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Principles over Security? The Impact of the Upcoming Danish Exit from Europol

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- **Denmark to be excluded from Europol due to electing not to abolish its JHA opt-outs. The Operational Agreement it has since negotiated with the EU falls short in several key areas, preventing optimal mutual cooperation between Denmark and the EU on important issues such as counter-terrorism and international organized crime. The implications of the operational agreement in regards to Europol are potentially far-reaching for Denmark in terms of both its EU policy and security, but also for the EU, which has to balance institutional dilemmas with security concerns.**



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On December 3, 2015, Danish voters rejected by a narrow 53 to 47 margin a proposal to abolish Denmark's current opt-outs on EU Justice and Home Affairs (JHA) issues in favour of an opt-in model akin to the UK's.¹ Although the referendum concerned 22 different JHA issues, the most important take-away from the referendum result is that Denmark will be excluded from the European Police Office (Europol) as of May 1st, 2017, preventing Denmark from optimal cooperation with the EU and its member states on important issues such as counter-terrorism and international organized crime.

The catalyst for the referendum was the increasingly untenable conflict between Denmark's existing opt-outs on JHA issues and EU developments following the Amsterdam and Lisbon Treaties, where an increasing amount of areas within JHA are decided by Qualified Majority Voting (QMV), and key aspects of JHA cooperation are becoming supranational. In May 2017, Europol will become supranational as well, in large part fueled by the need for more efficiency following the Brussels and Paris terrorist attacks. This excludes Denmark de jure due to the country's opt-outs.

Since the referendum, Denmark has negotiated in vain with the hopes of reaching a fully-fledged parallel agreement, having instead been forced to settle for an operational agreement proposition – conditional upon continued and future commitment to the Schengen Agreement – designed to minimize the negative impact of Denmark's exclusion from Europol without providing

comparable benefits to full membership.² As this analysis will emphasize, the implications of the operational agreement in regards to Europol are potentially far-reaching for Denmark in terms of both its EU policy and security, but also for the EU, which has to balance institutional dilemmas with security concerns.

Understanding the Referendum

The Danish referendum is unprecedented due to Denmark's unique relationship with the European Union; when Denmark rejected the Maastricht Treaty in 1992, Denmark was offered four special opt-outs³ agreed upon in the Edinburgh Agreement, which paved the way for a second referendum in 1993, allowing the ratification procedure to continue. The JHA opt-out essentially exempts Denmark from all participation on JHA issues at a supranational level.⁴ When it was negotiated, few were of such character, making Denmark traditionally portray its opt-outs as inherently positive, allowing it to cherry-pick between the legislations it wanted to implement, such as Europol, and the ones it did not, such as CEPOL⁵ and certain parts of EU asylum and immigration law.⁶ However, since then, and particularly since the Treaties of Amsterdam and Lisbon, much of the cooperation on JHA issues has become increasingly supranational. As such, Denmark is de jure excluded from any legal acts agreed upon after 2009⁷, leaving Denmark with an increasingly fragmented engagement

¹ Danmarks Statistik – Folkeafstemning Torsdag d. 3 December 2015. Available at:

<http://www.dst.dk/valg/Valg1664255/valgopg/valgopgHL.htm>

² European Commission – Press release, 15 December 2016: Declaration to minimize the negative effects of the Danish departure from Europol, following the referendum in Denmark on 3 December 2015. Available at: http://europa.eu/rapid/press-release_IP-16-4398_en.htm

³ The four opt-outs pertain to the areas of security and defence, citizenship, no participation in majority voting in justice and home affairs, and no requirement of adopting the euro.

⁴ Danmarks Radio, OVERBLIK – Retsforbeholdet – Hvad er det egentlig, vi skal stemme om? Available at: <https://www.dr.dk/nyheder/politik/eu15/overblik-retsforbeholdet-hvad-er-det-egentlig-vi-skal-stemme-om>

⁵ Schou Lauridsen, Nadja & Sørensen, Catharina. "Andenrangsloesning om Europol vil svække Dansk politi".

Tænketanken Europa, Notat 28. November 2016, p.15. Available at:

http://thinkeuropa.dk/sites/default/files/notat_andenrangsloesning_om_europol_vil_svaekke_dansk_politi.pdf

⁶ Peers, Steve. "Denmark and EU Justice and Home Affairs Law: Details of the Planned Referendum. EU Law Analysis, 17 March 2015. Available at:

<http://eulawanalysis.blogspot.cz/2015/03/denmark-and-eu-justice-and-home-affairs.html>

⁷ Larsen, Henrik. "What the Danish 'no' vote on Justice and Home Affairs means for Denmark and the EU. London School of Economics, December 10 2015. Available at:

<http://blogs.lse.ac.uk/europpblog/2015/12/10/what-the-danish-no-vote-on-justice-and-home-affairs-means-for-denmark-and-the-eu/>

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in regards to JHA and police cooperation (it is for instance not a member of EURODAC⁸ or ECRIS for third-country citizens⁹).

