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PROPOSAL

From:	Secretary-General of the European Commission, signed by Mr Jordi AYET PUIGARNAU, Director
date of receipt:	31 January 2019
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 signing, on behalf of the European Union, and on the provisional application of certain provisions of the Agreement between the European Union and the Swiss Confederation on the application of certain provisions of Council Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime, of 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, and the Annex thereto, and of Council Framework Decision 2009/905/JHA on accreditation of forensic service providers carrying out laboratory activities
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Delegations will find attached document COM(2019) 27 final - ANNEX.

Encl.: COM(2019) 27 final - ANNEX



EUROPEAN
COMMISSION

Brussels, 31.1.2019
COM(2019) 27 final

ANNEX

ANNEX

to the

Proposal for a Council Decision

on the signing, on behalf of the European Union, and on the provisional application of certain provisions of the Agreement between the European Union and the Swiss Confederation on the application of certain provisions of Council Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime, of 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, and the Annex thereto, and of Council Framework Decision 2009/905/JHA on accreditation of forensic service providers carrying out laboratory activities

AGREEMENT

between the European Union and the Swiss Confederation on the application of certain provisions of Council Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime, 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, and the Annex thereto, and of Council Framework Decision 2009/905/JHA on accreditation of forensic service providers carrying out laboratory activities

THE EUROPEAN UNION, on the one hand, and

THE SWISS CONFEDERATION, on the other hand,

hereinafter referred to as ‘the Contracting Parties’,

WISHING to improve police and judicial cooperation between the Member States of the European Union and the Swiss Confederation, without prejudice to the rules protecting individual freedom,

CONSIDERING that current relationships between the Contracting Parties, in particular the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen *acquis*, demonstrate close cooperation in the fight against crime,

POINTING OUT the Contracting Parties’ common interest in ensuring that police cooperation between the Member States of the European Union and the Swiss Confederation is carried out in a fast and efficient manner compatible with the basic principles of their national legal systems, and in compliance with the individual rights and principles of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950,

RECOGNISING that Council Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union already lays down rules whereby the law enforcement authorities of the Member States of the European Union and the Swiss Confederation may exchange existing information and intelligence expeditiously and effectively for the purpose of carrying out criminal investigations or criminal intelligence operations,

RECOGNISING that, in order to stimulate international cooperation in this area, it is of fundamental importance that precise information can be exchanged swiftly and efficiently. The aim is to introduce procedures for promoting fast, efficient and inexpensive means of data exchange. For the joint use of data these procedures should be subject to accountability and incorporate appropriate guarantees as to the accuracy and security of the data during transmission and storage as well as procedures for recording data exchange and restrictions on the use of information exchanged,

POINTING OUT that this Agreement therefore contains provisions which are based on the main provisions of Council Decision 2008/615/JHA and Council Decision 2008/616/JHA , and the Annex thereto and of Council Framework Decision 2009/905/JHA , and are designed to improve the exchange of information whereby Member States of the European Union and the Swiss Confederation grant one another access rights to their automated DNA analysis files, automated dactyloscopic identification systems and vehicle registration data. In the case of data from national DNA analysis files and automated dactyloscopic identification systems, a hit/no hit system should enable the searching State, in a second step, to request specific related personal data from the State administering the file and, where necessary, to request further information through mutual assistance procedures, including those adopted pursuant to Council Framework Decision 2006/960/JHA,

CONSIDERING that those provisions would considerably speed up existing procedures enabling Member States and the Swiss Confederation to find out whether another State, and if so, which, has the information it needs,

CONSIDERING that cross-border data comparison will open up a new dimension in crime fighting. The information obtained by comparing data will open up new investigative approaches and thus play a crucial role in assisting States' law enforcement and judicial authorities,

CONSIDERING that the rules are based on networking States' national databases,

CONSIDERING that subject to certain conditions, States should be able to supply personal and non-personal data in order to improve the exchange of information with a view to preventing criminal offences and maintaining public order and security in connection with major events with a cross-border dimension,

