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PROPOSAL

From:	Secretary-General of the European Commission, signed by Mr Jordi AYET PUIGARNAU, Director
date of receipt:	14 February 2018
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 signing, on behalf of the European Union, of the Agreement between the European Union and the Swiss Confederation on supplementary rules in relation to the instrument for financial support for external borders and visa, as part of the Internal Security Fund, for the period 2014 to 2020

Delegations will find attached document COM(2018) 64 final.

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Proposal for a

COUNCIL DECISION

on the signing, on behalf of the European Union, of the Agreement between the European Union and the Swiss Confederation on supplementary rules in relation to the instrument for financial support for external borders and visa, as part of the Internal Security Fund, for the period 2014 to 2020

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

Regulation (EU) No 515/2014 of the European Parliament and of the Council of 16 April 2014, establishing, as part of the Internal Security Fund, the instrument for financial support for external borders and visa and repealing Decision No 574/2007/EC entered into force on 21 May 2014 and became applicable as of 1 January 2014[1].

Regulation (EU) No 514/2014 of the European Parliament and of the Council of 16 April 2014 laying down general provisions on the Asylum, Migration and Integration Fund and on the instrument for financial support for police cooperation, preventing and combating crime, and crisis management also entered into force on 21 May 2014 and became applicable as of 1 January 2014[2]. Under Article 19 of Regulation (EU) No 515/2014, the provisions of Regulation (EU) No 514/2014 apply to the instrument for financial support for external borders and visa, as part of the Internal Security Fund (hereinafter referred to as 'the ISF Borders and Visa').

The purpose of the ISF Borders and Visa is to establish a solidarity mechanism binding the participating states by the same European rules on the control of external borders in each other's interests and on each other's behalf. The ISF Borders and Visa will serve to accomplish a key objective of the Schengen *acquis*, namely to share responsibility for an 'efficient, high and uniform level of control at the external borders', as set out in Article 15 of Regulation (EU) 2016/399 of the European Parliament and of the Council[3]. It is thus a development of the Schengen *acquis*.

Article 5(7) of Regulation (EU) No 515/2014 provides that the countries associated with the implementation, application and development of the Schengen *acquis* participate in the instrument in accordance with its provisions and that arrangements are to be concluded on their financial contributions and the supplementary rules necessary for such participation, including provisions ensuring the protection of the Union's financial interests and the power of audit of the Court of Auditors, as the respective Association Agreements do not provide for such rules.

The aim of the draft Agreement with Switzerland is to establish the arrangements referred to in Article 5(7) of Regulation (EU) No 515/2014 and to enable the Commission to assume ultimate responsibility for implementation of the budget of the instrument in this associated country and determine its contribution to the Union budget in respect of this instrument.

As regards budgetary and financial controls, the Member States are subject to horizontal obligations (e.g. the competence of the Court of Auditors and of the European Anti-Fraud Office (OLAF)), derived either directly from the Treaty or from secondary Union legislation. These obligations apply to the Member States directly and are therefore not laid down in Regulation (EU) No 515/2014. However, in application of Article 5(7) of Regulation (EU) No 515/2014, they must be extended to the associated country by means of the draft Agreement.

In order to protect the Union's financial interests against fraud and other irregularities, Regulation (EU) No 514/2014 provides for Commission staff, the Court of Auditors and OLAF to be granted suitable access to carry out controls. Article 5(9) of Regulation (EU) No 514/2014 adds that cooperation agreements with third countries will expressly empower the

[1] OJ L150, 20.05.2014, page 143.
[2] OJ L150, 20.05.2014, page 112.
[3] OJ L 77, 23.3.2016, page 1.

Commission, the Court of Auditors and OLAF to conduct such audits, on-the-spot controls and inspections. Consequently, this is provided for in the draft Agreement.

2. LEGAL ELEMENTS OF THE PROPOSAL

• Legal basis

Having as its aim the conclusion of arrangements between the Union and Switzerland on this country's contribution to the instrument for financial support for external borders and visa for the period 2014-2020 and on the supplementary rules necessary for this participation, the present proposal for the signature of the Agreement is based on Articles 77(2) and 218(5) of the Treaty on the Functioning of the European Union.

