Council of the European Union

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PROPOSAL

From:	Secretary-General of the European Commission, signed by Mr Jordi AYET PUIGARNAU, Director
date of receipt:	21 February 2019
To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union
No. Cion doc.:	COM(2019) 89 final
Subject:	Annex to the Proposal for a Council Decision on the signing, on behalf of the Union, of the Status Agreement between the European Union and Montenegro on actions carried out by the European Border and Coast Guard Agency in Montenegro

Delegations will find attached document COM(2019) 89 final.

Encl.: COM(2019) 89 final

EUROPEAN
COMMISSION

Brussels, 21.2.2019
COM(2019) 89 final

ANNEX

ANNEX

to the

Proposal for a COUNCIL DECISION

on the signing, on behalf of the Union, of the Status Agreement between the European Union and Montenegro on actions carried out by the European Border and Coast Guard Agency in Montenegro

ANNEX

STATUS AGREEMENT

between the European Union and Montenegro on actions carried out by the European Border and Coast Guard Agency in Montenegro

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THE EUROPEAN UNION

and MONTENEGRO,

Hereinafter referred to as 'the Parties',

WHEREAS situations may arise where the European Border and Coast Guard Agency, hereinafter referred to as the 'Agency', coordinates operational cooperation between EU Member States and Montenegro, including on the territory of Montenegro,

WHEREAS a legal framework in the form of a status agreement should be established for the situations where the team members of the Agency will have executive powers on the territory of Montenegro.

CONSIDERING that all actions of the Agency on the territory of Montenegro should fully respect fundamental rights,

HAVE DECIDED TO CONCLUDE THE FOLLOWING AGREEMENT:

Article 1

Scope of the Agreement

1. This Agreement shall cover all aspects that are necessary for carrying out actions by the Agency that may take place in the territory of Montenegro whereby team members of the Agency have executive powers.

2. This Agreement shall only apply in the territory of Montenegro or parts thereof.

3. The status and delimitation under international law of the respective territories of the Member States of the European Union and Montenegro is in no way affected neither by this Agreement nor by any act accomplished in its implementation by the Parties or on their behalf, including the establishment of operational plans or the participation in cross-border operations.

Article 2

Definitions

For the purposes of this Agreement:

(1) 'action' means a joint operation, a rapid border intervention or a return operation;

(2) ‘joint operation’ means an action aimed at tackling illegal immigration or cross-border crime or aimed at providing increased technical and operational assistance at the border of Montenegro neighbouring a Member State and deployed in the territory of Montenegro;

(3) ‘rapid border intervention’ means an action aimed at rapidly responding to a situation of specific and disproportionate challenges at the borders of Montenegro neighbouring a Member State and deployed in the territory of Montenegro for a limited period of time;

(4) 'return operation' means an operation that is coordinated by the Agency and involves technical and operational reinforcement being provided by one or more Member States under which returnees from one or more Member States are returned either on a forced or voluntary basis to Montenegro;

(5) ‘border control’ means the control of persons carried out at a border in response exclusively to an intention to cross or the act of crossing that border, regardless of any other consideration, consisting of border checks at border crossing points and border surveillance between border crossing points;

(6) ‘Member of a team’ means a member either of the Agency staff or a member of a team of border guards and other relevant staff from participating Member States, including border guards and other relevant staff that are seconded by Member States to the Agency to be deployed during an action;

(7) 'Member State' means a Member State of the European Union;

(8) 'home Member State' means the Member State of which a member of a team is a border guard or other relevant staff member;

(9) 'personal data’ means any information relating to an identified or identifiable natural person; an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person;

(10) 'participating Member State' means a Member State which participates in the action in Montenegro by providing technical equipment, border guards and other relevant staff deployed as part of the team;

(11) 'Agency' means the European Border and Coast Guard Agency established by Regulation (EU) 2016/1624 on the European Border and Coast Guard.

Article 3

Launching the Action

1. The initiative to launch an action can be proposed to the competent authorities of Montenegro by the Agency. The competent authorities of Montenegro may request the Agency to consider launching an action.

2. Carrying out an action requires the consent of both competent authorities of Montenegro and the Agency.

Article 4

Operational Plan

An Operational Plan, that has the agreement of the Member State or Member States bordering the operational area, shall be agreed for each joint operation or rapid border intervention. The plan shall set out in detail the organisational and procedural aspects of the joint operation or rapid border intervention, including a description and an assessment of the situation, the operational aim and objectives, the operational concept, the type of technical equipment to be deployed, the implementation plan, the cooperation with other third countries, other Union Agencies and bodies or international organisations, the provisions in respect of fundamental rights including personal data protection, the coordination, command, control, communication and reporting structure, the organisational arrangements and logistics, the evaluation and the financial aspects of the joint operation or rapid border intervention. The evaluation of the joint operation or of the rapid border intervention shall be conducted jointly by Montenegro and by the Agency.