RECOGNISING that in addition to improving the exchange of information, there is a need to regulate other forms of closer cooperation between police authorities, in particular by means of joint security operations (e.g. joint patrols),

CONSIDERING that the hit/no hit system provides for a structure of comparing anonymous profiles, where additional personal data is exchanged only after a hit, the supply and receipt of which is governed by national law, including the legal assistance rules. This set-up guarantees an adequate system of data protection, it being understood that the supply of personal data to another State requires an adequate level of data protection on the part of the receiving State,

CONSIDERING that the Swiss Confederation should bear the costs incurred by its own authorities in connection with the application of this agreement,

RECOGNISING that the accreditation of forensic service providers carrying out laboratory activities is an important step towards a safer and more effective exchange of forensic information, certain provisions of Council Framework Decision 2009/905/JHA shall be complied with by the Swiss Confederation,

CONSIDERING that the processing of personal data by the authorities of the Swiss Confederation for the purposes of the prevention, detection or investigation of terrorist offences or of other serious criminal offences pursuant to this agreement should be subject to a standard of protection of personal data under its 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/JHA ,

TAKING AS A BASIS the mutual confidence of the Member States of the European Union and the Swiss Confederation in the structure and operation of their legal systems,

TAKING INTO ACCOUNT the circumstance that, pursuant to the Agreement between the Swiss Confederation and the Principality of Liechtenstein referring to the cooperation in the frame of the Swiss information system of the dactyloscopic data and DNA profile , both countries share the same database and systems with regard to the exchange of information, respectively the DNA and dactyloscopic data,

RECOGNISING that the provisions of bilateral and multilateral agreements remain applicable for all matters not covered by this Agreement,

HAVE DECIDED TO CONCLUDE THIS AGREEMENT:

Article 1

Object and purpose

1. Subject to the provisions of this Agreement, the content of Articles 1-24, 25(1), 26-32 and 34 of Council Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime, shall be applicable in bilateral relations between the Swiss Confederation and each of the Member States of the European Union.
2. Subject to the provisions of this Agreement, the content of Articles 1-19 and 21 of 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, and the Annex thereto except its chapter 4, point 1, shall be applicable in the relations referred to in paragraph 1.
3. The declarations made by Member States in accordance with Council Decisions 2008/616/JHA and 2008/615/JHA shall also be applicable in their relations with the Swiss Confederation.
4. Subject to the provisions of this Agreement, the content of Articles 1-5 and 6(1) of Council Framework Decision 2009/905/JHA on accreditation of forensic service providers carrying out laboratory activities shall be applicable in the relations referred to in paragraph 1.

Article 2

Definitions

1. 'Contracting Parties' shall mean the European Union and the Swiss Confederation.
2. 'Member State' shall mean a Member State of the European Union.
3. 'State' shall mean a Member State or the Swiss Confederation.

Article 3

Uniform application and interpretation

1. The Contracting Parties, in order to achieve the objective of arriving at as uniform an application and interpretation as possible of the provisions referred to in Article 1, shall keep under constant review the development of the case-law of the Court of Justice of the European Union, as well as the development of the case-law of the competent courts of the Swiss Confederation relating to such provisions. To this end a mechanism shall be set up to ensure regular mutual exchange of such case-law.

2. The Swiss Confederation shall be entitled to submit statements of case or written observations to the Court of Justice in cases where a question has been referred to it by a court or tribunal of a Member State for a preliminary ruling concerning the interpretation of any provision referred to in Article 1.

Article 4

Dispute settlement

Any dispute between the Swiss Confederation and a Member State regarding the interpretation or the application of this Agreement or of any of the provisions referred to in Article 1 and amendments thereto may be referred by a party to the dispute to a meeting of representatives of the governments of the Member States and of the Swiss Confederation, with a view to its speedy settlement.