While the referendum result can partially be explained by the positive experience of using the opt-outs, it cannot explain the Danish electorate's decision to jeopardize Danish participation in Europol alone, which is otherwise regarded as highly important by the overwhelming majority of the electorate.¹⁰ The campaign against abolishing the opt-out, led by the far-right nationalist "Danish People's Party" promised that obtaining a parallel agreement akin to the parallel agreements Denmark already enjoys on JHA issues would be a mere formality.

These past parallel agreements are essentially amendments to Denmark's opt-outs designed to mitigate the harmful effects, allowing Denmark to copy the EU law but pass it as a Danish law.¹¹ However, past parallel agreements have on average taken Denmark almost 6 years to negotiate, and none have been obtained since 2009.¹² Therefore, it is not surprising that the EU quickly ruled out a parallel agreement, leaving Denmark in doubt over its future arrangements regarding Europol.

The Danish Perspective: Uncertainty in an Increasingly Volatile World

Although the final draft and legal text has not yet been agreed upon, the wording of the recent joint

statement between Juncker, Tusk and Danish Prime Minister Løkke Rasmussen is telling: the foremost task of the operational agreement is to minimize the negative impact of Denmark's exclusion from Europol.¹³ On a concrete level, the operational agreement as it currently stands means Denmark will lose its full and direct access to Europol databases, among them, the EIS¹⁴ database which can ultimately lead to the authorities being forced to release suspects from custody due to the lack of timely information. Denmark will also lose full access to Europol's operational activities and its say within Europol's leading organs.

Future access to Europol's databases will instead have to go through a liaison officer, who can on behalf of Denmark access those databases based off Danish inquiries. In this regard, Denmark will be treated like any third party country as opposed to an EU member country, meaning it will be subjected to increased regulations as per data-sensitivity and security regulations.¹⁵ Considering Denmark made over 70.000 inquiries into the EIS database in 2015 alone, the impact of losing direct access cannot be overstated.¹⁶

From the perspective of other EU member states, Denmark's impeded access to aforementioned databases through a specific liaison officer will potentially disrupt the flow of information crucial to efficient cross-border cooperation on intelligence both from Denmark to the EU, and vice-versa. Furthermore, due to Europol being the fulcrum for EU cooperation on crime, Denmark will be

⁸ An information system containing finger-print information on asylum seekers and illegal migrants

⁹ European Criminal Records Information System. Denmark participates in relation to EU citizens but not third-country citizens.

¹⁰ Møller, Bjarke & Sørensen, Catharina. "Stort Flertal Ønsker Dansk Deltagelse i EU's Politisamarbejde". Tænketanken Europa, 11 August 2014. Available at: <http://thinkeuropa.dk/politik/stort-flertal-oensker-dansk-deltagelse-i-eus-politisamarbejde>

¹¹ Hvidt, Nanna & Mouritzen, Hans (eds.) et al. "Danish Foreign Policy Yearbook 2010". Danish Institute for International Studies (DIIS), p. 143. Available at: http://pure.diis.dk/ws/files/61432/YB2010_Danish_Foreign_Policy_Yearbook_WEB.pdf

¹² Møller, Bjarke. Parallelaftale har Lange Udsigter. Tænketanken Europa, 11 Januar 2016. Available at: <http://thinkeuropa.dk/politik/parallelaftale-har-lange-udsigter>

¹³ Council of the European Union – Press release, 15 December 2016: Declaration to minimize the negative effects of the Danish departure from Europol, following the referendum in Denmark on 3 December 2015. Available at:

<http://www.consilium.europa.eu/en/press/press-releases/2016/12/15-tusk-joint-statement-denmark-europol/>

¹⁴ European Information System

¹⁵ Schou Lauridsen, Nadja & Sørensen, Catharina. "Andenrangsloesning om Europol vil svække Dansk politi". Tænketanken Europa, Notat 28. November 2016, p. 8. Available at: http://thinkeuropa.dk/sites/default/files/notat_andenrangsloesning_om_europol_vil_svaekke_dansk_politi.pdf

¹⁶ Berlingske Tidende. "Rigspolitichefen: Europol-exit får Store Konsekvenser for Politiets Arbejde. October 5, 2016. Available at: <http://www.b.dk/politiko/rigspolitichefen-europol-exit-faar-store-konsekvenser-for-politiets-arbejde>

left out of important security cooperation on international criminal activities.¹⁷

