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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
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Subject:	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.

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2019/0041 (NLE)

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

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

• Reasons for and objectives of the proposal

Article 54(3) of Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard[1] provides that the European Border and Coast Guard Agency may coordinate operational cooperation between Member States and third countries with respect to management of the external borders. In that respect, it can carry out actions at the external borders involving one or more Member States and a third country neighbouring at least one of those Member States, subject to the agreement of that neighbouring country, including on the territory of that third country.

Pursuant to Article 54(4) of Regulation (EU) 2016/1624, in cases where it is envisaged that European Border and Coast Guard teams will be deployed to a third country in actions where the team members will have executive powers, or where other actions in third countries require it, a status agreement shall be concluded by the Union with the third country concerned. The status agreement shall cover all aspects that are necessary for carrying out the actions. It shall in particular set out the scope of the operation, civil and criminal liability and the tasks and powers of the members of the teams. The status agreement shall ensure the full respect of fundamental rights during these operations.

On the basis of negotiating directives adopted by the Council, the European Commission has negotiated with Montenegro a status agreement with a view of setting up the legal framework that will allow acting immediately through setting up Operational Plans when quick reaction will be needed. While Montenegro is not currently widely used as a transit country by migrants, the situation might change, as it has already happened in the past. Organised crime networks quickly adapt their routes and methods for smuggling migrants to any new circumstances. With the status agreement in place, the responsible authorities of Montenegro and the EU Member States, coordinated by the European Border and Coast Guard Agency, will be in a much better position to quickly respond to such possible developments.

The attached proposal for a Council Decision constitutes the legal instrument for the signing of the status agreement between the European Union and Montenegro.

On 16 October 2017, the Commission received the Council authorisation to open negotiations with Montenegro on a status agreement for actions carried out by the European Border and Coast Guard Agency in Montenegro.

Negotiations on the status agreement have been opened and finalised on 5 July 2018. Negotiations will be successfully finalised by the initialling of the status agreement at a later date.

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

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

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[1] O.J. 16.9.2016, L 251/1.

- **Relationship with existing bilateral agreements**

The agreement between the Croatian Ministry of Interior and the Ministry of Interior of Montenegro on police cooperation entered into force for Croatia on 11 November 2011 (NN/MU No. 15/2011).

A working arrangement (which is being updated) between Montenegro and the European Border and Coast Guard Agency is conversely in place, that includes in particular regular participation of competent Montenegrin authorities in European Border and Coast Guard Agency led joint operations, as observers on Member States' territory.

Montenegro reported good cross border cooperation – especially at technical level - with all its neighbours and good progress as regards the negotiations of a number of agreements with Serbia, Bosnia and Herzegovina, and Croatia. A Protocol between the Ministries of Interior of Montenegro, Albania and Kosovo* has established a Joint Police Cooperation Centre in Plav which is aimed at advancing cross-border cooperation in the fight against crime, through more intense exchange of operational information and closer coordination of joint security efforts. The Joint Police Cooperation Centre has been officially opened on 30 May 2017.

- **Consistency with other Union policies**

The European Agenda on Migration[2] is built on four pillars. One of these is border management: this involves better management of the EU external border, in particular through solidarity towards those Member States that are located at the external borders, and improving the efficiency of border crossings. A reinforced control of Montenegro's borders will also positively impact the EU external borders, as well as the borders of Montenegro. Further strengthening security at the external borders is also in line with the European Agenda on Security[3].

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

- **Legal basis**

The legal basis for this proposal for a Council Decision is Article 77(2)(b) and (d) and Article 79(2)(c) TFEU in conjunction with Article 218(5) TFEU.

The conclusion of a status agreement by the Union is explicitly provided for in Article 54(4) of Regulation (EU) 2016/1624 which states that, in cases where it is envisaged that European Border and Coast Guard teams will be deployed to a third country in actions where the team members will have executive powers, or where other actions in third countries require it, a status agreement shall be concluded by the Union with the third country concerned.

Pursuant to Article 3(2) TFEU, the Union shall inter alia have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union. Article 54(4) of Regulation (EU) 2016/1624 provides for the conclusion of a status agreement by the European Union with the third country concerned. Consequently, the

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* This designation is without prejudice to positions on status, and is in line with UNSCR 1244/1999 and the ICJ Opinion on the Kosovo declaration of independence.