Article 5

Amendments

1. Where it is necessary to amend the provisions referred to in Article 1, the European Union shall inform the Swiss Confederation at the earliest possible occasion and collect any comments it may have.

2. The Swiss Confederation shall be notified of any amendment of the provisions referred to in Article 1 by the European Union as soon as the amendment is adopted.

The Swiss Confederation shall decide independently whether to accept the content of the amendment and to implement it into its internal legal order. This decision shall be notified to the European Union within three months of the date of notification.

3. If the content of the amendment can be binding on the Swiss Confederation only after the fulfilment of constitutional requirements, the Swiss Confederation shall inform the European Union of this at the time of its notification. The Swiss Confederation shall promptly inform the European Union in writing upon fulfilment of all constitutional requirements. Where a referendum is not required, notification shall take place as soon as the referendum deadline expires. If a referendum is required, the Swiss Confederation shall have a maximum of two years from the date of the notification by the European Union within which to make its notification. From the date laid down for the entry into force of the amendment for the Swiss Confederation and until the information upon fulfilment of its constitutional requirements, the Swiss Confederation shall provisionally apply, where possible, the content of the amendment.

4. If the Swiss Confederation does not accept the amendment, this Agreement shall be suspended. A meeting of the Contracting Parties shall be convened to examine all further possibilities with a view to continue the good functioning of this Agreement, including the possibility to take notice of equivalence of legislation. Suspension shall be terminated as soon as the Swiss Confederation notifies its acceptance of the amendment or if the Contracting Parties agree to reinstate the Agreement.

5. If, after a period of six months of suspension, the Contracting Parties have not agreed to reinstate the Agreement, it shall cease to apply.

6. Paragraphs 4 and 5 do not apply to amendments relating to Chapters 3, 4 or 5 of Council Decision 2008/615/JHA or Article 17 of Council Decision 2008/616/JHA, in respect of which the Swiss Confederation has notified the European Union that it does not accept the amendment stating the reasons thereof. In that case, and without prejudice to Article 10, the content of the relevant provisions in their version prior to the amendment shall continue to be applicable in the relations between the Swiss Confederation and the Member States.

Article 6

Review

The Contracting Parties agree to carry out a common review of this Agreement no later than five years after its entry into force. The review shall in particular address the practical implementation, interpretation and development of the Agreement and shall also include issues such as the consequences of development of the European Union relating to the subject-matter of this Agreement.

Article 7

Relationship with other instruments

1. The Swiss Confederation may continue to apply bilateral or multilateral agreements or arrangements on cross-border cooperation with Member States that are in force on the date this Agreement is concluded in so far as such agreements or arrangements are not incompatible with the objectives of this Agreement. The Swiss Confederation shall notify the European Union of any such agreements or arrangements which will continue to apply.

2. The Swiss Confederation may conclude or bring into force additional bilateral or multilateral agreements or arrangements on cross-border cooperation with Member States after this Agreement has entered into force insofar as such agreements or arrangements provide for the objectives of this Agreement to be extended or enlarged. The Swiss Confederation shall notify the European Union of any such new agreement or arrangement within three months of signing or, in the case of instruments that were signed before the entry into force of this Agreement, within three months of their entry into force.

3. The agreements and arrangements referred to in paragraphs 1 and 2 may not affect relations with Member States that are not parties thereto.

4. This Agreement shall be without prejudice to existing agreements on legal assistance or mutual recognition of court decisions.

