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2017/0266 (NLE)

Proposal for a

**COUNCIL DECISION**

**on the conclusion, on behalf of the European Union, of the Additional Protocol  
supplementing the Council of Europe Convention on the Prevention of Terrorism  
(CETS No. 217)**

## **EXPLANATORY MEMORANDUM**

### **1. SUBJECT-MATTER OF THE PROPOSAL**

The Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism (‘the Additional Protocol’) was adopted by the Committee of Ministers on 19 May 2015. The European Union signed the Additional Protocol on 22 October 2015<sup>1</sup>. The present proposal concerns the decision to conclude the Additional Protocol on behalf of the Union.

The Additional Protocol (Convention No. 217) supplements the Convention on the Prevention of Terrorism (Convention No. 196). To be able to conclude the Additional Protocol, the European Union must have concluded or simultaneously conclude Convention No. 196<sup>2</sup>. The present proposal is therefore accompanied by, and must be read together with, a proposal concerning a decision to conclude Convention No. 196 on behalf of the Union.

### **2. CONTEXT OF THE PROPOSAL**

The objective of the Additional Protocol is to supplement Convention No. 196 with a series of provisions aimed at implementing the criminal law aspects of UN Security Council Resolution 2178(2014) on “Threats to international peace and security caused by terrorist acts”. In the Resolution, the Security Council called on Member States of the United Nations to take a series of measures aimed at preventing and curbing the flow of foreign terrorist fighters to conflict zones.

The Additional Protocol responds to this call by furthering a common understanding of and response to foreign terrorist fighter-related offences, which serves as a benchmark for information exchange and facilitates cross-border investigations and prosecutions of acts of a preparatory nature having the potential and danger of leading to the commission of terrorist offences.

The Additional Protocol thus provides for the criminalisation of the following acts: Participation in an association or group for the purpose of terrorism (Article 2), receiving training for terrorism (Article 3), travelling or attempting to travel for terrorist purposes (Article 4), providing or collecting funds for such travels (Article 5) and organising and facilitating such travels (Article 6). Finally, Article 7 aims at enhancing information exchange by obliging Parties to designate a contact point to provide or treat requests for available information in a timely manner.

Article 2 is considered as an important instrument in effectively investigating and prosecuting those contributing with their activities to the commission of terrorist offences by terrorist groups.

Article 3 provides for the criminalisation of acts of a preparatory nature, i.e. receiving terrorist training, complementing the existing offence of providing training as defined in Article 7 of Convention No. 196. At the same time, the provision in Article 3 enhances legal certainty and the effectiveness of Articles 4 – 6 of the Additional Protocol in that it provides for a definition of receiving terrorist training which is mentioned as one of the purposes of the travel.

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<sup>1</sup> Council Decision (EU) 2015/1913 of 18 September 2015 on the signing, on behalf of the European Union, of the Council of Europe Convention on the Prevention of Terrorism (CETS No 196, OJ L 280, 24.10.2015, p. 22) and Council Decision (EU) 2015/1914 of 18 September 2015 on the signing, on behalf of the European Union, of the Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism (CETS No 196, OJ L 280, 24.10.2015, p. 24).

<sup>2</sup> See Article 10 of the Additional Protocol.

Articles 4 to 6 are meant to transpose operative paragraph 6 a) – c) of UNSCR 2178(2014). They expand the scope of criminalisation to other acts of a preparatory nature going beyond those already covered by Convention No. 196 (i.e. public provocation, providing training and recruitment to terrorism).

With the provision on enhanced information exchange/contact points in Article 7, the Additional Protocol responds to a call in operative paragraph 3 of the UNSCR 2178(2014) for more international cooperation while more specifically facilitating the prevention and investigation of departures to third countries with the purpose of committing terrorist offences or participating in terrorist training activities.

The Additional Protocol came into force on 1 July 2017. As of 11 July 2017, three EU Member States have ratified the Additional Protocol, and twenty-four EU Member States have signed it<sup>3</sup>. The European Union signed the Additional Protocol on 22 October 2015.

### **3. REASONS FOR THE PROPOSAL**

The terrorist threat has grown and rapidly evolved in recent years. Individuals referred to as ‘foreign terrorist fighters’ travel abroad for the purpose of terrorism. Returning foreign terrorist fighters pose a heightened security threat to all Member States. Foreign terrorist fighters have been linked to recent attacks and plots in several Member States. In addition, the Union and its Member States face increased threats from individuals who are inspired or instructed by terrorist groups abroad. Action against terrorism needs to be stepped up, not only at national level, but also at pan-European level and beyond.

Terrorism has a global character and represents a growing threat to fundamental rights, democracy and the rule of law in Europe and all over the world. Terrorist attacks are indiscriminate. The victims of terrorism can come from anywhere.

