



Council of the
European Union

Brussels, 16 March 2017
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ENFOPOL 115
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NOTE

From: Europol

To: Delegations

Subject: Draft Agreement on Operational and Strategic Cooperation between the Kingdom of Denmark and the European Police Office (Europol)

Delegations will find enclosed a letter from the Chairperson of the Europol Management Board on the above-mentioned subject and its annexes.



The Hague, 15 March 2017

MBS 038.2017

Management Board

Ms Christine Roger
Director General
Justice and Home Affairs
General Secretariat of the Council

Subject: draft cooperation agreement with Denmark, including JSB opinion

Dear Ms Roger,

Further to the 15 December declaration from the Prime Minister of Denmark and the Presidents of the Commission and the European Council to minimise the negative effects of the Danish departure from Europol, the Management Board (MB) proposed to the Council the addition of Denmark to the list of third States and organisations with which Europol shall conclude agreements. Subsequently, the MB authorised the Director to enter into negotiations on the conclusion of an operational agreement with Denmark and submitted the draft cooperation agreement to the Joint Supervisory Board (JSB) for an opinion.

The draft agreement was submitted to the Board through a written procedure that ended on 10 March and generated comments by Belgium, France, Germany, Italy, Portugal, Spain and Sweden.

Member States generally support the conclusion of an agreement between Europol and Denmark, given the particular circumstances, and stress the need to maintain an appropriate level of operational cooperation for the benefit of all Member States. However, MB members made drafting proposals and asked for clarifications notably regarding Recital 10 and Article 10(6).

Member States underlined that the secondment of Europol staff or national experts should be subject to a decision of the Management Board, as is common practice, and requested clarifications on the purpose and nature of such secondments, including cost-implications for Europol. Language inconsistencies between Recital 10 and Articles 9(1) and 10(6) of the draft agreement were also noted.

Member States supported the need for Denmark - as an EU member state and part of the Schengen area - to have an appropriate level of cooperation and information exchange with Europol. They emphasized also that any arrangement should not result in a more advantageous status than that of Member States.

The JSB acknowledged the extraordinary situation between Denmark and Europol and the need to regulate the relationship from an operational point of view. The JSB highlighted the uncertain data protection situation that could potentially result if no agreement is reached before 1 May and, in this context, found that the draft agreement may be concluded. Also, the JSB made observations regarding possible inconsistencies between the Europol Regulation and the draft agreement. These were addressed in a revised version of the draft.

In relation to Article 10(6) of the draft agreement, Europol has clarified that this is meant to include both Europol staff (Temporary Agents, Contract Agents) and/or seconded national experts (SNE) who would process Danish requests.

The draft agreement was amended to clarify that the specifically assigned personnel, who will process Danish requests 24/7, will be located at Europol, under its authority, and that their possible secondment to Denmark would be subject to a decision by the Management Board.

Europol clarified that, if such a decision would be taken, the conditions of their deployment would be detailed in an “administrative arrangement” under Article 17 of the draft agreement, which would be submitted to the Management Board. This arrangement would notably specify that, as provided for in the cooperation agreement, the SNEs perform their tasks under the authority of Europol and that such tasks should be performed in a separate and secure environment at the headquarters of the Danish National Police in Copenhagen. It is recalled that the protocol on privileges and immunities applies only to Europol Temporary Agents and Contract Agents, but not to SNEs.

In addition, Europol clarified that the possible secondment of Europol liaison officers to Denmark in accordance with Article 9(1) will be subject to the approval of the Management Board.

Against this background, I am pleased to transmit the draft agreement as agreed between Denmark and Europol, as well as the opinion of the JSB for the Council's consideration.

I remain at your disposal for any further information you may need.

Yours sincerely,



Arie IJzerman

Chairperson

Enclosures: Draft operational agreement between Europol and Denmark (#884492 v5A)

JSB opinion on the draft agreement (#885765)

Draft Agreement
on Operational and Strategic Cooperation
between the Kingdom of Denmark and the European Police Office

The Kingdom of Denmark

and

the European Police Office (hereafter referred to as "the Contracting Parties")

- (1) Considering that as of 1 May 2017, the new Europol Regulation (EU) 2016/794¹ (hereafter "Europol Regulation") will apply and that, as a consequence both of the application of Protocol (No 22) on the position of Denmark (hereafter "Protocol 22"), under which the Kingdom of Denmark (hereafter "Denmark") does not take part in the adoption of measures pursuant to Title V of Part Three of the TFEU and such measures are not binding upon nor applicable in Denmark, and of the fact that Denmark has so far not exercised the option provided for in Part IV of the said Protocol which would allow it to fully participate in the new Europol Regulation, Denmark will no longer be part of Europol to which it has participated since Europol's establishment in 1998² and will be regarded as a third country with respect to Europol,
- (2) Aware however of the urgent problems arising from international crime, especially terrorism, organised crime and other forms of serious crime and of the importance attached by all sides to preventing and combatting terrorism and serious crime which affect a common interest covered by a European Union's policy,

¹ Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA (OJ L 135, 24.5.2016, p. 53).

² Council Act of 26 July 1995 drawing up the Convention based on Article K.3 of the Treaty on European Union, on the establishment of a European Police Office (Europol Convention) (OJ C 316, 27.11.1995, p. 1) (entered into force on 1.10.1998).