Article 5

Tasks and powers of the members of the team

1. Members of the team shall have the authority to perform the tasks and exercise the executive powers required for border control and return operations.

2. Members of the team shall respect the laws and regulations of Montenegro.

3. Members of the team may only perform tasks and exercise powers in the territory of Montenegro under instructions from and, as a general rule, in the presence of border guards or other relevant staff of Montenegro. Montenegro shall issue where appropriate instructions to the team in accordance with the Operational Plan. Montenegro may exceptionally authorise members of the team to act on its behalf.

   The Agency, through its Coordinating Officer, may communicate its views to Montenegro on the instructions given to the team. In that case, Montenegro shall take those views into consideration and follow them to the extent possible.

   In cases where the instructions issued to the team are not in compliance with the Operational Plan, the Coordinating Officer shall immediately report to the Executive Director of the Agency. The Executive Director may take appropriate measures, including the suspension or the termination of the action.

4. Members of the team shall wear their own uniform while performing their tasks and exercising their powers. Members of the team shall also wear visible personal identification and a blue armband with the insignias of the European Union and of the Agency on their uniforms. For the purposes of identification vis-à-vis the national authorities of Montenegro, members of the team shall at all times carry an accreditation document referred to in Article 8.

5. While performing their tasks and exercising their powers, members of the team may carry service weapons, ammunition and equipment as authorised according to the home Member State's national law. Montenegro shall, in advance of the deployment of the members of the team, inform the Agency of the permissible service weapons, ammunition and equipment and of the conditions for their use.

6. While performing their tasks and exercising their powers, members of the team shall be authorised to use force, including service weapons, ammunition and equipment, with the consent of Montenegro and the home Member State, in the presence of border guards or other relevant staff of Montenegro and in accordance with the national law of Montenegro. Montenegro may authorise members of the team to use force in the absence of border guards or other relevant staff of Montenegro.

7. Montenegro may authorise members of the team to consult its national databases if necessary for fulfilling operational aims specified in the Operational Plan and for return operations. The members of the team shall only consult data which is necessary for performing their tasks and exercising their powers. Montenegro shall, in advance of the deployment of the members of the team, inform the Agency of the national databases which may be consulted. That consultation shall be carried out in accordance with the national data protection law of Montenegro.

Article 6

Suspension and Termination of the Action

1. The Executive Director of the Agency may suspend or terminate the action, after informing Montenegro in writing, if the provisions of this Agreement or of the Operational Plan are not respected by Montenegro. The Executive Director shall notify Montenegro the reasons thereof.

2. Montenegro may suspend or terminate the action, after informing the Agency in writing, if the provisions of this Agreement or of the Operational Plan are not respected by the Agency or by any participating Member State. Montenegro shall notify the Agency the reasons thereof.

3. In particular, Montenegro or the Executive Director of the Agency may suspend or terminate the action in cases of breach of fundamental rights, violation of non-refoulement principle or of data protection rules.

4. Termination of the action shall not affect any rights or obligations arising out of the application of this Agreement or the Operational Plan before such termination.

Article 7

Privileges and Immunities of the members of the team

1. The privileges and immunities granted to the members of the team of the Agency aim at ensuring successful exercise of their official functions in the course of the actions carried out in accordance with the Operational Plan on the territory of Montenegro.

2. Papers, correspondence and assets of members of the team shall be inviolable, except in case of measures of execution which are permitted pursuant to paragraph 7.

3. Members of the team shall enjoy immunity from the criminal jurisdiction of Montenegro in respect of the acts performed in the exercise of their official functions in the course of the actions carried out in accordance with the Operational Plan.

In the event of an allegation of a criminal offence being committed by a member of the team, the Executive Director of the Agency and the competent authority of the home Member State shall be notified immediately. Prior to the initiation of the proceeding before the court, the Executive Director of the Agency, after careful consideration of any representation made by the competent authority of the home Member State and the competent authorities of Montenegro, shall certify to the court whether the act in question was performed in the exercise of their official functions in the course of the actions carried out in accordance with the operational plan. Pending the certification by the Executive Director of the Agency, the Agency and the home Member State shall refrain from taking any measure likely to jeopardise possible

subsequent criminal prosecution of the member of the team by the competent authorities of Montenegro.