The terrorist attacks perpetrated in the last years in the European Union and elsewhere in the world were unacceptable infringements of the principles which underpin democratic societies. In the face of such an enduring threat, the European Union is more than ever obliged to act united to promote and uphold the principles which are its *raison d’être*.

The cross-border nature of terrorism requires strong international cooperation. A common understanding of foreign terrorist-fighter-related offences and criminal offences of a preparatory nature with the potential to lead to the commission of terrorist acts contributes to further enhancing the effectiveness of the criminal justice instruments and cooperation at Union and international level. The fact that legal norms in this sphere – including those that apply within the EU – are often derived from international instruments such as the Additional Protocol further underscores the need for the European Union to speak with a single voice on the international plane.

Finally, the European Union has adopted a comprehensive set of legal instruments to fight terrorism, as described below. The provisions contained in these instruments coincide almost fully with the provisions of the Additional Protocol. The Additional Protocol is liable to affect those common rules or alter their scope.

With the adoption of Directive (EU) 2017/514 on combating terrorism, the European Union is ready to complete its commitment to be a party to the Additional Protocol by conclusion of that instrument.

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<sup>3</sup> Council of Europe Treaty Office, [Chart of signatures and ratifications of Treaty 217](#), status as of 29 August 2017.

## 4. LEGAL ELEMENTS OF THE PROPOSAL

### 4.1 Union competence to conclude the Additional Protocol

Article 3(2) TFEU provides that the Union has exclusive competence “*for the conclusion of an international agreement ... in so far as its conclusion may affect common rules or alter their scope.*” An international agreement may affect common rules or alter their scope where the area covered by the agreement overlaps with Union legislation or is covered to a large extent by Union law<sup>4</sup>.

The Union has already adopted measures in the area covered by the Additional Protocol, including substantive criminal law provisions as well as a provision on enhanced information exchange. The EU legal framework governing criminal offences related to terrorism is laid down in Directive (EU) 2017/541 on combating terrorism<sup>5</sup>, which replaces the Council Framework Decision 2002/475/JHA on combating terrorism with regard to the Member States bound by the Directive. Recital 5 of the Directive refers specifically to UNSCR 2178(2014) and the Additional Protocol. The Directive sets the criminal legal framework for all crimes defined by the Additional Protocol, and provides accompanying rules on sanctions, jurisdiction and liability of legal persons.

The provisions of the Additional Protocol relating to information exchange are covered by Council Decision 2005/671/JHA on the exchange of information and cooperation concerning terrorist offences<sup>6</sup>, which Directive (EU) 2017/541 also amends.

Other relevant Union instruments in this regard are notably 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<sup>7</sup>, as well as Council Decision 2008/615/JHA of 23 June 2008 on the stepping up of cross-border cooperation, particularly in combatting terrorism and cross-border crime (Prüm-Decision)<sup>8</sup>. These instruments regulate on the one hand information exchange for the purpose of criminal investigations in terrorist related matters and the establishment of contact points for the exchange of information on the other. Europol<sup>9</sup> in particular supports the police cooperation between Member States and amongst Member States and Third countries, to adequately respond to the phenomenon of foreign terrorist fighters.

The area covered by the Additional Protocol overlaps with Union legislation and is, in any event, covered to a large extent by Union law. Its conclusion may therefore ‘*affect common rules or alter their scope*’ within the meaning of Article 3(2) TFEU. The Union accordingly has exclusive competence to conclude the Additional Protocol.

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<sup>4</sup> Case 22/70 *Commission v Council* [1971] ECR 263 and Opinion 3/15 of 14 February 2017 (*Marrakesh Treaty*).

<sup>5</sup> Directive (EU) 2017/541 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, (OJ L 88, 31 March 2017, p.6).

<sup>6</sup> OJ L 253, 29.9.2005, p. 22.

<sup>7</sup> OJ L 386, 29.12.2006, p. 89.

<sup>8</sup> OJ L 210, 6.6.2008, p. 1.

<sup>9</sup> 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).

## **4.2 The legal basis for the proposed decision**

The choice of legal basis for an EU measure must rest on objective factors that are amenable to judicial review; these include the aim and the content of the measure<sup>10</sup>. If examination of a European Union measure reveals that it pursues a twofold purpose or that it has a twofold component and if one of those is identifiable as the main or predominant purpose or component, whereas the other is merely incidental, the measure must be founded on a single legal basis, namely that required by the main or predominant purpose or component.

The predominant purpose of the Additional Protocol is to introduce criminal offences related to terrorism, for which the Union has competence based on Article 83(1) TFEU. The substantive legal basis for signing the Additional Protocol is therefore Article 83(1) TFEU. Article 7 on enhanced information exchange through designation of contact points facilitates the detection, prevention and investigation of those traveling or attempting to travel and thus facilitates the practical application of Article 4 of the additional protocol. It is therefore of an ancillary nature.