Additionally, the entry into force of the operational agreement is conditional upon Denmark's continued commitment to the Schengen Agreement. While this conditionality is logical considering how intertwined Europol's and Schengen's information systems are¹⁸, it also puts the Danish Eurosceptic parties in a difficult position in their dual emphasis on increasing security but also denouncing the Schengen agreement. Last but not least, the operational agreement does not address the potential further marginalization of Denmark on related issues in the future. With future initiatives in the pipeline, such as the PNR planned for 2018, this marginalization will inexorably continue, making a more long-term sustainable solution pertinent.¹⁹ Such a solution exists in the form of Protocol 22 of the Amsterdam and later Lisbon Treaty, but as it obliges Denmark to give up its opt-out model, it remains a dead end unless Denmark goes against the referendum result.²⁰

In sum, while the operational agreement to some extent mitigates the negative consequences of Denmark's exclusion from Europol, it is indisputably a considerable weakening of Denmark's security situation as well as Denmark's ability to contribute to EU police cooperation. The important question therefore remains how Denmark's Europol exit will affect the EU as a whole and other member states individually.

The European Perspective: Avoiding a Precedent from an Unprecedented Situation

From a European perspective, the Danish situation is a needless headache with no precedent to work from. Timmermans' characterization of the Danish situation as "impossible, like being half pregnant"²¹ amply illustrates the mounting frustration within the EU at this complex, unparalleled situation.

In legal terms, the EU has, through the operational agreement, chosen to characterize Denmark as a third country in its relation to Europol, despite being an EU member, which goes against EU law. It is therefore uncertain whether the operational agreement will be accepted by the various EU institutions, especially the Council which must agree upon the necessary legal changes through qualified majority voting. The European Parliament has planned two hearings on the case, with a chance that the Parliament will choose to defer to the European Court of Justice in order to clarify whether or not it is even possible to treat a member state as a third country.²²

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¹⁷ Schou Lauridsen, Nadja & Sørensen, Catharina. "Andenrangsloesning om Europol vil svække Dansk politi". Tænk tanken Europa, Notat 28. November 2016, pp. 5-6 & 14-16. Available at: http://thinkeuropa.dk/sites/default/files/notat_andenrangsloesning_om_europol_vil_svaekke_dansk_politi.pdf

¹⁸ EULISA. "SIS II – 2015 Statistics". March 2016, pp. 7-11. Available at: <http://www.eulisa.europa.eu/Publications/Reports/SIS%20II%20-%20public%202015%20stats.pdf>

¹⁹ Passenger Name Register

²⁰ EUR-LEX. Consolidated Version of the Treaty on the Functioning of the European Union. Protocols 16, 17 & 22 on Denmark's. Available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12012E%2FTXT>

²¹ Møller, Bjarke. "Vil Danmark være halvt gravid i Europol?" Jyllands-Posten, 14 December 2016. Available at: <http://jyllands-posten.dk/debat/international/ECE9224153/vil-danmark-vaere-halvt-gravid-i-europol/>

²² Møller, Bjarke. "Danmark får B-Medlemskab af Europol". Tænk tanken Europa, 15 December 2016. Available at: <http://thinkeuropa.dk/politik/danmark-faar-b-medlemskab-af-europol>

From a security perspective, the immediate impacts of the Danish exclusion or restricted access are relatively inconsequential. While Denmark has produced a high number of foreign fighters relative to its population²³, it is dubious that the fight against terrorism would be diminished due to the current global focus on the issue. In terms of providing data, Denmark's contribution is unlikely to change in the immediate future as well. However, from a long-term perspective, Denmark's contribution will inevitably become more and more marginalized as it is excluded from an increasing number of bodies due to its opt-out. While this undoubtedly affects Denmark more profoundly than the EU as a whole, it is still a weak link in the chain.

Politically, the results of the British referendum have influenced the EU's approach to the Danish situation. Before it became apparent that Denmark would be unable to receive a parallel agreement and instead have to settle for an operational agreement, Britain made it clear that it would seek a special agreement on Europol akin to what Denmark has enjoyed in the past.²⁴ Thus, any concessions given to Denmark by the EU on Europol could potentially establish a precedent to be used in Brexit negotiations. This partially explains the unwillingness by the EU to establish a parallel agreement and instead opt for the operational agreement; it reinforces the precedence that operational agreements have on JHA matters since Iceland and Norway, both non-EU members, already have such agreements established.²⁵

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Ultimately, the Danish situation is not desirable for the EU either. The referendum result has empowered the anti-European parties to demand a change in Danish policy towards the EU by diverging from the hitherto consensus of staying close to the EU core²⁶, which may further destabilize the Union.

How to Mend this Relationship of Mutual Dissatisfaction?

