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2018/0418 (NLE)

Proposal for a

COUNCIL DECISION

on the conclusion of a Protocol between the European Union, the Swiss Confederation and the Principality of Liechtenstein to the Agreement between the European Community and the Swiss Confederation concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland regarding the access to Eurodac for law enforcement purposes

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

• Reasons for and objectives of the proposal

The Regulation (EU) No. 603/2013[1] that recasts Regulation No 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention was adopted and entered into force on 19 July 2013. The Regulation is applicable since 20 July 2015.

The Regulation (EU) No. 603/2013 allows, *inter alia*, for the consultation of Eurodac by law enforcement authorities for the purpose of prevention, detection and investigation of terrorist offences and other serious criminal offences. This aims at enabling law enforcement authorities to request the comparison of fingerprint data with those stored in the Eurodac central database when they seek to establish the exact identity of or obtain further information concerning a person who is suspected of a terrorism or serious crime.

On 26 October 2004, the Agreement between the European Community and the Swiss Confederation concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland (hereinafter: Agreement of 26 October 2004) was concluded[2]. On 28 February 2008, the Protocol between the European Community, the Swiss Confederation and the Principality of Liechtenstein on the accession of the Principality of Liechtenstein to the Agreement between the European Community and the Swiss Confederation concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland (hereinafter: Protocol of 28 February 2008) was concluded[3].

Switzerland and Liechtenstein apply the asylum elements of the Regulation (EU) No. 603/2013 in line with the Agreement of 26 October 2004 and the Protocol of 28 February 2008. However, the law enforcement access to Eurodac falls outside the scope of the said Agreement and Protocol.

At a meeting on 14 May 2014 with representatives from the Commission, Denmark, Switzerland, Liechtenstein, Norway and Iceland confirmed their interest in entering into negotiations with the European Union to extend the law enforcement provisions of the Regulation (EU) No. 603/2013 to them via an international agreement.

On 14 December 2015, the Council authorised the Commission to open negotiations on agreement between the European Union, on the one part, and, *inter alia*, Switzerland and Liechtenstein, on the other part, on the modalities of the participation by Switzerland and Liechtenstein to the procedure for comparison and data transmission for law enforcement purposes foreseen in chapter VI of the Regulation (EU) No 603/2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU)

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1 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 purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (recast) (OJ L 180, 29.6.2013, p. 1).

2 OJ L 53, 27.2.2008, p. 5.

3 OJ L 160, 18.6.2011, p. 39.

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 purposes.

The negotiations have been finalised and an Agreement in the form of a Protocol to the Agreement of 26 October 2004, extending the application of the Agreement of 26 October 2004 to law enforcement was initialled.

The extension of the law enforcement provisions of the Regulation (EU) No. 603/2013 to Switzerland and Liechtenstein would enable the law enforcement authorities of Switzerland and Liechtenstein to request a comparison of fingerprint data against the data entered by other participating States and stored in the Eurodac database when they seek to establish the identity or get further information concerning a person who is suspected of a serious crime or terrorism or concerning a victim. On the other hand, it would enable the law enforcement authorities of all other participating States, whether other EU Member States or Associates Countries, to request a comparison of fingerprint data against the data entered by Switzerland and Liechtenstein and stored in the Eurodac database, for the same purposes.

The objective of the present Protocol is to establish legally binding rights and obligations to ensure the effective participation of Switzerland and Liechtenstein in the law enforcement elements of the Regulation (EU) No. 603/2013. The Protocol establishes that all participating States, whether other EU Member States, Associates Countries or Switzerland and Liechtenstein, with access to Eurodac, may also access each other's data for law enforcement purposes.

- **Consistency with existing policy provisions in the policy area**

The proposal is consistent with EU policies regarding access to Eurodac database

- **Consistency with other Union policies**

The proposal is consistent with the EU policies in the area of freedom, security and justice.

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

- **Legal basis**

The legal basis for this proposal for a Council Decision is Article 87(2)(a), Article 88(2)(a) of the Treaty on the Functioning of the European Union (TFEU), in conjunction with Article 218(6)(a).