The Directive on combating terrorism, the main purpose of which is to set minimum rules concerning the definition and sanctions of terrorist and terrorism-related offences, was also adopted on the basis of Article 83(1) TFEU. It also includes provisions to improve the exchange of information and the support and protection of victims of terrorism.

Article 218(6) TFEU provides that the Council, on a proposal by the negotiator, shall adopt a decision concluding the agreement. Article 218(6)(a) TFEU provides that, where an agreement covers fields to which the ordinary legislative procedure applies, the Council shall adopt a decision concluding the agreement after obtaining consent of the European Parliament.

The Additional Protocol covers fields to which the ordinary legislative procedure applies, namely the setting of minimum rules concerning the definition of criminal offences in the area of terrorism (Article 83(1) TFEU) where consent by the European Parliament is required. The procedural legal basis of the proposed decision is therefore Article 218(6)(a) TFEU.

## **4.3 Contact point for exchange of information**

Pursuant to Article 7 of the Protocol, Parties are to designate a contact point for the 24/7 exchange of information on foreign terrorist fighters. It is proposed to designate Europol as this contact point, under the conditions stipulated in Regulation (EU) 2016/794 on relations with partners and the transfer and exchange of personal data.

## **4.4 Territorial Application**

In accordance with Protocol 22 of the Treaty of the European Union, the Additional Protocol signed and eventually concluded by the European Union is binding upon and applies in all EU Member States with the exception of Denmark. In accordance with Protocol 21 of the Treaty of the European Union, the Additional Protocol signed and eventually concluded by the European Union is binding upon and applies in the United Kingdom only insofar as this Member State notifies the Council of its wish to take part in the adoption and application of this instrument. Ireland is bound by Framework Decision 2002/475/JHA and is therefore to take part in the adoption of this Decision.

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<sup>10</sup> C-377/12, *Commission v Council*, paragraph 34.

Proposal for a

## **COUNCIL DECISION**

**on the conclusion, on behalf of the European Union, of the Additional Protocol supplementing the Council of Europe Convention on the Prevention of Terrorism (CETS No. 217)**

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 83(1), in conjunction with Article 218(6)(a) thereof,

Having regard to the proposal from the European Commission,

Having regard to the consent of the European Parliament,

Whereas:

- (1) In accordance with Council Decision (EU) 2015/1914 of 18 September 2015<sup>11</sup>, the Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism (CETS No. 196) ("the Additional Protocol") was signed on 22 October 2015, subject to its conclusion.
- (2) Article 10 of the Additional Protocol provides that the Additional Protocol shall be open for approval by the European Union.
- (3) The Union has already adopted measures in the different areas covered by the Additional Protocol.
- (4) The Additional Protocol requires parties to designate a contact point for the purpose of exchange of information on persons travelling for the purposes of terrorism.
- (5) Ireland is bound by Council Framework Decision 2002/475/JHA<sup>12</sup> and is therefore taking part in the adoption of this Decision.
- (6) [In accordance with Article 3 of Protocol (No 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 to the Treaty on the Functioning of the European Union, the United Kingdom has notified its wish to take part in the adoption and application of this Decision,

OR

In accordance with Articles 1 and 2 of Protocol (No 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 to the Treaty on the Functioning of the European Union, and without prejudice to Article 4 of that Protocol, the United Kingdom 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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<sup>11</sup> Council Decision (EU) 2015/1914 of 18 September 2015, (OJ L 280, 24.10.2015, p. 22)

<sup>12</sup> Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism (OJ L 164, 22.6.2002, p. 3).

- (7) 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,
- (8) The Additional Protocol should therefore be approved on behalf of the European Union.

HAS ADOPTED THIS DECISION:

*Article 1*

The Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism (CETS No. 196) is hereby approved on behalf of the European Union.

The text of the Additional Protocol is attached to this Decision.

*Article 2*

The European Union Agency for Law Enforcement Cooperation (Europol) is designated as the contact point provided for in Article 7 of the Additional Protocol and in accordance with Regulation (EU) 2016/794 of the European Parliament and of the Council<sup>13</sup>.

*Article 3*

The President of the Council shall designate the person empowered to proceed, on behalf of the European Union, to deposit the instrument of approval provided for in Article 10 of the Additional Protocol, in order to express the consent of the European Union to be bound by the Additional Protocol.

*Article 4*

This Decision shall enter into force upon its adoption<sup>14</sup>.

Done at Brussels,

*For the Council  
The President*

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<sup>13</sup> 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, 24.05.2016, p.53).

<sup>14</sup> The date of entry into force of the Additional Protocol for the European Union will be published in the *Official Journal of the European Union* by the General Secretariat of the Council.