• The necessity for the proposed decision

On the basis of Article 5(7) of Regulation (EU) No 515/2014 the conclusion of the Agreement with Switzerland is necessary for the establishment of the arrangements on this country's contribution to the instrument for financial support for external borders and visa for the period 2014-2020 and on the supplementary rules necessary for this participation.

Although Article 19(4) of the agreement as initialled provides for the possibility to apply the agreement provisionally as from the day following its signature, without prejudice to constitutional requirements, the Swiss authorities have informed the Commission that under the terms of Swiss governmental and administrative organisation law such provisional application is not possible. Therefore, the present proposal for a Council Decision does not include the provisional application of the agreement. The agreement will enter into force under the terms of its Article 19(2) and (3) on the first day of the first month following the day of the last notification on the completion of the ratification procedure.

• Proportionality

Not applicable.

• Choice of the instrument

Not applicable.

3. RESULTS OF CONSULTATIONS WITH INTERESTED PARTIES AND IMPACT ASSESSMENTS

• Outcome of the Negotiations

The Commission presented on 28 May 2014 a recommendation to the Council in order to authorise the Commission to open negotiations with Norway, Iceland, Switzerland, and Liechtenstein on an international Agreement establishing such supplementary rules.

The Commission received the Council authorisation to open negotiations with Norway, Iceland, Switzerland, and Liechtenstein on an Agreement on the modalities of these countries' participation in the Internal Security Fund – Borders and Visa on 14 July 2014.

The negotiations were held jointly with all associated countries. Two rounds of negotiations took place. The final text of the draft Agreement with Switzerland was initialled on 21 April 2017.

The Commission considers that the objectives set by the Council in its negotiating directives were attained and that the draft Arrangement is acceptable to the Union.

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

The final content of it can be summarised as follows:

The draft Agreement foresees the annual financial contribution of Switzerland to the budget of the Internal Security Fund – Borders and Visa by an annual sum calculated in accordance with its GDP as a percentage of GDP of all States participating in the Fund [Article 10 and the Annex]. Annual payments are specified in Article 11.

Furthermore the draft Agreement foresees also the modalities for the designation of the Responsible Authority and for the annual reporting system.

The Agreement contains as well provisions to protect the financial interests of the Union against fraud and measures to ensure compliance with the provisions relevant for the financial management and control as laid down in the Treaty on the Functioning of the European Union ('TFEU') and in Union law based on the TFEU.

- **Ex-post evaluations/fitness checks of existing legislation**

Not applicable.

- **Stakeholder consultations**

Not applicable.

- **Collection and use of expertise**

Not applicable.

- **Impact assessment**

Not applicable, considering that the proposal is linked to the programme management and aims at signing an international agreement which was negotiated on the basis of the negotiating directives established by the Council.

- **Regulatory fitness and simplification**

Not applicable.

- **Fundamental rights**

Not applicable.

4. BUDGETARY IMPLICATION

Article 10 and the Annex of the draft Agreement describe the provisions related to the annual financial contributions of the associated country to the budget of the Internal Security Fund – Borders and Visa and their possible adaptation to the situation described as per the Annex.

5. OTHER ELEMENTS

- **Territorial application**

Regulation (EU) No 515/2014 constitutes a development of the Schengen *acquis*. In this regard, the present Agreement with Switzerland also builds on the Schengen *acquis*.

In accordance with Articles 1 and 2 of Protocol No 22 on the position of Denmark annexed to the TEU and TFEU, Denmark does not take part in the adoption of this decision and will not

be bound by it or be subject to its application. In accordance with Article 4 of the aforementioned Protocol, Denmark will decide within six months after the Council has adopted this proposal whether it will implement the proposed decision in its national law.

This proposal constitutes a development of elements of the Schengen *acquis* in which the United Kingdom and Ireland do not take part and they will therefore not be bound or subject to its application, in accordance with Council Decisions 2000/365/EC[4] and 2002/192/EC[5] respectively.

- **Implementation plans and monitoring, evaluation and reporting arrangements**

Article 17 of the Agreement specifies the applicable reporting and monitoring arrangements. By 15 February each year and until 2022 included, Switzerland is to submit an annual implementation report to the Commission for the previous financial year.

- **Explanatory documents (for directives)**

Not applicable.

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

Not needed.

