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2021/0280 (NLE)

Proposal for a

## **COUNCIL DECISION**

**on the position to be taken on behalf of the European Union in the Specialised Committee on Law Enforcement and Judicial Cooperation 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 period referred to in Article 540(3) of the EU UK Trade and Cooperation Agreement (Prüm) during which DNA-profiles and fingerprints can be exchanged with 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 Specialised Committee on Law Enforcement and Judicial Cooperation in connection with Article 540(3) 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 (hereafter: ‘the TCA’).

The TCA includes the possibility 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, on the automated comparison of DNA profiles, dactyloscopic data and vehicle registration data. In order for the UK to take advantage of these possibilities, it will first need to take the necessary implementing measures and undergo an evaluation.

Prior to the TCA, the United Kingdom and the Member States were already cooperating by automated comparison of DNA-profiles and fingerprints, and providing personal data following a hit. In order to avoid a gap in ongoing cooperation, the TCA stipulates that the Member States may supply such data to the United Kingdom pending the outcome of evaluations required by the TCA until 30 September 2021. This interim period can be extended once by a maximum of nine months, i.e. until 30 June 2022, by the Specialised Committee on Law Enforcement and Judicial Cooperation.

### **2. CONTEXT OF THE PROPOSAL**

#### **2.1. The Trade and Cooperation Agreement between the EU and the United Kingdom**

The TCA establishes the basis for a broad relationship between the EU 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 TCA entered into force on 1 May 2021 and established, amongst others, a Specialised Committee on Law Enforcement and Judicial Cooperation.

#### **2.2. The Specialised Committee on Law Enforcement and Judicial Cooperation**

The Specialised Committee on Law Enforcement and Judicial Cooperation is established to address matters covered by Part Three of the TCA, entitled “Law Enforcement and Judicial Cooperation in Criminal Matters”. The TCA establishes several Specialised Committees.

With respect to issues related to their area of competence, Specialised Committees shall have the power to, amongst others, monitor and review the implementation and ensure the proper functioning of the TCA, assist the overarching Partnership Council in the performance of its tasks and adopt decisions, including amendments, and recommendations in respect of all matters where this Agreement or any supplementing agreement so provides.

#### **2.3. The envisaged act of the Specialised Committee on Law Enforcement and Judicial Cooperation**

Article 540(3) of the TCA provides that the Specialised Committee on Law Enforcement and Judicial Cooperation can extend the period during which Member States may continue to compare data as referred to in Articles 530, 531 and 534 and, in case of a match, supply further available personal data under domestic law, including legal assistance rules, as referred to in Article 536 of the TCA. This period will end on 30 September 2021, unless the

Specialised Committee on Law Enforcement and Judicial Cooperation decides to extend it by a maximum of nine months.

The decision of the Specialised Committee on Law Enforcement and Judicial Cooperation to extend the above-mentioned period may take any form. The decisions of the co-chairs shall be taken by mutual consent (see Article 1(2) of Annex 1 of the TCA). The decision can be taken at any time, but in order to avoid a gap in cooperation, it would need to be taken before 1 October 2021.

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

#### **3.1. Background**

The TCA includes the possibility 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, on the automated comparison of DNA profiles, dactyloscopic data and vehicle registration data. In order for the UK to take advantage of these possibilities, it will first need to take the necessary implementing measures and undergo an evaluation.

On the basis of an overall evaluation report on the evaluation visit and, where applicable, a pilot run, the Union shall determine the date or dates from which such data may be supplied by Member States to the United Kingdom.

Under the TCA, the United Kingdom also has to undergo an evaluation regarding the automated transfer of DNA and dactyloscopic data for which the connections with the UK were already established under the Union's "Prüm" framework<sup>1</sup>.

Under Article 540(2) of the TCA, the Union shall determine the date or dates from which personal data may be supplied by Member States to the United Kingdom pursuant to the TCA on the basis of an overall evaluation report on the evaluation visit and, where applicable, the pilot run.

In order to avoid a gap in ongoing cooperation concerning DNA and dactyloscopic data, the TCA stipulates that Member States may supply data to the United Kingdom pending the outcome of these evaluations and the decision referred to in Article 540(2) of the TCA until 30 September 2021. This interim period can be extended once by a maximum of nine months, i.e. to 30 June 2022, by the Specialised Committee on Law Enforcement and Judicial Cooperation.

#### **3.2. Need for a Council Decision**

The evaluation of the UK under the TCA is at a very early stage. Past evaluation procedures carried out under the Union's "Prüm" framework have taken at least six months. Subsequently, additional time is required to allow the Council to process the evaluation report and to decide formally that such data may be exchanged. For these reasons, it is highly unlikely that the abovementioned process will be finalised by September 2021. This means that there is a significant risk that a gap in cooperation concerning DNA and dactyloscopic data would arise from 1 October 2021. This would present concrete risks for the internal security of the Union. As the Specialised Committee on Law Enforcement and Judicial Cooperation can extend the interim period only once, it is proposed to do so for the maximum period of nine months, i.e. until 30 June 2022.

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<sup>1</sup> Council Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime (OJ L 210, 6.8.2008, p. 1) and Council Decision 2008/616/JHA 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 L 210, 6.8.2008, p. 12).

