

12 December 2016

**OPERATIONAL ARRANGEMENTS TO MINIMISE THE NEGATIVE EFFECTS OF THE
DANISH DEPARTURE FROM EUROPOL, FOLLOWING THE REFERENDUM IN
DENMARK ON 3 DECEMBER 2015**

On 1 May 2017 the new Europol Regulation (EU) 2016/794 shall apply. In light of the referendum on 3 December 2015 Denmark cannot participate in the new Regulation under the terms of Protocol No 22 to the Treaty on the European Union and the Treaty on the Functioning of the European Union.

Given the importance attached by all sides to combatting cross-border serious and organised crime and international terrorism, it is important to ensure cooperation on key matters so as to enhance the EU's resilience to threats.

This note sets out the operational arrangements that could be envisaged in order to minimise the negative effects of Denmark no longer being a member of Europol. In designing such operational arrangements, Denmark, as an EU Member State, should not find itself in a worse position than that of third countries that have concluded an operational agreement with Europol. However, such an agreement with Denmark cannot in any way equal full membership of Europol, i.e. provide for access to Europol's data repositories, or for full participation in Europol's operational work, or give decision-making rights in the governing bodies of Europol. Nevertheless, it should ensure a sufficient level of operational cooperation including exchange of personal data, subject to adequate safeguards. This particular status that would be granted to Denmark is linked to Denmark's membership of the European Union and Denmark's participation in the Schengen acquis.

In this context, it is observed that any operational agreement must be Denmark-specific and be constructed in light of the particular situation of Denmark - notably its membership of the European Union and its participation in the Schengen area. It is recalled that a parallel agreement, granting the same rights and obligations for Denmark as other Member States have with regard to Europol, is excluded, as it would amount to a circumvention of Protocol No 22 to the Treaty on the European Union and the Treaty on the Functioning of the European Union. That Protocol sets out the legal process for a Danish opt-in to Justice and Home Affairs matters and cannot be circumvented by any other legal arrangements.

Finally, it is observed that a new agreement needs to be concluded with a view to be finalised by 1 May 2017, or in case that would prove impossible, limit to the maximum extent possible the gap between 1 May 2017 and the entry into force of the new agreement, in order to minimise the negative impact on cooperation and data exchange.

In terms of content, the operational agreement would – in addition to the terms and conditions of the Europol model third country agreement – ensure in particular the following:

- Europol would provide an interface for Danish requests to input and receive data, in the form of a number of dedicated Danish-speaking staff that would deal exclusively with Danish data, on a 24h/7 basis.
- Europol would accept to exchange information not only with designated contact points but with any competent authority designed by Denmark to this end.
- Europol would second its own liaison officers to Copenhagen.
- Europol would ex-officio notify Denmark on any information concerning Denmark.
- Denmark would not be required to explain the reason for each request addressed to Europol for cross-checking data.

- Denmark would be invited to monthly meetings of heads of Europol national units and would be granted observer status in the Management Board of Europol.

The agreement would be conditioned on Denmark's continued membership in the Schengen area, on Denmark to continue to set a high level of security of processing of personal data by the police and the prosecution service in the areas of criminal law in Denmark and on the implementation of Directive 2016/680/EU on data protection in police matters¹ by 1 May 2017 and on Denmark's agreement to the application of the jurisdiction of the European Court of Justice and the competence of the European Data Protection Supervisor.

In terms of process, the envisaged legal route would be to apply the current Europol legal framework, i.e. Articles 23 and 26 of Council Decision 2009/371/JHA (the Europol Decision), which entails the following steps, with regard to which the Commission would be available to swiftly assist Europol and the Council, as appropriate:

- Amendment of Council Decision 2009/935/JHA in order to add Denmark to the list of "third countries" with which Europol shall conclude cooperation agreements. Pursuant to Article 26(1)(a) of the Europol Decision, this requires the Europol Management Board asking the Council to add Denmark to the list and the Council adopting, by qualified majority, an Implementing Decision amending that list², after consulting the European Parliament (three months' consultation period, which could be shortened if agreed).
- Negotiation by Europol of an operational agreement with Denmark as rapidly as possible, so as to allow for it to be concluded by 1 May 2017. The Commission would be available to assist Europol in this matter.
- Adoption by the Council, by qualified majority, after having obtained the opinion of the Joint Supervisory Body (via the Management Board of Europol) and after consulting the European Parliament (three-month time period, which could be shortened, if agreed), an Implementing Decision approving the conclusion of the agreement.
- Conclusion of the Operational Agreement by Europol, ideally by 1 May 2017.

It is noted that the new Europol legal framework, Regulation (EU) 2016/794, which will apply as of 1 May 2017, provides for the grandfathering of existing third country agreements. This means that the legal effects of an agreement between Europol and Denmark, provided that it is concluded before 1 May 2017 and contains adequate data protection safeguards, would be maintained in accordance with Article 9 of Protocol 36.

It is recognised that the time-table for the conclusion of the abovementioned steps is challenging. The Danish authorities and the Commission will endeavour to take all the necessary actions and contacts with relevant institutional actors to ensure that the process can be concluded as rapidly as possible. If it is not possible to conclude an agreement with a view to be finalised by 1 May 2017, Denmark and the Commission will discuss alternative options, taking into account the legal constraints in terms of avoiding a circumvention of Protocol No 22.

¹ 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).

² And possibly adapting the wording in Article 1(a) of Council Decision 2009/934/JHA.