described that it was carrying out an analysis of the legal, technical and operational requirements, both functional and non-functional, with a view to ensuring that the United Kingdom's PNR data processing systems will be compliant with Article 552(4) of the Trade and Cooperation Agreement. The United Kingdom concluded that this was a highly complex operation.

The United Kingdom's assessment indicates that the current systems used by the United Kingdom to process PNR data are scheduled to be decommissioned by 2024. The United Kingdom explains that the necessary technical adjustments to its systems as required by the Trade and Cooperation Agreement are being made by adjusting and adding to the technical requirements of the new systems in development, rather than by further adapting the current core system which is being decommissioned.

The United Kingdom's assessment describes the progress of the United Kingdom's technical adjustments project to define functional and non-functional requirements, and to design, build and implement technical capability to operate in compliance with Article 552(4) of the Trade and Cooperation Agreement and to delete the PNR data of passengers after their departure from the country, unless a risk assessment indicates the need to retain such PNR data.

[2] OJ 2016 L 119, p. 132.

In addition to that assessment, the United Kingdom submitted to the Specialised Committee on Law Enforcement and Judicial Cooperation on 1 October 2021 a report pursuant to Article 552(12)(a) of the Trade and Cooperation Agreement from the independent administrative body referred to in Article 552(7) of the Trade and Cooperation Agreement, as to whether the additional data protection safeguards provided for in Article 552(11) of the Trade and Cooperation Agreement have been applied effectively. This report includes an annex by the United Kingdom supervisory authority referred to in Article 525(3) of the Trade and Cooperation Agreement.

The Specialised Committee on Law Enforcement and Judicial Cooperation considered the United Kingdom's reports on 19 October 2021. At that occasion, the United Kingdom stated that it intends to complement the annex to the report pursuant to Article 552(12)(a) of the Trade and Cooperation Agreement and it was agreed this would be done in November 2021 before the Partnership Council takes a decision on the extension of the interim period pursuant to Article 552(13) of the Trade and Cooperation Agreement.

3.2. Proposed position

In view of the above, the Commission considers that the Partnership Council should decide to extend the interim period for one year to 31 December 2022. The Partnership Council should take such a decision by 31 December 2021.

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*.'

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*'[3].

4.1.2. Application to the present case

The Partnership Council is a body set up by an agreement, namely the Trade and Cooperation Agreement.

Article 552(13) of the Trade and Cooperation Agreement provides that where the special circumstances referred to in paragraph 10 of that article persist, the Partnership Council shall extend the interim period referred to in paragraph 11 of that article for one year. Therefore, the adoption of a Union position in respect of such decision falls within the scope of Article 218(9) TFEU.

[3] 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.

The legal effects of the extension fall completely on the Union, as a party to the Trade and Cooperation Agreement. This entails that, in accordance with Article 3(2) TFEU, the Union has exclusive competence in this matter.

The decision on an extension of the period referred to in Article 552(13) of the Trade and Cooperation Agreement does not entail that the framework of the Trade and Cooperation Agreement be supplemented or amended.

Therefore, the procedural legal basis for the proposed decision is Article 218(9) TFEU.

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 extension of the period referred to in Article 552(13) 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.

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.

2021/0389 (NLE)

Proposal for a

COUNCIL DECISION

on the position to be taken on behalf of the European Union in the Partnership Council established by 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, regarding the extension of the interim period referred to in Article 552(11) of that Agreement during which the United Kingdom may derogate from the obligation to delete Passenger Name Record data of passengers after their departure from 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)(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 information,

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: 'United Kingdom'), of the other part (hereafter: 'the Trade and Cooperation Agreement')[4] lays down rules under which passenger name record (hereafter: 'PNR') data may be transferred to, processed and used by the United Kingdom competent authority for flights between the Union and the United Kingdom, and establishes specific safeguards in that regard.

(2) Article 542 of the Trade and Cooperation Agreement sets out that Title III of Part Three (LAW ENFORCEMENT AND JUDICIAL COOPERATION IN CRIMINAL MATTERS) of the Trade and Cooperation Agreement lays down rules under which PNR data may be transferred to, processed and used by the United Kingdom competent authority for flights between the Union and the United Kingdom, and establishes specific safeguards in that regard

(3) Article 552(4) of the Trade and Cooperation Agreement provides that the United Kingdom shall delete the PNR data of passengers after their departure from the country unless a risk assessment indicates the need to retain such PNR data.