The EU has made it clear that the only way for Denmark to fully participate in Europol is by activation of Protocol 22.²⁷ As such, any negotiation on alternatives will invariably produce subpar outcomes for Denmark due to the EU's superior negotiating position. After all, if Denmark finds the operational agreement unpalatable, the option to hold a second referendum, this time only on the JHA issues pertaining to full Europol participation, remains available. It remains to be seen whether or not Denmark will opt for this when the first draft of

²³ Bergen, Peter. "The British Connection to ISIS Beheadings." CNN, 16 September 2014. Available at:

<http://edition.cnn.com/2014/09/14/opinion/bergen-british-connection-isis-beheadings/index.html?c=&page=2>

²⁴ Paravicini, Giulia. "Europol First in Line for Life After Brexit". Politico, 16 August 2016. Available at:

<http://www.politico.eu/article/europol-first-in-line-for-life-after-brexitvb-law-enforcement-rob-wainwright/>

²⁵ Agreement Between the European Union and Iceland and Norway on the Application of Certain Provisions 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime and Council Decision 2008/616/JHA on the Implementation of Decision 2008/615/JHA, and the Annex thereto. Available at:

<http://ec.europa.eu/world/agreements/prepareCreateTreatiesWorkspace/treatiesGeneralData.do?step=0&redirect=true&treatyId=8402>

²⁶ Larsen, Henrik. "European Views on the UK's Renegotiation: Romania, Denmark, Belgium and Luxembourg." London School of Economics, 14 October 2015. Available at:

<http://blogs.lse.ac.uk/europpblog/2015/10/14/european-views-on-the-uks-renegotiation-romania-denmark-belgium-and-luxembourg/>

²⁷ Council of the European Union – Press release, 15 December 2016: Declaration to minimize the negative effects of the Danish departure from Europol, following the referendum in Denmark on 3 December 2015. Available at:

<http://www.consilium.europa.eu/en/press/press-releases/2016/12/15-tusk-joint-statement-denmark-europol/>

the operational agreement has been evaluated, but it is undoubtedly the ideal option from a European perspective.

"However, there are several reasons for why it is also within the EU's interest to adopt a flexible stance on Denmark's situation."

However, there are several reasons for why it is also within the EU's interest to adopt a flexible stance on Denmark's situation. Given the domestic popularity of the Danish Eurosceptic parties and general misgivings about the EU's handling of particularly the migration crisis, the EU has to carefully balance the consequences in order not to estrange the Danes further. Given how zealously Denmark clings to its opt-outs, it might take a long time before another referendum is attempted. Furthermore, there will be similar conflicts between Denmark and the EU in the future given that the opt-outs remain in place. Barring a second referendum, a potential compromise could be to amend Protocol 22 to allow Denmark to establish parallel agreements within the EU police cooperation frameworks.²⁸ As Britain is expected to leave the EU soon, any parallel agreements given to Denmark specifically related to its opt-outs would constitute less of a potentially undesirable precedent than before. This recommendation naturally presupposes that the EU accepts that the Danish opt-outs are a permanent rather than temporary fixture, which might be a bitter pill to swallow. However, given how entrenched the opt-outs have become for Denmark, this arguably remains the most mutually beneficial path. It would, on top of it, nuance the EU's image amongst critics of its hardline negotiation stance at a relatively cheap expense. The operational agreement arguably serves a similar purpose, yet if the EU insists on the operational agreement, clarifying what Denmark's status in relation to Europol actually entails will be more than essential, as the current limitation on direct, full access to the database repositories

poses a needless security – and political – risk for the EU as well as Denmark.

Concluding Remarks: The EU's Balancing Act between Treaty-Enshrined Principles and Highly-Demanded Flexibility

Developments within the EU will continue to marginalize Denmark in JHA issues where the opt-outs remain. The operational agreement falls short of what full membership of Europol or a parallel agreement mimicking full membership can achieve, compromising primarily Danish but also European security. Given the high priority of security within the EU, this situation is undesirable for all parties. While the EU's reluctance to offer special treatment to the Danes is understandable, it would nonetheless be in the EU's interest to adopt a more flexible stance on the matter of Danish participation in Europol and police cooperation in general, if not on JHA issues as a whole.

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The UK is leaving the Union, making the Danish opt-outs truly unique and therefore unable to establish an undesirable precedent. Negotiations on a parallel agreement on Europol and other police cooperation institutions could therefore begin, offering a mutually optimal long-term solution to replace the operational agreements that will inevitably have to be made until the parallel agreement would be in place. This would both respect the Danish decision to retain its EU-given opt-outs,

²⁸ This is possible through Article 8 of Protocol 22. See note 20.

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with all the contemporary and future limitations this entails, without compromising specifically on the Union's increasingly important security issues.

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