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PROPOSAL

From: Secretary-General of the European Commission,
signed by Mr Jordi AYET PUIGARNAU, Director

date of receipt: 19 October 2017

To: Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of
the European Union

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Subject: Proposal for a COUNCIL DECISION on the conclusion, on behalf of the
European Union, of the Council of Europe Convention on the Prevention of
Terrorism (CETS No. 196)

Delegations will find attached document COM(2017) 606 final.

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2017/0265 (NLE)

Proposal for a

COUNCIL DECISION

**on the conclusion, on behalf of the European Union, of the Council of Europe
Convention on the Prevention of Terrorism (CETS No. 196)**

EXPLANATORY MEMORANDUM

1. SUBJECT-MATTER OF THE PROPOSAL

The Council of Europe Convention on the Prevention of Terrorism (Convention No. 196) was opened for signature on 16 May 2005. The European Union signed Convention No. 196 on 22 October 2015¹. The present proposal concerns the decision to conclude Convention No. 196 on behalf of the Union. It must be read together with a proposal concerning a decision to conclude the Additional Protocol (Convention No. 217) that supplements the Convention on the Prevention of Terrorism (Convention No. 196).

2. CONTEXT OF THE PROPOSAL

The purpose of Convention No. 196 is to enhance the efforts of the parties in preventing terrorism and its negative effects on the full enjoyment of human rights, in particular the right to life, both by measures taken at national level and through international co-operation (Article 2). Convention No. 196 thus criminalises the following acts when committed intentionally: public provocation to commit a terrorist offence (Article 5), recruitment for terrorism (Article 6), training for terrorism (Article 7) as well as aiding and abetting, inciting and attempting the aforementioned offences (so-called "ancillary offences" as defined in Article 9). Article 1 defines the notion of "terrorist offence" referring to acts as listed in the Appendix I to Convention No. 196.

These provisions defining criminal offences are complemented by provisions establishing the liability of legal entities for the aforementioned offences (Article 10) and setting out conditions for sanctions and penalties (Article 11). The establishment, implementation and application of the criminalisation of these activities are subject to the conditions and fundamental rights' safeguards as stipulated in Article 12. Convention No. 196 lays down jurisdictional rules for its offences (Article 14). It establishes an obligation to investigate (Article 15) and to prosecute or extradite (Article 18). These measures are accompanied by rules on the protection, compensation and support for victims of terrorism (Article 13), national prevention policies (Article 3) and international co-operation on prevention (Article 4). Convention No. 196 also contains several provisions aiming at strengthening international co-operation in criminal matters through mutual legal assistance, including spontaneous exchange of information (Articles 17 and 22) and extradition (Articles 19, 20 and 21), being subject to a non-discrimination clause (Article 21).

Convention No. 196 provides that it is open for signature to the European Union (Article 23 paragraph 1). In addition, it includes a "disconnection clause" ensuring that in relations between European Union Member States, EU rules apply (Article 26 paragraph 3).

Following the sixth ratification, of which four were by Member States of the Council of Europe, Convention No. 196 came into force on 1 June 2007. As of 21 February 2017,

¹ 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).

twenty-three EU Member States have ratified the Convention, and all EU Member States have signed it².

An Additional Protocol (Convention No. 217) was adopted by the Council of Europe on 19 May 2015. The Additional Protocol supplements Convention No. 196 and came into force on 1 July 2017. It is not possible to be a party to the Additional Protocol without also being a party to Convention No. 196³.

The European Union has signed Convention No. 196, as well as its Additional Protocol⁴.

3. REASONS FOR THE PROPOSAL

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*.

Action against terrorism needs to be stepped up, not only at national level, but also at pan-European level and beyond. The cross-border nature of terrorism requires strong international cooperation. A common understanding of terrorist and terrorism-related offences, complemented with provisions to facilitate cooperation between national authorities as laid down in Convention No. 196 contributes to further enhancing the effectiveness of the criminal justice instruments and cooperation at Union and international level.

Convention No. 196 relates to the criminalisation of terrorist and terrorist-related activities, as well as international cooperation regarding such offences and the protection, compensation and support for victims of terrorism. The Treaties, and in particular the provisions from Title V of Part Three of the TFEU, confer upon the EU competence in the field covered by Convention No. 196. This is borne out by the fact that the Union has already adopted measures in the different areas covered by Convention No. 196:

- Directive (EU) 2017/541 on combating terrorism⁵, which replaces Council Framework Decision 2002/475/JHA on combating terrorism as amended by Framework Decision 2008/919/JHA with regard to the Member States bound by the Directive;
- Council Decision 2005/671/JHA on the exchange of information and cooperation concerning terrorist offences⁶;

² Council of Europe Treaty Office [Chart of signatures and ratifications of Treaty 196](#), status as of 29 August 2017.