- **Subsidiarity (for non-exclusive competence)**

The Agreement of 26 October 2004 is an existing international agreement concluded by the EU and Switzerland. In accordance with the principle of subsidiarity set out in Article 5 TEU, the objectives of the Protocol to this Agreement can only be achieved through a proposal from the Commission at EU level.

- **Proportionality**

The proposal complies with the proportionality principle because it does not go beyond what is necessary in order to achieve the objectives of the effective participation of Switzerland and Liechtenstein in the law enforcement elements of the Eurodac Regulation (EU) No. 603/2013.

- **Choice of the instrument**

A Decision of the Council on the conclusion of the Agreement is required under Article 218(6) TFEU

3. RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS

- **Stakeholder consultations**

The Council (Asylum Working Party) has been consulted on the content and advancement of the negotiations. The European Parliament (LIBE Committee) has been informed.

4. OTHER ELEMENTS

- **Detailed explanation of the specific provisions of the proposal**

The proposal sets out a decision authorising the conclusion of the Protocol between the EU and Switzerland and Liechtenstein on behalf of the European Union. The TFEU foresees for the Council to adopt a Commission proposal for a decision to authorise the signature and conclusion of an international agreement.

The Protocol establishes the application of Regulation (EU) No 603/2013 to Switzerland and Liechtenstein regarding access to Eurodac for law enforcement purposes. Therefore it enables the designated law enforcement authorities of the other participating States and Europol to request a comparison of fingerprint data against the data transmitted to the Eurodac Central System by Switzerland and Liechtenstein. It also enables the designated law enforcement authorities of Switzerland and Liechtenstein to request a comparison of fingerprint data against the data transmitted to the Eurodac Central System by the other participating States.

The Protocol guarantees that the current EU level of protection of personal data is applicable to the processing of personal data pursuant to the Protocol by the authorities of Switzerland and Liechtenstein and of the Member States. Such processing of personal data 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/JHA.

The Protocol conditions the access to Eurodac for law enforcement purposes by Switzerland and Liechtenstein by prior legal and technical implementation of Decision 2008/615/JHA with regard to dactyloscopic data.

The Protocol provides that the mechanisms regarding amendments provided for in the Agreement of 26 October 2004 should apply to all amendments regarding the access to Eurodac for law enforcement purposes.

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THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 87(2)(a), Article 88(2)(a) and Article 218(6)(a) thereof,

Having regard to the proposal from the European Commission,

Having regard to the consent of the European Parliament[4],

Whereas:

(1) In accordance with the Decision [XXX] of [XXX][5], the Protocol between the European Union, the Swiss Confederation and the Principality of Liechtenstein to the Agreement between the European Community and the Swiss Confederation concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland regarding the access to Eurodac for law enforcement purposes was signed on [XXX], subject to its conclusion at a later date.

(2) In order to support and strengthen police cooperation between the competent authorities of the Member States and those of Switzerland and Liechtenstein for the purpose of prevention, detection and investigation of terrorist offences and other serious criminal offences, the involvement of the European Union is required to enable Switzerland and Liechtenstein to participate in the law-enforcement-related aspects of Eurodac.

(3) This Protocol should be approved on behalf of the European Union.

(4) In accordance with Article 3 of the Protocol 21 on the Position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice annexed to the Treaty on European Union and the Treaty on the Functioning of the European Union, these Member States have notified their wish to take part in the adoption and application of this Decision.

(5) In accordance with Articles 1 and 2 of 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, Denmark is not taking part in the adoption of this Decision and is not bound by it or subject to its application,

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4 OJ C […], […], p. […].

5 OJ L […], […], p. […].

HAS ADOPTED THIS DECISION:

Article 1

The Protocol between the European Union, the Swiss Confederation and the Principality of Liechtenstein to the Agreement between the European Community and the Swiss Confederation concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland regarding the access to Eurodac for law enforcement purposes ('the Protocol') is hereby approved on behalf of the Union.

The text of the Protocol is attached to this Decision.

Article 2

The President of the Council shall designate the person(s) empowered to proceed, on behalf of the European Union, to the notification provided for in Article 4(2) of the Protocol, in order to express the consent of the European Union to be bound by the Protocol.

Article 3

This Decision shall enter into force on the day following that of its publication in the *Official Journal of the European Union*.

Done at Brussels,

For the Council
The President