- (3) Wishing therefore to ensure cooperation between Europol and Denmark on key matters so as to enhance the EU's resilience to security threats and to minimise the negative effects of the Danish departure from Europol by concluding with Denmark an Operational and Strategic Cooperation Agreement which would allow it to cooperate with Europol to a level at least equivalent to that of third countries with which such agreements have been concluded, without Denmark having access, e.g. through inputting or retrieving data, to information stored by Europol in its processing systems,
- (4) Considering that Denmark is a Member State of the European Union,
- (5) Considering that Denmark implements fully in its national law, in accordance with Article 4 of Protocol 22, the Schengen *acquis*, and is therefore bound under international law by a number of EU law enforcement provisions, including the measures aimed at compensating the absence of internal border controls on persons within the Schengen area,
- (6) Considering that Denmark is also part of the Nordic passport union together with the other Nordic States, two of which are EU Member States and two of which are associated with the implementation of the Schengen *acquis* and its further development,
- (7) Considering that Denmark is bound by the European Convention on Human Rights³ and the Convention No 108 of the Council of Europe on personal data protection⁴,
- (8) Considering that the Europol Management Board has, following the inclusion of Denmark in the list of third States with which Europol shall conclude agreements as set out in Council Decision 2009/935/JHA⁵, given Europol the authorisation to enter into negotiations on a cooperation agreement with Denmark on 17 February 2017,
- (9) Considering that the Council of the European Union, having regard to the opinion of the European Parliament, has on (...date....) given Europol the authorisation to agree to the present Agreement between Denmark and Europol,⁶

³ European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950.

⁴ Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data of 28 January 1981.

⁵ Council Decision 2009/935/JHA of 30 November 2009 determining the list of third States and organisations with which Europol shall conclude agreements (OJ L 325, 11.12.2009, p. 12).

⁶ (insert reference of the Council Implementing Decision).

- (10) Considering that because of the above-mentioned specific situation of Denmark, both as an EU and Schengen Member State, it is appropriate to provide in the present Agreement, in addition to the provisions usually provided for in operational agreements with third countries, that Europol will specifically assign Danish speaking Europol staff or seconded national experts for treating, under the authority of Europol, Danish requests to input, receive, retrieve and cross-check data on a 24/7 basis, that Europol will exchange information with Danish competent authorities, and that Europol will inform Denmark without delay of information concerning it, as well as that Denmark will be invited to the meetings of the Heads of the Europol National Units and may be invited, as an observer, to the Europol Management Board and its subgroups,
- (11) Considering that, in view of the above additional provisions referred to in recital 10 and in line with the Declaration of 15 December of Presidents of the European Commission, of the European Council and the Prime Minister of Denmark, in order to secure the uniform application and interpretation of this Agreement, it is appropriate to provide that the Court of Justice of the European Union will have jurisdiction as regards questions on the validity and interpretation of this Agreement raised by Danish courts or tribunals and as regards compliance by Denmark with the Agreement, as well as with regard to personal data protection and Europol's liability,
- (12) Considering likewise that it is appropriate to provide that the data protection provisions of this Agreement comprise an obligation for Denmark to apply Directive 2016/680 with respect to the personal data exchanged pursuant to this Agreement and to recognise the role of the European Data Protection Supervisor, that Denmark will appropriately contribute financially to Europol's budget and that the present Agreement is conditioned on Denmark's continued membership of the Schengen area. If Denmark was no longer bound by the Schengen *acquis*, the present Agreement would as a consequence be terminated,
- (13) Respectful of Denmark's and Europol's obligations under the Charter of Fundamental Rights of the European Union,

Have agreed as follows:

Article 1

Purpose

The purpose of this Agreement is to establish cooperative relations between Europol and Denmark in order to support and strengthen action by the competent authorities of the other Member States of the European Union and of Denmark and their mutual cooperation in preventing and combating serious crime affecting two or more Member States of the European Union, terrorism and forms of crime which affect a common interest covered by a Union policy, in particular through the exchange of information between Europol and Denmark.

Article 2

Definitions

For the purpose of this Agreement:

- a) "Europol Council Decision" means the Council Decision (2009/371/JHA) of 6 April 2009 establishing the European Police Office (Europol),⁷ OJ L 121, 15.5.2009;
- b) "Europol Regulation" means Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA.⁸

⁷ OJ L 121, 15.5.2009, p. 37.

⁸ OJ L 135, 24.5.2016, p. 53.

Chapter I - Scope

Article 3

Areas of crime

1. The cooperation as established in this Agreement shall relate to all areas of crime within Europol's competence, as listed in Annex 1, including related criminal offences.
2. Related criminal offences shall be the criminal offences committed in order to procure the means of perpetrating the criminal acts referred to in paragraph 1, criminal offences committed in order to facilitate or perpetrate such acts, and criminal offences committed in order to ensure the impunity of such acts.

Article 4

Areas of cooperation

The cooperation may, additional to the exchange of information, in accordance with the tasks of Europol as outlined in Europol's legal framework, in particular include the exchange of specialist knowledge, general situation reports, results of strategic analysis, information on criminal investigation procedures, information on crime prevention methods, participation in joint investigation teams and training activities as well as providing advice and support in individual criminal investigations.

Article 5

Relation to other international instruments

This Agreement shall not prejudice or otherwise affect or impact upon the legal provisions with regard to exchange of information between Denmark and any other Member State of the European Union foreseen by any Mutual Legal Assistance Treaty, any other cooperation agreement or arrangement, any other Union legal act or agreement concluded by the Union or working law enforcement relationship for the exchange of information.