³ See Article 10 of the Additional Protocol.

⁴ 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).

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

⁶ OJ L 253, 29.9.2005, p. 22.

- Directive (EU) 2012/29 on establishing minimum standards on the rights, support and protection of victims of crime and replacing Council Framework Decision 2001/220/JHA⁷;
- Council Directive (EC) 2004/80 on compensation to crime victims⁸;
- Directive (EU) 2011/99 of the European Parliament and the Council on the European Protection Order⁹;
- Council Framework Decision 2009/948/JHA on the prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings¹⁰;
- Council Framework Decision 2002/465/JHA on joint investigation teams¹¹;
- Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States¹²;
- Directive (EU) 2014/41 regarding the European Investigation Order in criminal matters¹³;
- Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union¹⁴;
- Convention implementing the Schengen Agreement¹⁵;
- 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 Union¹⁶;
- 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)¹⁷;

The European Union has thus adopted a comprehensive set of legal instruments to fight terrorism. This highlights the need for Member States to act within the framework of the EU institutions when undertaking international commitments in the area of fighting terrorism.

With the adoption of the Directive 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. This can only be done by concluding Convention No. 196, at the latest simultaneously with conclusion of its Additional Protocol.

⁷ OJ L 315, 14.11.2012, p. 57.

⁸ OJ L 261, 6.8.2004, p. 15.

⁹ OJ L 338, 21.12.2011, p. 2.

¹⁰ OJ L 328, 15.12.2009, p. 42.

¹¹ OJ L 162, 20.6.2002, p. 1.

¹² OJ L 190, 18.7.2002, p.1.

¹³ OJ L 130, 1.5.2014, p. 1.

¹⁴ Council Act of 29.5.2000 establishing the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, OJ C197, 12.7.2000, p.1

¹⁵ OJ L 239, 22.9.2000, p. 19.

¹⁶ OJ L 386, 29.12.2006, p. 89.

¹⁷ OJ L 210, 6.6.2008, p. 1.

4. LEGAL ELEMENTS OF THE PROPOSAL

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 measure¹⁸. 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 Convention No. 196 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 Convention No. 196 is therefore Article 83(1) TFEU.

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.

Convention No. 196 covers fields to which the ordinary legislative procedure applies, most notably the setting of minimum rules concerning the definition of criminal offences in the area of terrorism, as well as police and judicial cooperation in criminal matters (Articles 82 , 83(1) and 87 TFEU). The procedural legal basis of the proposed decision is therefore Article 218(6)(a) TFEU.

5. TERRITORIAL APPLICATION

In accordance with Protocol 22 of the Treaty of the European Union, Convention No. 196 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, Convention No. 196 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.

¹⁸ C-377/12, *Commission v Council*, paragraph 34.

Proposal for a

COUNCIL DECISION

on the conclusion, on behalf of the European Union, of the Council of Europe Convention on the Prevention of Terrorism (CETS No. 196)

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) 2015/1913 of 18 September 2015¹⁹, the Council of Europe Convention on the Prevention of Terrorism (CETS No. 196) was signed on 22 October 2015, subject to its conclusion.
- (2) Article 23 of the Council of Europe Convention on the Prevention of Terrorism (CETS No. 196; 'the Convention') provides that the Convention shall be open for approval by the European Union.
- (3) The Union has already adopted measures in the different areas covered by the Convention.
- (4) Ireland is bound by Council Framework Decision 2002/475/JHA²⁰ and is therefore taking part in the adoption of this Decision.
- (5) [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,]
- (6) 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

¹⁹ OJ L 280 of 24.10.2015, p. 22.

²⁰ Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism (OJ L 164, 22.6.2002, p.3).

European Union, Denmark is not taking part in the adoption of this Decision and is not bound by it or subject to its application,

(7) The Convention should therefore be approved on behalf of the European Union,
HAS ADOPTED THIS DECISION:

Article 1

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

The text of the Convention is attached to this Decision.

Article 2

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 23 of the Convention, in order to express the consent of the European Union to be bound by the Convention.

Article 3

This Decision shall enter into force upon its adoption²¹.

Done at Brussels,

*For the Council
The President*

²¹ The date of entry into force of the Convention for the European Union will be published in the *Official Journal of the European Union* by the General Secretariat of the Council.