If the act was committed in the exercise of official functions, the proceeding shall not be initiated. If the act was not performed in the exercise of official functions, the proceeding may continue. The certification by the Executive Director of the Agency shall be binding upon the competent authorities of Montenegro. Privileges granted to members of the team and immunity from the criminal jurisdiction of Montenegro do not exempt them from the jurisdiction of the home Member State.

The immunity of members of the team from the criminal, civil and administrative jurisdiction of Montenegro may be waived by the home Member State as the case may be. Such a waiver must always be an express waiver.

4. Members of the team shall enjoy immunity from the civil and administrative jurisdiction of Montenegro in respect of all acts performed by them in the exercise of their official functions in the course of the actions carried out in accordance with the operational plan. If any civil proceeding is instituted against members of the team before any Montenegro court, the Executive Director of the Agency and the competent authority of the home Member State shall be notified immediately. Prior to the initiation of the proceeding before the court, the Executive Director of the Agency, after careful consideration of any representation made by the competent authority of the home Member State and the competent authorities of Montenegro, shall certify to the court whether the act in question was performed by Members of the team in the exercise of their official functions in the course of the actions carried out in accordance with the operational plan.

If the act was performed in the exercise of official functions, the proceeding shall not be initiated. If the act was not performed in the exercise of official functions, the proceeding may continue. The certification by the Executive Director of the Agency shall be binding upon the jurisdiction of Montenegro.

The initiation of proceedings by members of the team shall preclude them from invoking immunity from jurisdiction in respect of any counter-claim directly connected with the principal claim.

5. Members of the team, who are witnesses, may be obliged by the competent Montenegrin authorities, with full respect to the provision of Articles 7.3 and 7.4, to provide evidence through a statement and in accordance with the Montenegrin procedural provisions.

6. In case of damage caused by a member of a team in the exercise of official functions in the course of the actions carried out in accordance with the Operational Plan, the Republic of Montenegro shall be liable for any damage.

In case of damage caused by gross negligence or wilful misconduct or if the act was not committed in the exercise of official functions by a member of the team from a participating Member State, the Republic of Montenegro may request, via the Executive Director of the Agency, that compensation be paid by the participating Member State concerned.

In case of damage caused by gross negligence or wilful misconduct or if the act was not committed in the exercise of official functions by a member of the team who is a staff member of the Agency, the Republic of Montenegro may request that compensation be paid by the Agency.

In case of damage caused in Montenegro, due to force majeure, neither Montenegro nor the participating member state nor the Agency, shall hold any responsibility.

7. No measures of execution may be taken in respect of members of the team, except in the case where a civil proceeding not related to their official functions in the course of the actions carried out in accordance with the Operational Plan is instituted against them.

Property of members of the team, which is certified by the Executive Director of the Agency to be necessary for the fulfilment of their official functions, shall be free from seizure for the satisfaction of a judgment, decision or order. In civil proceedings, members of the team shall not be subject to any restrictions on their personal liberty or to any other measures of constraint.

8. The immunity of members of the team from the jurisdiction of Montenegro shall not exempt them from the jurisdictions of the respective home Member States.

9. Members of the team shall, with respect to services rendered for the Agency, be exempt from social security provisions which may be in force in Montenegro.

10. Members of the team shall be exempt from any form of taxation in Montenegro on the salary and emoluments paid to them by the Agency or the home Member States, as well as on any income received from outside Montenegro.

11. Montenegro shall, in accordance with such laws and regulations as it may adopt, permit the entry of articles for the personal use of members of the team, and shall grant exemption from all customs duties, taxes, and related charges other than charges for storage, transport and similar services, in respect of such articles. Montenegro shall also allow the export of such articles.

12. The personal baggage of members of the team may be inspected only in cases of justified suspicions that it contains articles that are not for the personal use of members of the team, or articles whose import or export is prohibited by the law or subject to quarantine regulations of Montenegro. Inspection of such personal baggage shall be conducted only in the presence of member(s) of the team concerned or an authorised representative of the Agency.

Article 8

Accreditation document

1. The Agency shall, in cooperation with Montenegro, issue a document in Montenegrin language and the official language(s) of the institutions of the European Union to each member of the team for the purposes of identification vis-à-vis the national authorities of Montenegro and as proof of the holder's rights to perform the tasks and exercise the powers referred to in Article 5 of this Agreement and in the Operational Plan. The document shall include the following information on the member: name and nationality; rank or job title; a recent digitised photograph and tasks authorised to be performed during the deployment.

2. The accreditation document, in combination with a valid travel document, grants the member of the team access to Montenegro without the need for a visa or prior authorisation.

