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2018/0316 (NLE)

Proposal for a

COUNCIL DECISION

on the conclusion of the Arrangement with the Kingdom of Norway, the Republic of Iceland, the Swiss Confederation and the Principality of Liechtenstein on the participation by those States in the European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

Regulation (EU) No 1077/2011 established the European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice¹, commonly referred to as eu-LISA, in order to ensure the operational management of the second-generation Schengen Information System (SIS II), the VISA Information System (VIS) and Eurodac and potentially of the preparation, development and operational management of other large-scale IT systems in the area of freedom, security and justice only if so provided by relevant legislative instruments, based on Articles 67 to 89 TFEU. The technical support for a separate secure electronic transmission channel known as DubliNet, set up under Article 18 of Commission Regulation (EC) 1560/2003 which Member States' competent authorities for asylum use for the exchange of information on applicants for international protection, was transferred from the Commission to eu-LISA by a service level agreement on 31 July 2014. Following the entry into force on 29 December 2017 of Regulation (EU) 2017/2226², the Agency became responsible for the development and operational management of the Entry/Exit System (EES). Article 37 of Regulation (EU) 1077/2011 stipulates that "*Under the relevant provisions of their association agreements, arrangements shall be made in order to specify, inter alia, the nature and extent of, and the detailed rules for, the participation by countries associated with the implementation, application and development of the Schengen acquis and Eurodac-related measures in the work of the Agency, including provisions on financial contributions, staff and voting rights.*" The countries referred to in Article 37 are Iceland, Norway, Switzerland and Liechtenstein, referred to hereafter as the "associate countries".

The participation of associate countries in the Agency's work is a necessary step having regard to their association to the Schengen acquis and to Dublin and Eurodac-related measures and to their participation in the large-scale IT systems operated by the Agency. On that basis, the Commission presented on 29 February 2012 a recommendation to the Council in order to authorise the Commission to open negotiations on an arrangement between the European Union of the one part, and Norway, Iceland, Switzerland and Liechtenstein of the other part, on the modalities of the participation by those States in the European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice.

The Commission received the Council authorisation to open negotiations with Norway, Iceland, Switzerland and Liechtenstein on an arrangement on the modalities of these countries' participation in the Agency on 24 July 2012.

The negotiations were held jointly with all associate countries. Several rounds of negotiations took place. The associate countries were reminded by letter of 21 April 2016 from the Director General of the Directorate General for Migration and Home Affairs that Norway and Switzerland would have to formally accept Regulation (EU) 1077/2011, within the meaning

¹ Regulation (EU) No 1077/2011 of the European Parliament and of the Council of 25 October 2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice, OJ L 286, 1.11.2011, p. 1.

² Regulation (EU) 2017/2226 of the European Parliament and of the Council of 30 November 2017 establishing an Entry/Exit System (EES) to register entry and exit data and refusal of entry data of third-country nationals crossing the external borders of the Member States and determining the conditions for access to the EES for law enforcement purposes, and amending the Convention implementing the Schengen Agreement and Regulation (EC) No 767/2008 and (EU) 1077/2011, O.J. L 327 of 9.12.2017, p. 20.

of the relevant association agreements, before the arrangement could be initialled. Switzerland notified the Council that it had completed its constitutional requirements with regard to the acceptance of Regulation (EU) 1077/2011 on 11 April 2017. Norway notified the Council that it had completed its constitutional requirements with regard to the acceptance of this Regulation on 16 August 2017. Adaptations were then required to the draft Arrangement *inter alia* to adapt the text following the entry into force of the EES Regulation and to cover future Dublin-related systems.

Member States have been informed and consulted in the relevant Council Working Groups.

The final text of the draft Arrangement was initialled on 15 June 2018.

2. RESULTS OF NEGOTIATIONS

The Commission considers that the objectives set by the legislator in Article 37 of Regulation (EU) No 1077/2011 and by the Council in its negotiating directives were attained and that the draft Arrangement is acceptable to the Union.

The final content of it can be summarised as follows:

The draft Arrangement foresees the full participation of Iceland, Norway, Switzerland and Liechtenstein in the activities of the Agency [Article 1], representation in the Agency's Management Board with limited voting rights on certain decisions [Article 2], representation in the Agency's Advisory Groups with limited voting rights on the decisions referred to under Article 2 [Article 3], annual financial contributions of Norway, Iceland, Switzerland and Liechtenstein, to the budget of the Agency as regards SIS, VIS, DubliNet and EES by an annual sum calculated in accordance with its GDP as a percentage of GDP of all States participating in the Agency's work and, as regards Eurodac, by an annual sum of a fixed percentage (specific for each associate country) of the relevant budget appropriations for the budgetary year. [Article 4 and Annex I]. The draft arrangement further defines the legal status of the Agency in Iceland, Norway, Switzerland and Liechtenstein [Article 5], the liability of the Agency with regard to Iceland, Norway, Switzerland and Liechtenstein [Article 6], the recognition by Iceland, Norway, Switzerland and Liechtenstein of the jurisdiction of the Court of Justice with regard to the Agency [Article 7], the privileges and immunities of the Agency in Iceland, Norway, Switzerland and Liechtenstein, and a derogation of the staff regulations allowing nationals of Iceland and Norway and Switzerland and Liechtenstein to be engaged under contract by the Agency [Article 9]. The draft arrangement finally contains provisions on combatting fraud [Article 10], dispute settlement [Article 12], entry into force [Article 14] and validity and termination [Article 15].