Chapter II – Mode of cooperation

Article 6

National contact point

1. Denmark shall designate a national contact point to act as the central point of contact between Europol and competent authorities of Denmark.
2. The exchange of information between Europol and Denmark as specified in this Agreement shall take place between Europol and the national contact point. This does not preclude however, direct exchanges of information between Europol and the competent authorities as defined in Article 7, if considered appropriate by both Contracting Parties.
3. The national contact point will also be the central point of contact in respect of review, correction and/or deletion of personal data.
4. The national contact point shall equally be the central point of contact for the transmission of personal data from private parties established within Denmark, as well as for information from private persons residing in Denmark, to Europol.
5. Denmark shall ensure the possibility for the national contact point to enable information exchange on a 24-hour basis. The national contact point shall ensure that information can be exchanged without delay with the competent authorities as defined in Article 7.
6. The national contact point for Denmark is designated in Annex 2.

Article 7

Competent authorities

1. Competent authorities are all police authorities and other law enforcement services existing in Denmark which are responsible under national law for preventing and combating criminal offences. The competent authorities shall also comprise other public authorities existing in Denmark which are responsible under national law for preventing and combating criminal offences in respect of which Europol is competent.
2. Without prejudice to Article 11, the transfer of information by Europol to Denmark and transfer within Denmark shall be restricted to these competent authorities.

Article 8

Consultations and closer cooperation

1. The Contracting Parties agree that to further the cooperation and enhance as well as monitor the development of the provisions of this Agreement, regular exchanges, as appropriate, are integral. Specifically:
 - a. High level meetings between Europol and the competent authorities of Denmark shall take place regularly to discuss issues relating to this Agreement and the cooperation in general.
 - b. A representative of the national contact point and Europol shall consult each other regularly on policy issues and matters of common interest for the purpose of realising their objectives and coordinating their respective activities.
 - c. A representative of the national contact point shall be invited to attend the meetings of the Heads of Europol National Units.
 - d. A representative of Denmark may be invited to the Europol Management Board and its subgroups as an observer without the right to vote.

2. When appropriate, consultation shall be arranged at the required level between representatives of the competent authorities of Denmark and Europol, responsible for the areas of criminality to which this Agreement applies, to agree upon the most effective way in which to organise their particular activities.

Article 9

Liaison officers

1. The Contracting Parties agree to enhance the cooperation as laid down in this Agreement through the secondment of liaison officer(s) from Denmark. Europol may second one or more liaison officer(s) to Denmark.
2. The liaison officers' tasks, rights and obligations, their number, and the costs involved, shall be governed by an administrative arrangement.
3. Denmark shall ensure that its liaison officers have speedy and, where technically feasible, direct access to the national databases necessary for them to fulfil their respective tasks.
4. Europol will as far as possible assist Denmark in respect of concluding an agreement with the Kingdom of the Netherlands concerning the privileges and immunities enjoyed by Denmark's seconded liaison officers. Within the territory of Denmark a Europol liaison officer shall enjoy the privileges and immunities accorded by Protocol No 7 on the privileges and immunities of the European Union, annexed to the TEU and to the TFEU.
5. The liaison officers from Denmark which have been seconded to Europol pursuant to the Europol Decision before 1 May 2017 may be assigned the responsibilities of liaison officers in accordance with this Article. In such a case, the rights and obligations of those liaison officers shall be governed by administrative arrangements referred to in paragraph 2.

Chapter III - Information exchange

Article 10

General provisions

1. Exchange of information between the Contracting Parties shall only take place for the purpose of and in accordance with the provisions of this Agreement.
2. The transmission of personal data and classified information by Europol must be necessary in individual cases for the purpose of preventing or combating the criminal offences referred to in Article 3.
3. The Contracting Parties shall only supply information to each other which was collected, stored and transferred in accordance with their respective legal framework on data protection and sensitive non-classified and classified information referred to in paragraph 4 and in Article 16 of this Agreement and has not been obtained in violation of the Charter of Fundamental Rights of the European Union.
4. For the purposes of this Agreement:
 - (a) Denmark shall continue to be bound by Convention No 108 of the Council of Europe.⁹
 - (b) Until 1 May 2017, Europol shall be bound by the provisions on relations with third States contained in the Europol Decision and its implementing decisions, in particular Council Decision 2009/934/JHA.

⁹ Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data of 28 January 1981.

(c) From 1 May 2017, Europol and Denmark shall be bound by the following provisions of the Europol Regulation relating to data protection safeguards, including the role of the European Data Protection Supervisor with regard to the processing of personal data by Europol:

(i) Articles 28 to 48, except Article 45, and

(ii) Article 2 on definitions, in so far as its provisions are relevant for the application of the provisions of the Europol Regulation referred to in the present point (c) and in Articles 18 and 19 of this Agreement.

References to Member States in the provisions of the Europol Regulation referred to above and referred to in Articles 16, 18 and 19 of this Agreement shall be construed as references to Denmark. For the purpose of applying the obligation to rectify, erase or restrict data as set out in Article 37(5) of the Europol Regulation, Denmark shall request Europol to do so using the means referred to in paragraph 6 of this Article.

(d) Until 1 May 2017, Denmark shall continue to be bound by Council Framework Decision 2008/977/JHA¹⁰ of 27 November 2008 and the national law implementing it.

From 1 May 2017, Denmark shall apply the rules laid down in Directive (EU) 2016/680¹¹ of 27 April 2016 as implemented in its national law.

5. Europol shall notify Denmark without delay of any information concerning it.

a. If such information is subject to access restrictions pursuant to Article 11(3) that would prohibit its being shared, Europol shall consult with the provider of the information stipulating the access restriction and seek its authorisation for sharing. In such a case, the information shall not be shared without an explicit authorisation of the provider.

¹⁰ Council Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters (OJ L 350, 30.12.2008, p. 60).

¹¹ 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 (OJ L 119, 4.5.2016, p. 89).