3. The accreditation document shall be returned to the Agency at the end of the action.

Article 9

Fundamental Rights

1. Members of the team shall, in the performance of their tasks and in the exercise of their powers, fully respect fundamental rights and freedoms, including as regards access to asylum procedures, human dignity and the prohibition of torture, inhuman or degrading treatment, the right to liberty, the principle of non-refoulement and the prohibition of collective expulsions, the rights of the child and the right to respect for private and family life. While performing their tasks and exercising their powers, they shall not arbitrarily discriminate against persons on any grounds including sex, racial or ethnic origin, religion or belief, disability, age, sexual orientation or gender identity. Any measures interfering with fundamental rights and freedoms taken in the performance of their tasks and in the exercise of their powers shall be proportionate to the objectives pursued by such measures and respect the essence of these fundamental rights and freedoms.

2. Each Party shall have a complaint mechanism to deal with allegations of a breach of fundamental rights committed by its staff in the exercise of their official functions in the course of a joint operation, rapid border intervention or return operation performed under this Agreement.

Article 10

Processing of personal data

1. Processing of personal data by members of the team shall only take place when necessary for the performance of their tasks and the excercise of their powers for the implementation of this Agreement by Montenegro, the Agency or participating Member States.

2. Processing of personal data by Montenegro shall be subject to its national legislation.

3. Processing of personal data by the Agency and the participating Member State(s), including in case of transfer of personal data to Montenegro, shall be subject to Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, Council Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters and measures adopted by the Agency for the application of Regulation (EC) No 45/2001 as referred to in Article 45(2) of Regulation (EU) 2016/1624.

4. In case the processing involves the transfer of personal data, Member States and the Agency shall indicate, at the moment of transferring personal data to Montenegro, any restrictions on access to it or use of it, in general or specific terms, including as regards transfer, erasure or destruction. Where the need for such restrictions becomes apparent after the transfer of personal data, they shall inform Montenegro accordingly.

5. Personal data collected for administrative purposes during the action may be processed by Montenegro, the Agency and the participating Member States in line with the applicable data protection legislation.

6 The Agency, Montenegro and the participating Member States shall draw up a common report on the application of paragraphs 1 to 5 of this Article at the end of each action. This report shall be sent to the Agency's Fundamental Rights Officer and Data Protection Officer. They shall report to the Executive Director of the Agency.

Article 11

Disputes and interpretation

1. All issues arising in connection with the application of this Agreement shall be examined jointly by Montenegro's competent authorities and representatives of the

Agency, which shall consult the Member State or Member States neighbouring Montenegro.

2. Failing any prior settlement, disputes concerning the interpretation or application of this Agreement shall be settled exclusively by negotiation between Montenegro and the European Commission, which shall consult any Member State neighbouring the third country.

Article 12

Entry into force, duration, suspension and termination of the Agreement

1. This Agreement shall be approved by the Parties in accordance with their own internal legal procedures.

2. This Agreement shall enter into force the first day of the second month following the date on which the Parties have notified each other of the completion of the internal legal procedures referred to in paragraph 1 through diplomatic channels.

3. This Agreement shall be valid indefinitely.

4. The Agreement may be terminated or suspended by written agreement between the Parties or unilaterally by either Party. In this last case, the Party wishing to terminate or suspend it shall notify in writing the other Party thereof through diplomatic channels. The termination shall take effect the first day of the second month following the month notification was given.

4. Notifications made in accordance with this Article shall be sent, in the case of Montenegro, to the Ministry of Interior and in the case of the European Union, to the General Secretariat of the Council of the European Union.

Done at …. on ……

in duplicate in Montenegrin language and the official language(s) of the European Union, each of these texts being equally authentic.

In case of divergence between authentic language versions, the English language version shall prevail.

Signatures:

JOINT DECLARATION WITH REGARD TO ICELAND, NORWAY, SWITZERLAND AND LIECHTENSTEIN

The Contracting Parties take note of the close relationship between the European Union and Norway, Iceland, Switzerland and Liechtenstein, particularly by virtue of the Agreements of 18 May 1999 and 26 October 2004 concerning the association of those countries with the implementation, application and development of the Schengen acquis.

In such circumstances it is desirable that the authorities of Norway, Iceland, Switzerland and Liechtenstein, on the one hand, and the Republic of Montenegro, on the other hand, conclude, without delay, bilateral agreements on actions carried out by the European Border and Coast Guard Agency in the Republic of Montenegroin terms similar to those of this Agreement.

JOINT DECLARATION

Both parties agree that refraining from taking any measure likely to jeopardise possible subsequent criminal prosecution of the member of the team by the competent authorities of the host State includes refraining from actively facilitating the return of the concerned member of the team from the European Border and Coast Guard operation premises in Montenegro to his/her home Member State, pending the certification of the Executive Director of the Agency.