At the same time, it has to be taken into account that the Union already evaluated the UK as regards the exchange of DNA profiles and dactyloscopic data under its “Prüm” framework. The Commission is not aware of any legislative or regulatory measures taken by the United Kingdom since these evaluations that would affect the outcome of the ongoing evaluation under the TCA. In other words, *prima facie*, the Commission assumes that the United Kingdom still applies the same procedures and conditions as it did when it was evaluated in 2018 (for DNA-profiles) and 2019 (for dactyloscopic data) under the Union’s “Prüm” framework.

In these circumstances, it is therefore appropriate to establish the position to be taken on the Union’s behalf in the Specialised Committee on Law Enforcement and Judicial Cooperation on the possible extension, pursuant to Article 540(3) of the TCA, of the period during which Member States may continue to exchange data as referred to in Articles 530, 531, and 534 and, in case of a match, supply further available personal data under domestic law, including legal assistance rules, as referred to in Article 536 of the TCA with the United Kingdom.

#### **4. LEGAL BASIS**

##### **4.1. Procedural legal basis**

###### *4.1.1. Principles*

Article 218(9) of the Treaty on the Functioning of the European Union (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*’<sup>2</sup>.

###### *4.1.2. Application to the present case*

The Specialised Committee on Law Enforcement and Judicial Cooperation is a body set up by an agreement, namely the TCA.

Article 540(3) of the TCA provides for the possibility that the Specialised Committee on Law Enforcement and Judicial Cooperation extend the period during which Member States may continue to exchange data as referred to in Articles 530, 531 and 534 and, in case of a match, supply further available personal data as referred to in Article 536 of the TCA with the United Kingdom. Therefore, the adoption of a Union position in respect of such decision falls within the scope of Article 218(9) TFEU.

The legal effects of the extension fall completely on the Union, as a party to the TCA. 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 540(3) of the TCA does not entail that the framework of the TCA be supplemented or amended.

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

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<sup>2</sup> 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.

## **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 540(3) TCA pursues objectives and has components in the area of police cooperation.

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

## **4.3. Conclusion**

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

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## COUNCIL DECISION

**on the position to be taken on behalf of the European Union in the Specialised Committee on Law Enforcement and Judicial Cooperation 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 period referred to in Article 540(3) of the EU UK Trade and Cooperation Agreement (Prüm) during which DNA-profiles and fingerprints can be exchanged with 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 87(2)(a), in conjunction with Article 218(9) thereof,

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, of the other part (hereafter: ‘the TCA’)<sup>3</sup> 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, on 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 on the 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 TCA.
- (3) The United Kingdom also has to undergo an evaluation regarding searching and comparing DNA profiles and dactyloscopic data for which the connections with the United Kingdom were already established under the Union’s “Prüm” framework<sup>4</sup>.
- (4) Under Article 540(2) of the TCA, the Union shall determine the date or dates from which personal data may be supplied by Member States to the United Kingdom on the basis of an overall evaluation report on the evaluation visit and, where applicable, the pilot run.
- (5) Pending the outcome of the evaluation and the decision referred to in Article 540(2) of the TCA, in order to avoid a gap in ongoing cooperation concerning DNA profiles and

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<sup>3</sup> OJ L 149, 30.4.2021, p. 10–2539.

<sup>4</sup> Council 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. 1) and Council Decision 2008/616/JHA 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).

dactyloscopic data, Article 540(3) of the TCA provides that Member States may supply such data to the United Kingdom until 30 September 2021.

- (6) Article 540(3) of the TCA empowers the Specialised Committee on Law Enforcement and Judicial Cooperation to extend that period once by a maximum of nine months, i.e. until 30 June 2022.
- (7) The process referred to in recitals 3 to 6 is unlikely to be finalised by 30 September 2021. Therefore, there is a significant risk that a gap in cooperation concerning DNA profiles and dactyloscopic data would arise from 1 October 2021. This would present concrete risks for the internal security of the Union.
- (8) At the same time, the Union has already evaluated the United Kingdom as regards the exchange of DNA profiles and dactyloscopic data in the context of the Union's "Prüm" framework when the United Kingdom was still a Member State. The Union is not aware of any legislative or regulatory measures taken by the United Kingdom since these evaluations that would affect the outcome of the ongoing evaluation under the TCA.
- (9) In these circumstances, it is appropriate to establish the position to be adopted on the Union's behalf in the Specialised Committee on Law Enforcement and Judicial Cooperation to the effect of the Union agreeing to an extension until 30 June 2022 of the period during which Member states may continue to exchange data as referred to in Articles 530, 531 and 534 and, in case of a match, supply further available personal data as referred to in Article 536 of the TCA,

HAS ADOPTED THIS DECISION:

#### *Article 1*

The position to be taken on the Union's behalf in the Specialised Committee on Law Enforcement and Judicial Cooperation pursuant to Article 540(3) TCA shall be to agree to an extension until 30 June 2022 of the period during which Member States may continue to exchange personal data as referred to in Articles 530, 531 and 534, and supply further available personal data as referred to in Article 536 of the TCA with the United Kingdom.

#### *Article 2*

This Decision is addressed to the Commission.

Done at Brussels,

*For the Council  
The President*