- b. Irrespective of any access restrictions, Europol shall notify Denmark of any information concerning it if this is absolutely necessary in the interest of preventing imminent threat to life. In such a case, Europol shall at the same time notify the provider of the information about the sharing of the information and justify its analysis of situation.
6. Europol shall assign up to 8 Danish speaking Europol staff on a 24/7 basis to the task of processing Danish requests, as well as inputting and retrieving the data coming from the Danish authorities into the Europol processing systems. This shall include the right to modify, correct or delete the said data. Denmark shall second national experts to Europol for that purpose. Such staff or national experts shall act under the authority of Europol. This shall be without prejudice to the general task of Europol staff or of national experts seconded to Europol to process any request, including Danish ones, in accordance with the Europol Regulation.

The Europol Management Board may decide to second Europol staff or national experts to the territory of Denmark for the purpose of the said assignment. Such staff shall enjoy privileges and immunities referred to in Article 9(4), second sentence.

7. Data subjects shall exercise their data protection rights in accordance with the provisions referred to in Article 10(4) of this Agreement.
8. Requests for public access to information transmitted on the basis of the present Agreement and held by Europol shall be subject to Regulation 1049/2001 of 30 May 2001. Such requests shall be submitted to Denmark for its advice as soon as possible.

Requests for public access to information transmitted on the basis of the present Agreement and held by Denmark shall be subject to the Danish national law. Such requests shall be submitted to Europol for its advice as soon as possible and shall not be disclosed without its consent.

Article 11

Transfer of personal data

1. Requests from Europol or the competent authorities of Denmark for personal data shall be made only for the purpose of this Agreement and the personal data shall only be processed for the specific purpose(s) referred to in paragraph 2.
2. The Contracting Parties shall indicate at the moment of transfer of the personal data or before, the specific purpose or purposes for which the data were transferred. If Denmark has not done so, Europol, in agreement with Denmark shall process the information in order to determine the relevance such information as well as the purpose or purposes for which it is to be further processed. Europol may process information for a specific purpose different from that for which information has been provided only if authorised to do so by Denmark.
3. The Contracting Parties may indicate, at the moment of providing information, any restriction on its use, erasure or destruction, including possible access restrictions in general or specific terms. Where the need for such restrictions becomes apparent after the information has been provided, the Contracting Parties shall inform each other accordingly.
4. The Contracting Party receiving the data shall give an undertaking that the data will be processed only for the purpose for which they were transferred. The personal data shall be deleted as soon as they are no longer necessary for the purpose for which they were transferred.
5. Transfer of personal data revealing racial or ethnic origin, political opinions or religious or philosophical beliefs, or trade union membership, genetic data or data concerning a person's health or sex life by Europol shall be prohibited, unless it is strictly necessary and proportionate for preventing or combating crime that falls within Europol's objectives.
6. Europol shall keep a record of all communications of personal data under this Article and of the grounds for such communications.

Article 12

Use of the information

1. Information may be used only for the purpose for which it was provided and any restriction on its use, transfer, erasure or destruction, including possible access restrictions in general or specific terms must be respected by the Contracting Parties.
2. Use of information for a different purpose than the purpose for which the information was provided must be authorised by the Contracting Party that provided the data.

Article 13

Onward transfer of the information received

1. Onward transfer of the information received by Denmark shall be restricted to the competent authorities of Denmark as defined in Article 7 and shall take place under the same conditions as those applying to the original transfer. Any other onward transfer, including to third States and international organisations, must be consented to by Europol.
2. Onward transfer of the information received by Europol shall be restricted to the competent authorities in the Member States of the European Union and shall take place under the same conditions as those applying to the original transfer. Any other onward transfer, including to third States or international organisations must be consented to by Denmark.

Chapter IV - Other forms of cooperation

Article 14

Operational Analysis Projects

Europol may invite experts from Denmark to be involved in operational analysis projects under the conditions outlined for third countries in the guidelines further specifying the procedures for the processing of information by Europol as adopted by the Europol Management Board in accordance with Article 11 (1)(q) of the Europol Regulation.

Article 15

Participation in joint investigation teams

Denmark and Europol shall offer each other support in the facilitation of the setting up and operation of joint investigation teams including those set up with other Member States of the European Union.

Chapter V – Confidentiality of information

Article 16

Principles of security and confidentiality

Each Contracting Party shall:

1. protect and safeguard non-classified information in accordance with Europol's rules on the protection of sensitive non-classified information as referred to in Article 67(1) of the Europol Regulation, with the exception of information which is expressly marked or is clearly recognisable as being public information, by various measures including the obligation of discretion and confidentiality, limiting access to authorised personnel and general technical and procedural measures;
2. protect and safeguard classified information in accordance with Europol's rules on the protection of EU classified information, which shall be consistent with Decision 2013/488/EU¹², as provided for in Article 67(2) of the Europol Regulation.

Article 17

Administrative arrangement implementing this Agreement

An administrative arrangement between the Contracting Parties shall implement non-essential elements of this Agreement, such as technical and practical issues.

¹² Council Decision of 2013/488/EU 23 September 2013 on the security rules for protecting EU classified information (OJ L 274, 15.10.2013, p. 1).

Chapter VI -Right to judicial remedy, Liability and Jurisdiction of the European Court of Justice

Article 18

Right to judicial remedy against the European Data Protection Supervisor

With regard to any action against a decision of the European Data Protection Supervisor, Denmark shall recognise the jurisdiction of the Court of Justice of the European Union as provided for in Article 48 of the Europol Regulation.