(4) Article 552(11) of the Trade and Cooperation Agreement provides that the United Kingdom may derogate from paragraph 4 of that article on a temporary basis for an

[4] OJ L 149, 30.4.2021, p. 10–.

interim period, pending the implementation by the United Kingdom of technical adjustments as soon as possible. During this interim period, the United Kingdom competent authority shall prevent the use of the PNR data that is to be deleted in accordance with Article 552(4) of the Trade and Cooperation Agreement by applying the additional safeguards to that PNR data listed in Article 552(11), points (a)-(d) of the Trade and Cooperation Agreement.

(5) Article 552(10) of the Trade and Cooperation Agreement provides that Article 552(11) of the Trade and Cooperation Agreement applies due to the special circumstances that prevent the United Kingdom from making the technical adjustments necessary to transform the PNR processing systems which the United Kingdom operated whilst Union law applied to it into systems which would enable PNR data to be deleted in accordance with Article 552(4) of the Trade and Cooperation Agreement.

(6) Article 552(13) of the Trade and Cooperation Agreement provides that where the special circumstances referred to in Article 552(10) of the Trade and Cooperation Agreement persist, the Partnership Council shall extend the interim period referred to in Article 552(11) of the Trade and Cooperation Agreement for one year.

(7) On 1 October 2021, the United Kingdom submitted to the Specialised Committee on Law Enforcement and Judicial Cooperation established by the Trade and Cooperation Agreement an assessment pursuant to Article 552(12)(b) Trade and Cooperation Agreement.

(8) The United Kingdom concludes that the special circumstances referred to in Article 552(10) of the Trade and Cooperation Agreement persist, referring to the specific situation faced by the United Kingdom in having to adapt PNR data processing systems configured for compliance with Union law as a Member State into a system configured to meet the requirements of the Trade and Cooperation Agreement on international transfers of PNR data from the Union to third countries. The United Kingdom describes its efforts to transform its PNR processing systems into systems which would enable PNR data to be deleted in accordance with Article 552(4) of the Trade and Cooperation Agreement. The United Kingdom noted that it was carrying out an analysis of the legal, technical and operational requirements, both functional and non-functional, with a view to ensuring that the United Kingdom's PNR data processing systems will be compliant with Article 552(4) of the Trade and Cooperation Agreement. Pursuant to Article 552(13) of the Trade and Cooperation Agreement, the Specialised Committee on Law Enforcement and Judicial Cooperation considered the United Kingdom's assessment on 19 October 2021.

(9) On 1 October 2021, the United Kingdom also submitted to the Specialised Committee on Law Enforcement and Judicial Cooperation a report pursuant to Article 552(12)(a) of the Trade and Cooperation Agreement from the independent administrative body referred to in Article 552(7) of the Trade and Cooperation Agreement, including an annex by the United Kingdom supervisory authority referred to in Article 525(3) of that agreement, as to whether the safeguards provided for in Article 552(11) of that agreement have been applied effectively.

(10) Pursuant to Article 552(13) of the Trade and Cooperation Agreement, the Specialised Committee on Law Enforcement and Judicial Cooperation considered the United Kingdom's report on 19 October 2021. At that occasion, the United Kingdom stated that it intended to complement the annex to that report and that this would be done in November 2021 before the Partnership Council takes a decision on the extension of

the interim period pursuant to Article 552(13) of the Trade and Cooperation Agreement.

(11) It is therefore considered that the special circumstances referred to in Article 552(10) of the Trade and Cooperation Agreement persist, and that, pursuant to Article 552(13) of the Trade and Cooperation Agreement, the Partnership Council should extend the interim period referred to in Article 552(11) of the Trade and Cooperation Agreement by one year, until 31 December 2022.

(12) The Trade and Cooperation Agreement is binding on all the Member States by virtue of Decision (EU) 2021/689, which is based on Article 217 TFEU as its substantive legal basis.

(13) Denmark and Ireland are bound by Part III of the Trade and Cooperation Agreement by virtue of 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 taken on the Union's behalf in the Partnership Council pursuant to Article 552(13) of the Trade and Cooperation Agreement shall be to agree to an extension, until 31 December 2022, of the interim period during which the United Kingdom may derogate from the obligation to delete Passenger Name Record data of passengers after their departure from the United Kingdom.

Article 2

This Decision is addressed to the Commission.

Done at Brussels,

For the Council
The President