



Brussels, 6.2.2023
COM(2023) 56 final

2023/0023 (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 establishment of a standard form for requests for mutual assistance referred to in Article 635(1) of that Agreement

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 635(1) 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 Trade and Cooperation Agreement’).

Pursuant to its Article 633, the Trade and Cooperation Agreement supplements the provisions, and facilitates the application between Member States, on the one side, and the United Kingdom, on the other side, of the European Convention on Mutual Assistance in Criminal Matters, done at Strasbourg on 20 April 1959 (the “European Mutual Assistance Convention”), the Additional Protocol to the European Mutual Assistance Convention, done at Strasbourg on 17 March 1978, and the Second Additional Protocol to the European Mutual Assistance Convention, done at Strasbourg on 8 November 2001.

The Trade and Cooperation Agreement does not provide for any form for requests for mutual assistance in criminal matters, but mandates the Specialised Committee on Law Enforcement and Judicial Cooperation, in its Article 635(1), to establish such a standard form. If the Specialised Committee on Law Enforcement and Judicial Cooperation has adopted a decision in accordance with that provision, requests for mutual assistance must be made using the standard form.

2. CONTEXT OF THE PROPOSAL

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

The Trade and Cooperation Agreement establishes the basis for a broad relationship between the European 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. After provisional application since 1 January 2021, the Trade and Cooperation Agreement entered into force on 1 May 2021.

2.2. The Specialised Committee on Law Enforcement and Judicial Cooperation

The Trade and Cooperation Agreement sets up a number of joint bodies, including the Specialised Committee on Law Enforcement and Judicial Cooperation, 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). The Specialised Committee on Law Enforcement and Judicial Cooperation is established to address matters covered by Part Three of the Trade and Cooperation Agreement, entitled “Law Enforcement and Judicial Cooperation in Criminal Matters”.

With respect to issues related to its area of competence, the Specialised Committee has the power to, among others, monitor and review the implementation of Part Three of the Trade and Cooperation Agreement, assist the Partnership Council in the performance of its tasks and adopt decisions, including amendments, and recommendations in respect of all matters where the Trade and Cooperation Agreement or any supplementing agreement so provides.

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

Article 635(1) of the Trade and Cooperation Agreement provides for the obligation of the Specialised Committee on Law Enforcement and Judicial Cooperation to establish a standard form for requests for mutual assistance by adopting an annex to the Trade and Cooperation Agreement.

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

3.1. Background

The Trade and Cooperation Agreement supplements the provisions, and facilitates the application between Member States, on the one side, and the United Kingdom, on the other side, of the European Mutual Assistance Convention, done at Strasbourg on 20 April 1959, the Additional Protocol to the European Mutual Assistance Convention, done at Strasbourg on 17 March 1978, and the Second Additional Protocol to the European Mutual Assistance Convention, done at Strasbourg on 8 November 2001.

3.2. Proposed position

A standard form that competent authorities will use when requesting mutual assistance will facilitate mutual assistance between competent authorities in the Member States, on the one side, and the United Kingdom, on the other side, by indicating all necessary information a request should contain. The form in the Annex to this proposal for a Council Decision has been drafted jointly by experts of the Union and of the United Kingdom, taking into account relevant experience with existing forms, such as the form for the European Investigation Order, and the views of practitioners of Member States, of Union bodies, agencies and offices, and of the United Kingdom.

Given the obligation to establish a standard form for requests for mutual assistance by adopting an annex to the Trade and Cooperation Agreement under Article 635(1) of that Agreement, the position to be taken on the Union's behalf in the Specialised Committee on Law Enforcement and Judicial Cooperation needs to be established.

4. LEGAL BASIS

4.1. Procedural legal basis

4.1.1. Principles

Article 218(9) 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*'¹.

¹ 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.

4.1.2. Application to the present case

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

Article 635(1) of the Trade and Cooperation Agreement provides for the obligation of the Specialised Committee on Law Enforcement and Judicial Cooperation to undertake to establish a standard form for requests for mutual assistance by adopting an annex to the Trade and Cooperation Agreement. Therefore, the establishment of that standard form in a new annex to the Trade and Cooperation Agreement does not supplement or amend the institutional framework of the Trade and Cooperation Agreement. Once adopted, requests for mutual assistance shall be made using the standard form. It follows that 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 adoption 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.

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 adoption of a standard form for requests for mutual assistance referred to in Article 635(1) of the Trade and Cooperation Agreement pursues objectives and has components in the area of judicial cooperation. It will facilitate cooperation between judicial or equivalent authorities in the Member States, on the one hand, and in the United Kingdom, on the other hand, in relation to proceedings in criminal matters.

Therefore, the substantive legal basis of the proposed decision is Article 82(1) TFEU.

4.3. Conclusion

The legal basis of the proposed decision should be Article 82(1) TFEU, in conjunction with Article 218(9) TFEU.

5. PUBLICATION OF THE ENVISAGED ACT

As the act of the Specialised Committee on Law Enforcement and Judicial Cooperation will supplement the Trade and Cooperation Agreement with an Annex, it is appropriate to publish it in the *Official Journal of the European Union* after its adoption.

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 establishment of a standard form for requests for mutual assistance referred to in Article 635(1) of that Agreement

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 82(1), 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 information²,

Having regard to the proposal from the European Commission,

Whereas:

- (1) Title VIII of Part Three 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 ('the Trade and Cooperation Agreement')³ supplements the provisions, and facilitates the application between Member States, on the one side, and the United Kingdom, on the other side, of the European Convention on Mutual Assistance in Criminal Matters, done at Strasbourg on 20 April 1959, the Additional Protocol to the European Mutual Assistance Convention, done at Strasbourg on 17 March 1978, and the Second Additional Protocol to the European Mutual Assistance Convention, done at Strasbourg on 8 November 2001.
- (2) The Council, on a proposal from the Commission, is to adopt a decision 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. The Specialised Committee on Law Enforcement and Judicial Cooperation is a body set up by the Trade and Cooperation Agreement.
- (3) Pursuant to Article 635(1) of the Trade and Cooperation Agreement, the Specialised Committee on Law Enforcement and Judicial Cooperation is to undertake to establish a standard form for requests for mutual assistance by adopting an annex to that agreement. If the Specialised Committee on Law Enforcement and Judicial

² OJ L 149, 30.4.2021, p. 2.

³ OJ L 149, 30.4.2021, p. 10.

Cooperation has adopted such a decision, requests for mutual assistance are to be made using the standard form, in accordance with Article 635(2) of the Trade and Cooperation Agreement.

- (4) The Specialised Committee on Law Enforcement and Judicial Cooperation is to establish the standard form for requests for mutual assistance under the Trade and Cooperation Agreement by adopting an annex to that Agreement.
- (5) The standard form for requests for mutual assistance will facilitate mutual assistance between competent authorities in the Member States, on the one side, and the United Kingdom, on the other side, by indicating all necessary information a request should contain.
- (6) It is appropriate to establish the position to be taken on the Union's behalf in the Specialised Committee on Law Enforcement and Judicial Cooperation.
- (7) 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 of the Treaty on the Functioning of the European Union as its substantive legal basis.
- (8) Denmark and Ireland are bound by Part Three 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 Specialised Committee on Law Enforcement and Judicial Cooperation set up by Article 8(1)(r) of the Trade and Cooperation Agreement shall be based on the draft Decision of the Specialised Committee on Law Enforcement and Judicial Cooperation attached to this Decision.

Article 2

This Decision is addressed to the Commission.

Done at Brussels,

*For the Council
The President*