Article 19

Liability and the right to compensation

1. The contractual and non-contractual liability of Europol shall be governed by Article 49 of the Europol Regulation, including as regards the jurisdiction of the Court of Justice of the European Union which Denmark shall recognise.
2. The liability for incorrect personal data processing and the right to compensation shall be governed by Article 50 of the Europol Regulation, including as regards the jurisdiction of the Court of Justice of the European Union which Denmark shall recognise.
3. This Article shall be without prejudice to the jurisdiction of the Court of Justice of the European Union as provided for in Article 20.

Article 20

Jurisdiction of the Court of Justice of the European Union in relation to the interpretation of and compliance with the Agreement

1. Where a question on the validity or interpretation of this Agreement is raised before a Danish court or tribunal, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon whenever under the same circumstances a court or tribunal of another Member State of the European Union would do so in respect of the Europol Decision and its implementing measures, or the Europol Regulation.
2. Where any such question is raised in a case pending before a Danish court or tribunal against whose decision there is no judicial remedy under national law, the Danish court or tribunal shall bring the matter before the Court of Justice whenever under the same circumstances a court or tribunal of another Member State of the European Union would be required to do so in respect of the Europol Decision and its implementing measures, or the Europol Regulation.
3. Under Danish law, the courts in Denmark shall, when interpreting this Agreement, take due account of the rulings contained in the case-law of the Court of Justice in respect of provisions of the Europol Decision and its implementing measures, or the Europol Regulation.
4. Denmark shall be entitled to submit 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 of the Europol Decision and its implementing measures, or the Europol Regulation.
5. The European Commission may bring before the Court of Justice cases against Denmark concerning non-compliance with any obligation under this Agreement.

Denmark may bring a complaint to the Commission as to the non-compliance by Europol of its obligations under this Agreement. In such a case, the Commission shall investigate the matter and take all appropriate measures to settle the dispute in a mutual satisfactory manner.

The relevant provisions of the EU Treaties governing proceedings before the Court of Justice shall apply.

6. The Protocol on the Statute of the Court of Justice of the European Union and its Rules of Procedure shall apply.

Chapter VII - Final provisions

Article 21

Secure communication line

1. The establishment, implementation and operation of a secure communication line for the purpose of exchange of information between Europol and Denmark shall be regulated in the administrative arrangement referred to in Article 17 and shall build upon the existing secure communication line between Denmark and Europol.
2. Without prejudice to Article 19 a Party shall be liable for damage caused to the other Contracting Party as a result of wrongful actions relating to the establishment, the implementation or the operation of the secure communication line.
3. Any dispute between the Contracting Parties concerning the interpretation or application of provisions relating to the establishment, implementation and operation of a secure communication line shall be settled by means of consultations between the Contracting Parties, without prejudice to the application of Articles 19 and 20.

Article 22

Financial contribution

1. Denmark shall contribute to the revenue of Europol an annual sum calculated in accordance with its Gross National Income (GNI) as a percentage of the GNI of all participating States, including Denmark, in accordance with the formula laid down in Annex III.
2. The financial contribution referred to in paragraph 1 shall be incurred as from the day following the entry into force of this Agreement. The first financial contribution shall be reduced proportionally to the remaining time in the year after the entry into force.
3. Without prejudice to paragraphs 1 and 2, the Contracting Parties shall bear their own expenses which arise in the course of implementation of the present Agreement, unless otherwise stipulated in this Agreement.

Article 23

Notification of amendments to the Europol Regulation

Whenever amendments to the provisions of the Europol Regulation referred to in Articles 10(4)(c), 16, 18 and 19 of this Agreement or to the list of areas of crime contained in Annex I to the Europol Regulation are adopted, and therefore become applicable in the context of this Agreement, Europol shall notify Denmark thereof.

Article 24

Transitional provisions

1. Without prejudice to the necessary adjustments to be made pursuant the third subparagraph of paragraph 2, the personal data and information exchanged between Europol and Denmark on the basis of the Europol Decision before the entry into force of this Agreement, as well as the conditions applicable to such data and information, shall remain valid.
2. Europol shall within six months from the entry into force of this Agreement take the necessary measures to assign the required Europol staff to process Danish requests on a 24/7 basis as referred to Article 10(6).

Until such time, the Danish national unit, competent authorities and liaison officers shall be allowed to continue accessing directly the Europol data management system in the same way and for the same purpose as provided for under Articles 11 to 16 of the Europol Decision.

During this 6-month period, the Danish authorities and Europol shall take all appropriate measures to verify that the personal data and information provided by Denmark pursuant to the Europol Decision before the entry into force of this Agreement is accurate and complies with the relevant conditions such as handling, evaluation or classification codes and that such data and information can be kept in the same way within the Europol data management system pursuant to the provisions of this Agreement. If any modifications to those conditions are necessary, each Party shall introduce them, as appropriate.

3. Unless otherwise decided by Europol, Denmark shall remain associated with the activities of analysis groups to which it was taking part before 1 May 2017. Such association shall continue under the same conditions as provided for under the relevant pre-existing associations.

Article 25

Assessment

1. At the latest by 31 October 2020, the Commission shall assess the provisions of this Agreement. The assessment shall in particular concern the operational effectiveness of the Agreement as well as Denmark's compliance with the data protection provisions thereof. For the purpose of this assessment Denmark and Europol shall ensure access to relevant documentation, information and staff, as requested by the Commission.
2. The Commission shall inform in writing the European Parliament and the Council about the outcome of that assessment. Denmark shall be given the opportunity to provide written comments which shall be attached to the Commission's assessment.
3. In the light of this assessment, the Commission may submit, at the latest by 30 April 2021, a recommendation in accordance with Article 218(3) of the Treaty of the Functioning of the European Union with a view to replacing the present Agreement with an agreement referred to in Article 25(1)(b) of the Europol Regulation.