3. LEGAL ELEMENTS OF THE PROPOSAL

The present proposal for a Council decision is submitted pursuant to Articles 74, 77(2)(a) and (b), 78(2)(e), 79(2)(c), 82(1)(d), 85(1), 87(2)(a) and 88(2) TFEU in conjunction with Article 218 TFEU.

It constitutes the legal instrument for the conclusion of the Arrangement. The Council will decide by qualified majority.

The competence of the EU to conclude this Arrangement is explicitly provided for in Article 37 of Regulation (EU) 1077/2011 which states that under the relevant provisions of their association agreements, arrangements shall be made in order to specify, *inter alia*, the nature and extent of, and the detailed rules for, the participation by countries associated with the implementation, application and development of the Schengen acquis and Eurodac-related

measures in the work of the Agency, including provisions on financial contributions, staff and voting rights.

The consent of the European Parliament is required for the conclusion of this Arrangement pursuant to Article 218(6)(a)(v).

The arrangement will allow for the participation of Norway, Iceland, Switzerland and Liechtenstein in the work of the Agency with limited voting rights and will ensure the adequate financial contributions to the Agency.

4. BUDGETARY IMPLICATIONS

Article 4 and Annex I of the draft Arrangement describe the provisions related to the annual financial contributions of Iceland, Norway, Switzerland and Liechtenstein to the budget of the Agency.

5. CONCLUSION

In light of the above-mentioned results of negotiations, the Commission proposes that the Council approves, after having received the consent from the European Parliament, the Arrangement between the European Union and the Republic of Iceland, the Kingdom of Norway, the Swiss Confederation and the Principality of Liechtenstein on the participation of those States in the Agency for the operational management of large-scale IT systems in the area of freedom, security and justice.

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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 Articles 74, 77(2)(a) and (b), 78(2)(e), 79(2)(c), 82(1)(d), 85(1), 87(2)(a) and 88(2) in conjunction with Article 218 (6)(a)(v) 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 2018/XX of {...}, the Arrangement between the European Union, of the one part, and the Kingdom of Norway, the Republic of Iceland, the Swiss Confederation and the Principality of Liechtenstein, of the other part, on the participation by those States in the European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice, was signed by {...} on {...} subject to its conclusion.
- (2) As specified in recital 33 of Regulation (EU) No 1077/2011 of the European Parliament and of the Council³, the United Kingdom is taking part in and is bound by that Regulation. Ireland requested to participate in that Regulation following its adoption in accordance with Protocol No 19 on the Schengen acquis integrated into the framework of the European Union, annexed to the Treaty on European Union and to the Treaty on the functioning of the European Union (Protocol on the Schengen acquis) and 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. They should therefore give effect to Article 37 of the Regulation by taking part in this Decision. The United Kingdom and Ireland are therefore taking part in this Decision.
- (3) As specified in recital 32 of Regulation (EU) No 1077/2011, Denmark is not taking part in and is not bound by that Regulation. Denmark is therefore not taking part in this Decision. Given that this Decision insofar as it relates to the Schengen Information System (SIS II) established by Regulation (EC) No 1987/2006 of the

³ Regulation (EU) No 1077/2011 of the European Parliament and of the Council of 25 October 2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (OJ L 286, 1.11.2011, p.1).

European Parliament and of the Council⁴ and by Council Decision 2007/533/JHA⁵, to the Visa Information System (VIS) established by Council Decision 2004/512/EC⁶ and to the Entry/Exit System (EES) established by Regulation (EU) 2017/2226 of the European Parliament and of the Council⁷, builds upon the Schengen acquis, Denmark shall in accordance with Article 4 of that Protocol, decide within a period of six months after the adoption of this Decision whether it will implement it in its national law. In accordance with Article 3 of the Agreement between the European Community and the Kingdom of Denmark on the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in Denmark or any other Member State of the European Union and 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention⁸, Denmark is to notify the Commission whether it will implement the contents of this Decision, insofar as it relates to Eurodac and DubliNet,

HAS ADOPTED THIS DECISION:

Article 1

The arrangement between the European Union and Norway, Iceland, Switzerland and Liechtenstein on the participation by those States in the European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice is hereby approved on behalf of the Union.

The text of the Arrangement is attached to this Decision.

Article 2

The President of the Council shall designate the person(s) empowered to deposit on behalf of the Union the instrument of approval provided for in Article 14(4) of the Arrangement.

Article 3

This Decision shall enter into force on the day of its adoption.

Done at Brussels,

*For the Council
The President*

⁴ Regulation (EC) No 1987/2006 of the European Parliament and of the Council of 20 December 2006 on the establishment, operation and use of the second generation Schengen Information System (SIS II) (OJ L 381, 28.12.2006, p. 4).

⁵ Council Decision 2007/533/JHA of 12 June 2007 on the establishment, operation and use of the second generation Schengen Information System (SIS II) (OJ L 205, 7.8.2007, p. 63).

⁶ Council Decision 2004/512/EC of 8 June 2004 establishing the Visa Information System (VIS) (OJ L 213, 15.6.2004, p. 5).

⁷ Regulation (EU) 2017/2226 of the European Parliament and of the Council of 30 November 2017 establishing an Entry/Exit System (EES) to register entry and exit data and refusal of entry data of third-country nationals crossing the external borders of the Member States and determining the conditions for access to the EES for law enforcement purposes, and amending the Convention implementing the Schengen Agreement and Regulations (EC) No 767/2008 and (EU) No 1077/2011 (OJ L 327, 9.12.2017, p. 20).

⁸ OL L 66, 8.3.2006, p. 38.