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PROPOSAL

From:	Secretary-General of the European Commission, signed by Mr Jordi AYET PUIGARNAU, Director
date of receipt:	14 December 2018
To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union

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Subject:	ANNEX to the Proposal for a COUNCIL DECISION on the conclusion of a Protocol to the Agreement between the European Community and the Kingdom of Denmark on the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in Denmark or any other Member State of the European Union and 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention extending that agreement to law enforcement
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Delegations will find attached document COM(2018) 835 final - ANNEX.

Encl.: COM(2018) 835 final - ANNEX



Brussels, 14.12.2018
COM(2018) 835 final

ANNEX

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to the

Proposal for a COUNCIL DECISION

on the conclusion of a Protocol to the Agreement between the European Community and the Kingdom of Denmark on the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in Denmark or any other Member State of the European Union and 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention extending that agreement to law enforcement

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THE EUROPEAN UNION

and

THE KINGDOM OF DENMARK,

hereinafter referred to as 'the Parties',

(1) CONSIDERING that on 8 March 2006, the Agreement between the European Community and the Kingdom of Denmark (hereinafter referred to as 'Denmark') on the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in Denmark or any other Member State of the European Union and 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention (hereinafter referred to as 'the Agreement of 8 March 2006') was concluded¹.

(2) RECALLING that on 26 June 2013 the Union adopted Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes².

(3) REFERRING to the Protocol (No 22) on the position of Denmark, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, pursuant to which Denmark is not taking part in the adoption of Regulation (EU) No 603/2013 and is not bound by it or subject to its application.

¹ OJ L 66, 8.3.2006, p. 38.

² OJ L 180, 29.6.2013, p. 1.

(4) RECALLING that the procedures for comparison and data transmission for law enforcement purposes as laid down in Regulation (EU) No 603/2013 do not constitute an amendment of the provisions of Eurodac Regulation within the meaning of Article 3 of the Agreement of 8 March 2006 and therefore fall outside the scope of the said Agreement.

(5) CONSIDERING that a Protocol should be concluded between the European Union and Denmark to enable Denmark to participate in the law enforcement related aspects of Eurodac and therefore enable designated law enforcement authorities of Denmark to request the comparison of fingerprint data transmitted to the Eurodac Central System by the other participating States.

(6) CONSIDERING that the application of Regulation (EU) No 603/2013 for law enforcement purposes to Denmark should also enable designated law enforcement authorities of the other participating States and Europol to request the comparison of fingerprint data transmitted to the Eurodac Central System by Denmark.

(7) CONSIDERING that the processing of personal data by the authorities of the Member States for the purposes of the prevention, detection or investigation of terrorist offences or of other serious criminal offences pursuant to this Protocol should be subject to a standard of protection of personal data under their national law which complies with Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA³.

(8) CONSIDERING that Directive (EU) 2016/680 constitutes a development of the provisions of the Schengen acquis, under Title V of Part Three of the TFEU, and that Denmark, in accordance with Article 4 of Protocol No 22 on the position of Denmark, on 26 October 2016 has notified that it will implement the said directive in its national law. Denmark should therefore apply Directive (EU) 2016/680 and the further conditions set out in Regulation (EU) No 603/2013 as regards the processing of personal data by the designated authorities of Denmark for the purposes of the prevention, detection or investigation of terrorist offences or of other serious criminal offences.

(9) CONSIDERING that the further conditions set out in Regulation (EU) No 603/2013 as regards the processing of personal data by the designated authorities of the participating States, as well as by Europol, for the purposes of the prevention, detection or investigation of terrorist offences or of other serious criminal offences should also apply.