Article 26

Entry into force and duration

1. This Agreement shall enter into force on 30 April 2017.
2. It shall remain in force until its termination in accordance with Article 27 or its replacement in accordance with Article 25(3).

Article 27

Termination of the Agreement

1. In case Denmark would no longer be bound by the Schengen *acquis*, this Agreement shall be terminated on the same date as that *acquis* ceases to apply to Denmark.
2. This Agreement shall be terminated if Denmark informs the other Member States, in accordance with Article 7 of Protocol 22, that it no longer wishes to avail itself of the provisions of Part I of that Protocol.

This Agreement shall also be terminated if, following a notification in accordance with Article 8 of Protocol 22, Part I of that Protocol is replaced by the provisions in the Annex thereto and Denmark notifies pursuant to such provisions its intention to accept the Europol Regulation and its amending or replacing acts. Such termination shall take effect on the same date as the Europol Regulation becomes applicable to Denmark.

3. This Agreement may be terminated in writing by either of the Contracting Parties with three months' notice.
4. In case of termination, the Contracting Parties shall reach agreement on the continued use and storage of the information that has already been communicated between them. If no agreement is reached, either of the two Contracting Parties is entitled to require that the information which it has communicated be destroyed or returned to the transmitting Party.

Done at _____, on the _____ in duplicate in the Danish and English languages, each text being equally authentic.

For Denmark

For Europol

Annex I – Areas of crime

Europol's competence shall cover serious crime affecting two or more Member States of the European Union, terrorism and forms of crime which affect a common interest covered by a Union policy, as listed below;

- terrorism,
- organised crime,
- unlawful drug trafficking,
- illegal money-laundering activities,
- crime connected with nuclear and radioactive substances,
- illegal immigrant smuggling,
- trafficking in human beings,
- motor vehicle crime,
- murder, grievous bodily injury,
- illicit trade in human organs and tissue,
- kidnapping, illegal restraint and hostage taking,
- racism and xenophobia,
- organised robbery,
- illicit trafficking in cultural goods, including antiquities and works of art,
- swindling and fraud,

- racketeering and extortion,
- counterfeiting and product piracy,
- forgery of administrative documents and trafficking therein,
- forgery of money and means of payment,
- computer crime,
- corruption,
- illicit trafficking in arms, ammunition and explosives,
- illicit trafficking in endangered animal species,
- illicit trafficking in endangered plant species and varieties,
- environmental crime,
- illicit trafficking in hormonal substances and other growth promoters,
- other forms of crime listed in Annex I of Europol Regulation as from 1 May 2017.

With regard to the forms of crime listed above, for the purposes of this Agreement:

- (a) ‘crime connected with nuclear and radioactive substances’ means the criminal offences listed in Article 7(1) of the Convention on the Physical Protection of Nuclear Material, signed at Vienna and New York on 3 March 1980, and relating to the nuclear and/or radioactive materials defined in Article 197 of the Treaty establishing the European Atomic Community and in Council Directive 96/29/Euratom of 13 May 1996 laying down basic safety standards for the protection of the health of workers and the general public against the dangers arising from ionizing radiation¹³;
- (b) ‘illegal immigrant smuggling’ means activities intended deliberately to facilitate, for financial gain, the entry into, residence or employment in the territory of the Member States, contrary to the rules and conditions applicable in the Member States;
- (c) ‘trafficking in human beings’ means the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, as a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, the production, sale or distribution of child-pornography material, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;
- (d) ‘motor vehicle crime’ means the theft or misappropriation of motor vehicles, lorries, semi-trailers, the loads of lorries or semi-trailers, buses, motorcycles, caravans and agricultural vehicles, works vehicles and the spare parts for such vehicles, and the receiving and concealing of such objects;
- (e) ‘illegal money-laundering activities’ means the criminal offences listed in Article 6(1) to (3) of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, signed in Strasbourg on 8 November 1990;

¹³ OJ L 159, 29.6.1996, p. 1.

(f) ‘unlawful drug trafficking’ means the criminal offences listed in Article 3(1) of the United Nations Convention of 20 December 1988 against Illicit Traffic in Narcotic Drugs and Psychotropic Substances and in the provisions amending or replacing that Convention.

The forms of crime referred to in Article 3 and in this Annex shall be assessed by the competent authorities in accordance with the law of the States.

Annex II - National contact point

The national contact point for Denmark, to act as the central point of contact between Europol and other competent authorities of Denmark is hereby designated as:

Danish National Police, Polititorvet 14, 1780 København V, Denmark.

Annex III- Formula to calculate the contribution of Denmark to the revenue of Europol

The financial contribution of Denmark to the revenue of Europol as referred to in Article 22 of this Agreement, which shall be paid directly into Europol's budget, shall be calculated in the following way:

1. The most updated final figures of the Gross National Income (GNI) of Denmark available on 31 March of each year according to subparagraphs 2 and 3 shall be divided by the sum of the GNI figures of all the States participating in Europol available for the same year, including the GNI figure for Denmark. The obtained percentage will be applied to the part of the authorised Europol's revenue as defined in Article 57(3) of the Europol Regulation in the year under consideration to obtain the amount of the financial contribution of Denmark.

The calculation shall be made on the basis of the aggregate GNI at market prices and its components, supplied by the Member States in accordance with Article 2(2) of Regulation (EC, Euratom) No 1287/2003.

