

EXPLANATORY MEMORANDUM ON A PROPOSAL FOR A DECISION OF THE COUNCIL ESTABLISHING AN EU POSITION AHEAD OF A WITHDRAWAL AGREEMENT OR TRADE AND COOPERATION AGREEMENT GOVERNANCE COMMITTEE

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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 (PNR) data of passengers after their departure from the United Kingdom.

Submitted by the Home Office, 06 December 2022

SUBJECT MATTER

1. This proposal concerns a decision on the position the European Union is expected to take in the UK-EU Partnership Council and seeks the agreement of the European Council to agree in the Partnership Council via the written decision procedure before the end of the year that the interim period during which the United Kingdom may derogate from the obligation to delete PNR data of passengers after their departure from the UK be extended for a second and final time. **This decision would be welcomed by the UK and be in line with the position the UK will take in the Partnership Council.**
2. The Trade and Cooperation Agreement (TCA) provides the basis for PNR data for flights between the EU and the UK to be transferred to, processed and used by the UK for the purposes of preventing, detecting, investigating or prosecuting terrorism or serious crime and, exceptionally, to protect the vital interests of any natural person. The TCA places specific safeguards on the processing of PNR data, including the deletion of PNR data of certain passengers after their departure from the UK – unless a risk assessment based on objective evidence indicates the need to retain such data (Article 552(4)).
3. The TCA provides for a temporary derogation to this requirement pending the implementation by the UK of necessary technical adjustments to its systems for processing PNR data (Article 552(11)). These adjustments were necessary as

UK systems had been configured to process PNR data in accordance with the EU PNR Directive¹, which the UK had transposed when an EU Member State.

4. The UK has applied the derogation since the entry into force of the TCA. On 21 December 2021, the Partnership Council agreed to extend the interim period for one year until 31 December 2022.²
5. The TCA provides that the interim period may be extended by the Partnership Council for one further final year (Article 552(13)) providing certain conditions are met: primarily that the special circumstances relating to the transformation of the UK's PNR processing systems persist and where, in addition for the second and final extension, substantial progress has been made to transform those systems.
6. In line with Article 552(12), the UK provided documentation to the Specialised Committee on Law Enforcement and Judicial Cooperation to help inform the Partnership Council's decision. This comprised: a report from an Independent Administrative Body (IAB) on the application by the UK of the interim period safeguards described in Article 552(11) of the TCA; an opinion from the UK's supervisory authority for data protection (the Information Commissioner's Office) on the report of the IAB; and an assessment of the special circumstances requiring the derogation persist, together with a description of the substantial efforts made to transform the UK's systems for processing PNR data in compliance with Article 552(4).
7. At the end of this final extension, on 31 December 2023, the interim period shall end and the derogation from Article 552(4) permitted by Article 552(11) shall cease to apply. All the necessary technical adjustments to enable the UK to comply with Article 552(4) will need to be completed by this date.

SCRUTINY HISTORY

8. Lord Frost wrote to the Chairs of the Scrutiny Committees on 16 December 2021 in advance of the Partnership Council's corresponding decision last year.

¹ Directive (EU) 2016/681 of the European Parliament and of the Council 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 Decision No 2/2021 of 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, of 21 December 2021 as regards the extension 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, OJ L 467, 29.12.2021, p. 6

MINISTERIAL RESPONSIBILITY

9. The Foreign Secretary is responsible for the UK-EU relationship and is Co-Chair of the Partnership Council. The Home Secretary has primary responsibility for Law Enforcement and Criminal Justice matters, including those within Part Three of the TCA. The Minister for Security and Minister for Immigration also have an interest in this matter.

INTEREST OF THE DEVOLVED ADMINISTRATIONS

10. Matters of national security and border security are reserved under the United Kingdom's devolution settlements. The Northern Ireland Executive and the Scottish Government have nonetheless been made aware of this proposal and consulted about this Explanatory Memorandum with no comments raised.

LEGAL AND PROCEDURAL ISSUES

11. **Legal base:** The European Union's legal basis for this decision is Article 218(9) of the Treaty on the Functioning of the European Union (TFEU).
12. **Voting Procedure:** The European Council shall act on the basis of a qualified majority.
13. **Timetable for adoption and implementation:** A formal decision will be taken by the European Council ahead of the Partnership Council written decision procedure, which will take place before the end of the year.

POLICY IMPLICATIONS

14. The proposed European Council decision to extend the interim period for one further final year is in line with the position the UK will adopt at the Partnership Council.

CONSULTATION

15. No external consultation or impact assessment has been necessary.

FINANCIAL IMPLICATIONS

16. There are no financial implications for the UK. The necessary technical adjustments being made to the UK's systems for processing PNR data are funded through existing programmes of work.

A handwritten signature in black ink, reading "Tom Tugendhat". The signature is written in a cursive, flowing style.

Rt. Hon. Tom Tugendhat MBE VR MP
Security Minister
Home Office