(10) CONSIDERING that access should be allowed only on condition that comparisons with the national fingerprint databases of the requesting State and with the automated fingerprinting identification systems of all other participating States under Council Decision 2008/615/JHA of 23 June 2008 on the stepping up of cross-border cooperation, particularly in

³ OJ L 119, 4.5.2016, p. 89.

combating terrorism and cross-border crime⁴ did not lead to the establishment of the identity of the data subject. That condition requires the requesting State to conduct comparisons with the automated fingerprinting identification systems of all other participating States under Council Decision 2008/615/JHA which are technically available, unless that requesting State can justify that there are reasonable grounds to believe that it would not lead to the establishment of the identity of the data subject. Such reasonable grounds exist in particular where the specific case does not present any operational or investigative link to a given participating State. That condition requires prior legal and technical implementation of Decision 2008/615/JHA by the requesting State with regard to dactyloscopic data, as it should not be permitted to conduct a Eurodac check for law enforcement purposes where those above steps have not been first taken.

(11) CONSIDERING that prior to searching Eurodac, designated authorities should also, provided that the conditions for a comparison are met, consult the Visa Information System under Council Decision 2008/633/JHA of 23 June 2008 concerning access for consultation of the Visa Information System (VIS) by designated authorities of Member States and by Europol for the purposes of the prevention, detection and investigation of terrorist offences and of other serious criminal offences⁵.

(12) CONSIDERING that the mechanisms regarding amendments provided for in the Agreement of 8 March 2006 should apply to all amendments regarding the access to Eurodac for law enforcement purposes.

(13) CONSIDERING that this Protocol is part of the Agreement of 8 March 2006.

HAVE AGREED AS FOLLOWS:

Article 1

1. Regulation (EU) No 603/2013 shall be implemented by Denmark as regards the comparison of fingerprint data with those stored in the Eurodac Central System for law enforcement purposes, and shall under international law apply in its relations with the other participating States.

2. The Member States of the European Union except Denmark shall be considered as participating States within the meaning of paragraph 1. They shall apply the provisions of Regulation (EU) No 603/2013 which relate to law enforcement access to Denmark.

3. Iceland, Liechtenstein, Norway and Switzerland shall be considered as participating States within the meaning of paragraph 1 to the extent that an agreement similar to the present agreement is in force between them and the European Union.

⁴ OJ L 210, 6.8.2008, p. 1.

⁵ OJ L 218, 13.8.2008, p. 129.

Article 2

1. The provisions of Directive (EU) 2016/680 shall apply as regards the processing of personal data by Denmark arising from the application of this Protocol.
2. In addition to paragraph 1, the conditions set out in Regulation (EU) No 603/2013 as regards the processing of personal data by the designated authorities for the purposes of the prevention, detection or investigation of terrorist offences or of other serious criminal offences shall apply to Denmark.

Article 3

The provisions of the Agreement of 8 March 2006 regarding amendments shall apply to all amendments related to the access to Eurodac for law enforcement purposes.

Article 4

1. This Protocol shall be ratified or approved by the Parties. Instruments of ratification or approval shall be deposited with the Secretary General of the Council of the European Union, who shall be the depositary of this Protocol.
2. This Protocol shall enter into force on the first day of the month following notification by the depositary to the Parties that the instrument of ratification or approval of both Contracting Parties has been deposited.
3. This Protocol shall not apply before the provisions of Chapter 6 of Council Decision 2008/615/JHA have been implemented by Denmark and until the evaluation procedures under Chapter 4 of 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 crime⁶ have been completed with regard to dactyloscopic data with regard to Denmark.

Article 5

1. Each Party may withdraw from this Protocol by sending a declaration in writing to the depositary. This declaration shall take effect six months after being deposited.
2. The Protocol shall cease to be effective if either the European Union or Denmark have withdrawn from it.
3. This Protocol ceases to be effective if the Agreement of 8 March 2006 ceases to be effective.
4. A withdrawal from or a termination of this Protocol shall not affect the continued application of the Agreement of 8 March 2006.

⁶ OJ L 210, 6.8.2008, p. 12.

Article 6

This Protocol shall be drawn up in duplicate in the Bulgarian, Croatian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish and Swedish languages, each of these texts being equally authentic.

The original shall be deposited with the depositary, who shall establish a certified true copy for each of the Parties.

Done at Brussels on