In the light of the abovementioned considerations, the Commission proposes that the Council decide that the Agreement be signed on behalf of the Union and authorise the President of the Council to appoint the person(s) duly empowered to sign on behalf of the Union.

The Commission has made a separate proposal for a Council Decision on the conclusion of the attached Agreement between the European Union and the Swiss Confederation on supplementary rules in relation to the instrument for financial support for external borders and visa, as part of the Internal Security Fund, for the period 2014 to 2020[6]. The Council shall adopt this Decision after obtaining the consent of the European Parliament.

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4 Council Decision of 29 May 2000 concerning the request of the United Kingdom of Great Britain and Northern Ireland to take part in some of the provisions of the Schengen acquis (OJ L 131, 1.6.2000, p. 43).

5 Council Decision of 28 February 2002 concerning Ireland's request to take part in some of the provisions of the Schengen acquis (OJ L 64, 7.3.2002, p. 20).

6 Proposal for a Council Decision on the conclusion on behalf of the European Union of an Agreement between the European Union and the Swiss Confederation on supplementary rules in relation to the instrument for financial support for external borders and visa, as part of the Internal Security Fund for the period 2014 to 2020, COM(2016) XXX final [reference to be inserted later when a number is assigned by SG].

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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 77(2), in conjunction with Article 218(5) thereof,

Having regard to the proposal from the European Commission,

Whereas:

(1) Regulation (EU) No 515/2014 of the European Parliament and of the Council[7] provides that the countries associated with the implementation, application and development of the Schengen *acquis* are to participate in the instrument for financial support for external borders and visa, and that arrangements are to be concluded on their financial contributions and the supplementary rules necessary for such participation, including provisions ensuring the protection of the Union's financial interests and the powers of audit of the Court of Auditors.

(2) On 14 July 2014, the Council authorised the Commission to open negotiations with the Kingdom of Norway, the Republic of Iceland, the Swiss Confederation and the Principality of Liechtenstein for an Agreement on the modalities of their participation in the Internal Security Fund – Borders and Visa. The negotiations with the Swiss Confederation were successfully concluded by the initialling of the Agreement on 21 April 2017.

(3) 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. Given that this Decision builds upon the Schengen *acquis*, Denmark shall, in accordance with Article 4 of that Protocol, decide within a period of six months after the Council has decided on this Decision whether it will implement it in its national law.

(4) This Decision constitutes a development of the provisions of the Schengen *acquis* in which the United Kingdom does not take part, in accordance with Council Decision 2000/365/EC[8]; the United Kingdom is therefore not taking part in the adoption of this Decision and is not bound by it or subject to its application.

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[7] Regulation (EU) No 515/2014 of the European Parliament and of the Council of 16 April 2014 establishing, as part of the Internal Security Fund, the instrument for financial support for external borders and visa and repealing Decision No 574/2007/EC (OJ L 150, 20.5.2014, p. 143).

[8] Council Decision of 29 May 2000 concerning the request of the United Kingdom of Great Britain and Northern Ireland to take part in some of the provisions of the Schengen acquis (OJ L 131, 1.6.2000, p. 43).

(5) This Decision constitutes a development of the provisions of the Schengen *acquis* in which Ireland does not take part, in accordance with Council Decision 2002/192/EC[9]; Ireland is therefore not taking part in the adoption of this Decision and is not bound by it or subject to its application.

(6) The Agreement should be signed on behalf of the Union, subject to its conclusion at a later date,

HAS ADOPTED THIS DECISION:

Article 1

The signing on behalf of the European Union of the Agreement between the European Union and the Swiss Confederation on supplementary rules in relation to the instrument for financial support for external borders and visa, as part of the Internal Security Fund, for the period 2014 to 2020 is hereby approved, subject to the conclusion of the said Agreement.

The text of the Agreement to be signed is attached to this Decision.

Article 2

The Council Secretariat General shall establish the instrument of full powers to sign the Agreement, subject to its conclusion, for the person(s) indicated by the negotiator of the Agreement.

Article 3

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

Done at Brussels,

For the Council
The President

[9] Council Decision of 28 February 2002 concerning Ireland's request to take part in some of the provisions of the Schengen acquis (OJ L 64, 7.3.2002, p. 20).