2 COM (2015) 240 final.

3 COM (2015) 185 final.

attached agreement with Montenegro falls within the exclusive competence of the European Union.

- **Subsidiarity (for non-exclusive competence)**

Not applicable.

- **Proportionality**

The status agreement will allow for the deployment of European Border and Coast Guard teams by the European Border and Coast Guard Agency in Montenegro instead of bilateral deployment by Member States in case of a sudden influx of migrants.

A common approach is therefore needed to better manage the borders of Montenegro.

- **Choice of the instrument**

This proposal is in accordance with Article 218(5) TFEU, which envisages the adoption by the Council of decisions on international agreements. There exists no other legal instrument that could be used in order to achieve the objective expressed in the proposal.

3. RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS

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

Not applicable

- **Stakeholder consultations**

Not applicable

- **Collection and use of expertise**

Not applicable

- **Impact assessment**

No impact assessment has been required for the negotiation on the status agreement.

- **Regulatory fitness and simplification**

As this will be a new agreement, no evaluation or fitness checks of existing instruments could be carried out.

1.1. • Fundamental rights

The draft status agreement contains provisions ensuring that fundamental rights of persons affected by the actions of members of the team involved in an action coordinated by the European Border and Coast Guard Agency are protected.

Provisions on fundamental rights are further explained under point 5 'Other elements'.

4. BUDGETARY IMPLICATIONS

The status agreement in itself does not entail financial implications. It is indeed the actual deployment of European Border and Coast Guard teams on the basis of an Operational Plan and relevant Grant Agreement that will entail costs borne by the budget of the European Border and Coast Guard Agency. Future operations under the status agreement will be financed through the European Border and Coast Guard Agency's own resources.

The financial statement annexed to the proposal for a Regulation on a European Border and Coast Guard on the expenditure of the European Border and Coast Guard Agency evaluated at EUR 6.090 million on average each year for 2017-2020 the reinforced cooperation with third countries (including possible joint operations with neighbouring countries).

1.2. 5. OTHER ELEMENTS

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

The Commission will ensure proper monitoring of the implementation of the status agreement.

Montenegro and the European Border and Coast Guard Agency shall jointly evaluate each joint operation or rapid border intervention.

In particular, the European Border and Coast Guard Agency, Montenegro and the Member States participating to a specific action shall draw up a report at the end of each action on the application of provisions of the agreement including on the processing of personal data.

- **Explanatory documents (for directives)**

Not applicable.

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

Scope of the agreement

Under this Agreement, the European Border and Coast Guard Agency shall be able to deploy European Border and Coast Guard teams with executive powers in Montenegro to carry out joint operations, rapid border interventions or return operations.

European Border and Coast Guard teams may be deployed on the territory of Montenegro only in regions bordering the EU external borders and members of the team shall have executive powers in those areas of Montenegro as set out in the Operational Plan.

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.

Launching an action

The initiative to launch an action can be proposed by the Agency. The competent authorities of Montenegro may request the Agency to consider launching an action. Carrying out an action requires the consent of the competent authorities of Montenegro and the Agency.

Operational Plan

Before each joint operation or rapid border intervention, an Operational Plan must be agreed between the Agency and Montenegro. That Operational Plan must also be agreed by the Member State or Member States bordering the operational area.

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,

Tasks and powers of the members of the team

As a general rule, the teams shall have the authority to perform the tasks and exercise the executive powers required for border control and return operations. They shall respect the laws and regulations of Montenegro.

Teams shall only act in the territory of Montenegro under instructions from and in the presence of border guards or other relevant staff of Montenegro. Montenegro may exceptionally authorise members of the team to act on its behalf.

Members of the team shall wear where appropriate their own uniform, visible personal identification and a blue armband with the insignias of the European Union and of the Agency on their uniforms. They shall also carry an accreditation document in order to be clearly identified by the national authorities of Montenegro.

Members of the team may carry service weapons, ammunition and equipment as authorised according to their own State's national law. The Agency shall be beforehand notified by the authorites of Montenegro of the permissible service weapons, ammunition and equipment and conditions for their use.

Members of the team may use force, including service weapons, ammunition and equipment, with the consent of their own State and of the authorities of Montenegro, in the presence of border guards or other relevant staff of Montenegro, and in accordance with the national law of Montenegro. The authorities of Montenegro may authorise members of the team to use force also in the absence of their border guards.