For the purposes of calculating the contribution, amounts shall be converted between the national currency and the euro at the exchange rate on the last day of quotation of the calendar year preceding the budget year concerned, as published in the *Official Journal of the European Union*, C series.

2. The financial contribution shall be paid in euro.
3. Denmark shall pay its financial contribution no later than 45 days after receiving the debit note. Any delay in payment shall give rise to the payment of default interest by Denmark on the outstanding amount from the due date. The interest rate shall be the rate applied by the European Central Bank to its principal refinancing operations, as published in the C series of the Official Journal of the European Union, in force on the first day of the month in which the deadline falls, increased by 3,5 percentage points.

4. Denmark's financial contribution shall be adapted in accordance with this Annex when the financial contribution from the EU entered in the general budget of the EU as defined in 57(3) of the Europol Regulation is increased pursuant to Articles 26, 27 or 41 of the EU Financial Regulation (966/2012). In such a case, the difference shall be due 45 days after receiving the debit note from the Commission.
5. In the event that payment credits of Europol received from the EU according to Article 57(3) of the Europol Regulation related to a year N are not spent by 31 December of year N or that Europol budget of the year N has been lowered according to Articles 26, 27 or 41 of the Regulation (EU, Euratom) No 966/2012, the part of these unspent or lowered payment credits corresponding to the percentage of the contribution made by Denmark shall be transferred to the budget of year N+1 of Europol.



JOINT SUPERVISORY BODY OF EUROPOL

To the attention of:

Mr Arie IJzerman
Chair of the Europol Management Board
PO Box 908 50
2509 LW The Hague
The Netherlands

Opinion 17/14 of the JSB in respect of the draft agreement on Operational and Strategic Cooperation to be signed between Europol and the Kingdom of Denmark

A. Introductory remarks

1. The JSB has been called upon to draw up an opinion in respect to the draft agreement to be signed between Europol and the Kingdom of Denmark, contained in EDOC# 884492, as submitted by the chair of the Management Board of Europol on 6 March 2017. The JSB was requested to give an opinion before 14 March 2017.

2. Article 5 paragraph 4, Article 6, paragraphs 1 and 4, of Council Decision 2009/934/JHA adopting the implementing rules governing Europol's relations with partners, including the exchange of personal data and classified information¹ explicitly recognise that the JSB must give an opinion during the procedure in which the Council of the European Union has to decide whether to approve any agreement negotiated between Europol and third States such as the Kingdom of Denmark.

3. The JSB points out that the present opinion is based on the report as contained in EDOC # 878133, the JSB opinion on the data protection level in the Kingdom of Denmark (document 17/03), as well as the draft agreement between Europol and the Kingdom of Denmark, contained in EDOC#884492.

4. In view of the extremely short period of only 4 working days for the JSB to assess the draft agreement and to adopt an opinion, the observations made in this opinion are only focussed on some principal aspects of this draft agreement.

B. Observations

The legal basis for concluding this agreement is the Europol Council Decision. However, it is clear that the practical application of this agreement will take place after 1 May 2017 when the Europol

¹ *OJ L 325, 11.12.2009, p. 6*

Regulation is applied. This forces to carefully balance between the conditions laid down in the Europol Council Decision relating to the relation with third States and Council Decision 2009/934/JHA adopting implementing rules governing Europol's relations with partners, including the exchange of personal data and classified information, and the provisions in the Europol Regulation.

Preamble 3 of the draft agreement clarifies the aim of the present draft agreement between Europol and the Kingdom of Denmark, namely "to ensure cooperation between Europol and Denmark on key matters so as to enhance the EU's resilience to security threats and to minimise the negative effects of the Danish departure from Europol by concluding with Denmark an Operational and Strategic Cooperation agreement which would allow it to cooperate with Europol to a level equivalent to that of third countries with which such agreements have been concluded."

Preamble 10 highlights the specific situation of the Kingdom of Denmark both as an EU and Schengen Member State. This is used as justification to provide for additional provisions such as the establishment of "a specific interface comprising Danish speaking staff for treating Danish requests to input, receive, retrieve and cross-check data on a 24/7 basis,...". This sentence can lead to confusion especially by use of the word "interface". This term is also referring to technical facilities to communicate between different IT systems. In this respect the JSB stresses that any provision in the draft agreement for creating direct access to Europol's systems for the Kingdom of Denmark, whether under the present regime of the Europol Council Decision or under the Europol Regulation, may only create access rights that are in compliance with the legal basis.

The JSB welcomes the statements in preambles 11 and 12 referring to the jurisdiction of the Court of Justice of the European Union when applying this agreement and the application of Directive 2016/680 and the recognition of the role of the European Data Protection Supervisor (EDPS).

The JSB further (also) welcomes conditioning of the Agreement on Denmark's continued membership of the Schengen area. Seen strictly from the data protection view, such a statement offers additional appropriate safeguards, as the Schengen acquis provides for a robust and active protection of personal data.

That the factual application of the agreement will take place under the Europol Regulation as legal framework is made clear in Chapter III of the draft agreement. In view of this, it is from a data protection perspective crucial that the agreement follows the data protection framework of the Europol Regulation. Although it is a positive approach that Article 10 (4)(c) of the draft agreement ensures that almost the entire Chapter VI of the Europol Regulation providing for the data protection safeguards is applicable to the Kingdom of Denmark, the way this is done also raises some questions. The JSB refers to Article 38, (2)(a) and (b) of the Europol Regulation defining the responsibility in data protection matters and allocating the responsibility for the quality of data to Member States when they provide personal data to Europol (Article 38, (2)(a)) and to Europol for data provide by third countries (Article 38, (2)(b)).