Article 8

Notifications, declarations and entry into force

1. The Contracting Parties shall notify each other of the completion of the procedures required to express their consent to be bound by this Agreement.
2. The European Union may express its consent to be bound by this Agreement even if the decisions as regards the processing of personal data which are or have been supplied pursuant to Council Decision 2008/615/JHA have not yet been taken in respect of all the Member States.
3. Article 5(1) and (2) shall apply provisionally as from the time of signature of this Agreement.
4. With respect to amendments adopted after the signature of this Agreement but before its entry into force, the period of three months referred to in the last sentence of Article 5(2) shall start to run from the day of entry into force of this Agreement.
5. When giving its notification under paragraph 1 or, if so provided, at any time thereafter, the Swiss Confederation shall make the declarations provided for in this Agreement.
6. This Agreement shall enter into force on the first day of the third month following the date of the last notification pursuant to paragraph 1.
7. The supply by Member States and the Swiss Confederation of personal data under this Agreement may not take place until the provisions of Chapter 6 of Council Decision 2008/615/JHA have been implemented in the national law of the States involved in such supply.
8. In order to verify whether this is the case for the Swiss Confederation, an evaluation visit and a pilot run shall be carried out in respect of and under conditions and arrangements acceptable to the Swiss Confederation, similar to those concluded in respect of Member States pursuant to Chapter 4 of the Annex to Council Decision 2008/616/JHA.

On the basis of an overall evaluation report and following the same steps as for the launching of automated data exchanges in Member States the Council shall determine the date or dates as from which personal data may be supplied by Member States to the Swiss Confederation pursuant to this Agreement.
9. The provisions of Directive (EU) 2016/680 of the European Parliament and of the Council shall be implemented and applied by the Swiss Confederation. The Swiss Confederation shall communicate to the European Commission the text of the main provisions adopted in the field covered by the Directive.
10. The provisions of Council Framework Decision 2009/905/JHA referred to in Article 1, paragraph 4 shall be implemented and applied by the Swiss Confederation. The Swiss Confederation shall communicate to the European Commission the text of the main provisions adopted in the field covered by the Council Framework Decision.

11. The competent authorities of the Swiss Confederation may not apply the provisions of Chapter 2 of Council Decision 2008/615/JHA before the Swiss Confederation has transposed and applied the measures referred to in paragraphs 9 and 10.

Article 9

Accession

Accession by new Member States to the European Union shall create rights and obligations under this Agreement between those new Member States and the Swiss Confederation.

Article 10

Termination

1. This Agreement may be terminated at any time by one of the Contracting Parties.
2. Termination of this Agreement pursuant to paragraph 1 shall take effect six months after the deposit of the notification of termination.

Done at INSERT on DATE in two originals in the Bulgarian, Spanish, Czech, Danish, German, Estonian, Greek, English, French, Croatian, Italian, Latvian, Lithuanian, Hungarian, Maltese, Dutch, Polish, Portuguese, Romanian, Slovak, Slovenian, Finnish and Swedish languages, each of these texts being equally authentic.

For the European Union

For the Swiss Confederation

DECLARATION TO BE ADOPTED AT THE OCCASION OF THE SIGNATURE OF THE AGREEMENT

The European Union and the Swiss Confederation, Contracting Parties of the Agreement on the application of certain provisions of Council Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime, 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, and the Annex thereto, and of Council Framework Decision 2009/905/JHA on accreditation of forensic service providers carrying out laboratory activities (hereinafter referred to as ‘the Agreement’),

declare:

The implementation of the DNA, dactyloscopic and vehicle registration data exchange pursuant to the Agreement will require that the Swiss Confederation sets up bilateral connections for each of these data categories with each of the Member States.

To enable and facilitate this work, the Swiss Confederation will be provided with all the available documentation, software products and contact lists. The Swiss Confederation will have the opportunity to set up an informal partnership with Member States that have already implemented such data exchange, with a view to sharing experiences and getting practical and technical support. The details of such partnerships are to be arranged in direct contacts with the Member States concerned.

The Swiss experts can contact at any time the Presidency of the Council, the European Commission or leading experts in these matters to obtain information, clarification or any other support. Similarly the Commission will, whenever in preparation of proposals or communications it contacts representatives of the Member States, avail itself of the opportunity to contact also representatives of the Swiss Confederation.

Swiss experts may be invited to attend meetings where Member States’ experts discuss within the Council technical aspects which are directly relevant to the proper application and development of the content of the aforementioned Council Decisions.

ANNEX [...]