According to Article 10 (4)(c) of the draft agreement, references to Member States in the applied articles of the Europol Regulation shall be construed as references to the Kingdom of Denmark. This way the draft agreement deviates from the formal allocation of responsibilities as laid down in Article 38 of the Europol Regulation. The Kingdom of Denmark is in this respect regarded as any other Member State and not as a third State. This seems to be not in line with the aim as expressed in Preamble 3 to ensure cooperation between the Kingdom of Denmark and Europol to a level equivalent to that of third countries with which such agreements have been concluded.

Furthermore, the draft agreement excludes the application of the last sentence of Article 44 (4). According to that sentence, the EDPS shall - after taken immediate action in an extremely urgent case - immediately inform the national supervisory authorities justifying the urgent nature and the action taken. The JSB wonders why such an exemption is made. Any such action may have direct

consequences on national level and not only limited to data protection practices but also with a possible impact on ongoing national investigations and judicial procedures in the Kingdom of Denmark and other Members States or third States.

The draft agreement also excludes the application of Article 45 of the Europol Regulation establishing the Cooperation Board. The JSB stresses that opinions of this Board may very well directly regard third States.

Article 11(5) of the draft agreement forbids the transfer of sensitive data unless strictly necessary. However, Article 30(2) of Europol Regulation limits transferring of these categories of personal data not only with the condition of being strictly necessary but also that it must be proportionate for preventing or combating crime that falls within Europol's objectives. Article 11(5) of the draft agreement may not differ from Europol's responsibilities and obligations as stated in the Europol Regulation.

Another aspect that needs attention is the exclusion of the application of Article 48 of the Europol Regulation. This article provides for the possibility for a data subject, Europol and the Kingdom of Denmark to bring any action against a decision of the EDPS before the Court of Justice of the European Union. This exclusion seems to bring the Kingdom of Denmark in a unique position of being subject just like the other Member States of the Europol data protection and supervision regime but excluding the right to have a judicial remedy against actions of the EDPS.

However, Article 18 of the draft agreement refers to the right to judicial remedy against the EDPS. Without explicitly defining that right, it mentions that the Kingdom of Denmark shall - with regard to any action against a decision of the EDPS - recognise the jurisdiction of the Court of Justice of the European Union as provided for in Article 48 of the Europol Regulation. The JSB stresses that it assesses Article 18 of the draft agreement as to ensure the right to start any action against a decision of the EDPS before the Court of Justice of European Union. If not, this would in an unacceptable way undermine data subjects rights.

The JSB notes that the draft agreement obliges in Article 10(6) Europol to assign up to 8 Danish speaking Europol staff on a 24/7 basis. This Danish speaking staff will have the task to process Danish requests, as well as inputting and retrieving the data coming from the Danish authorities into the Europol processing systems including modification, correction or deletion of the data. Such staff (or national experts) shall act under the authority of Europol. The JSB emphasises that this provision may never be interpreted as if only the Danish speaking staff are in charge of performing data processing activities related to data provided for by the Kingdom of Denmark. Europol as organisation has its own responsibilities to comply with the provisions of the Europol Regulation more specifically Article 38 (2)(b) and (5)(b).

The JSB likes to draw attention to Article 17 of the draft agreement. According to that article, an administrative arrangement will be used to implement what is called non-essential elements of the agreement such as technical and practical issues. Europol should ensure that the Europol Data Protection Officer will be closely involved when implementing those so called technical and practical elements which undoubtedly have an impact on the processing of personal data by the Contracting Parties.

Article 24(2) of the draft agreement allows as a provisional measure that the Danish national units, competent authorities and liaison officers continue to have access to the Europol data management system in the same way and for the same purpose as the access to the Europol information system, the analytical work files and the index function. The JSB has serious doubts whether an instrument as the present draft agreement between the Kingdom of Denmark and Europol based on the Europol Council Decision, may set aside the provisions of Article 20 of the Europol Regulation.

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Not only is such unlimited access for a third State not allowed, it is also not in line with the intention expressed in Preamble 3 to arrange the cooperation with the Kingdom of Denmark to a level equivalent to that of third countries.

C. JSB Opinion in respect to the draft agreement between Europol and the Kingdom of Denmark

The JSB acknowledges the extraordinary situation between the Kingdom of Denmark and Europol. If no operational agreement is concluded before 1 May 2017, an uncertain data protection situation will evolve concerning the personal data exchanged between the Kingdom of Denmark and Europol. The JSB also understands that from an operational point of view the relation should be regulated as soon as possible. The draft agreement on Operational and Strategic Cooperation between Europol and the Kingdom of Denmark, as contained in document EDOC#884492, has many elements reflecting this unique situation. Due to the timing of the negotiations of the agreement so short before the deadline of 1 May 2017, and not involving the necessary data protection expertise, the draft agreement contains various elements of inconsistency between the Europol Regulation and the draft agreement. The JSB makes several observations in this opinion which, if it were a normal procedure for assessing a draft operational and strategic cooperation agreement without the present tight deadlines, might have lead to a recommendation to amend or clarify the draft agreement taking into account the comments made by the JSB before concluding the agreement.

The JSB is aware that this - in view of the procedure to follow before 1 May - might not be possible.

Considering the uncertain data protection situation after 1 May if no agreement is in place, and taking into account that this agreement may and cannot change the obligations and responsibilities of Europol, Member States and third States as defined in the Europol Regulation, the JSB is of the opinion that the present draft agreement may be concluded.

*Done at Brussels
10 March 2017*



*Vanna PALUMBO
Chair of the Joint Supervisory Body
(Signed by the Data Protection Secretary)*