Montenegro may authorise members of the team to consult its national databases if necessary for fulfilling operational aims specificed in the operational plan. Prior to the deployment of the deployment of the members of the team, the authorities of Montenegro shall inform the

Agency of the national databases which may be consulted in accordance with the national data protection law of Montenegro.

Suspension and termination of the action

Both the Agency and the authorities of Montenegro may suspend or terminate the action, if they deem that the provisions of the Agreement or of the Operational Plan are not respected by the other party.

Privileges and immunities of the members of the team

Members of the team shall enjoy immunity from the criminal jurisdiction of Montenegro in respect of all acts performed in the exercise of the official functions ('on duty') while they will not enjoy such immunity for acts committed 'off duty'.

The Operational Plan shall precisely set out the actions immune from the criminal jurisdiction of Montenegro.

In the event of an allegation of a criminal offence being committed by a member of the team, the Executive Director of the Agency, prior to the initiation of the proceeding before the court, shall certify to the competent judicial authorities of Montenegro whether the act in question was performed in the exercise of their official functions or not. The Executive Director of the Agency shall take his or her decision after careful consideration of any representation made by the competent authority of the Member State which has deployed the concerned border guard or other relevant staff and the competent authorities of Montenegro. 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.

A similar regime applies for the civil and administrative liability of the members of the team.

The immunity of members of the teams from the criminal, civil and administrative jurisdiction of Montenegro may be waived by the Member State which has deployed the concerned border guard or other relevant staff. Such a waiver must always be an express waiver.

Members of the team, who are witnesses, may be obliged to provide evidence through a statement and in accordance with the Montenegrin procedural provisions.

The agreement provides for a mechanism to compensate damages. The compensation mechanism is based on Article 42 of the Regulation (EU) 2016/1624 on the European Border and Coast Guard. If the damage is caused by a member of a team 'on duty', Montenegro shall be liable. If the damage is caused 'on duty' by a member of a team from a participating Member State by gross negligence or wilful misconduct or if the act was committed 'off duty', Montenegro may request via the Executive Director of the Agency that compensation be paid by the participating Member State concerned. If the damage is caused by a staff of the Agency, Montenegro may request that compensation be paid by the Agency.

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 is instituted against them.

Property of members of the team necessary for the fulfilment of their official functions shall be free from seizure. 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.

Members of the team shall be exempt from social security provisions which may be in force in Montenegro with respect to services rendered for the Agency. They shall also be exempt from any form of taxation in Montenegro on the salary and emoluments paid to them by the Agency or their Member States, as well as on any income received from outside Montenegro.

The authorities of Montenegro shall permit the entry and exit 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.

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 the member(s) of the team concerned or an authorised representative of the Agency.

Papers, correspondence and property of members of the team shall be inviolable, except in case of measures of execution.

Accreditation document

The Agency shall, in cooperation with Montenegro, issue an accreditation document to members of the team for the purposes of identification vis-à-vis the authorities of Montenegro as proof of the holder's rights to perform the tasks and exercise the powers conferred under this Agreement and in the Operational Plan. 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.

Fundamental rights

In the performance of their tasks and in the exercise of their powers, members of the team shall 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. 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 those fundamental rights and freedoms shall be proportionate to the objectives pursued by such measures and respect the essence of these fundamental rights and freedoms.

Each Party must have a complaint mechanism in place to deal with allegations of a breach of fundamental rights committed by its staff. The Agency has established the complaints mechanism referred to in Article 72 of the Regulation (EU) 2016/1624 on the European Border and Coast Guard and therefore satisfies this obligation. The Ombudsman of

Montenegro could deal with such allegations, except if the authorities of Montenegro decide to set up a mechanism specifically tasked to deal with complaints lodged under this Agreement.

Processing of personal data

Personal data shall be processed by members of the team when necessary for the performance of their tasks and the exercise of their powers in accordance with the rules applicable to the Agency and the EU Member States. Processing of personal data by the authorities of Montenegro shall be subject to its national legislation.

The Agency, the participating Member States and the authorities of Montenegro shall draw up a common report on the processing of personal data by members of the team 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.

Disputes and interpretation

All issues arising in connection with the application of this Agreement shall be examined jointly by the competent authorities of Montenegro and by representatives of the Agency, which shall consult the Member State or Member States neighbouring Montenegro.

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 Montenegro.

Competent authorities for the implementation of the Agreement

For Montenegro, the competent authority for the implementation of this Agreement is the Ministry of Interior. For the European Union, it is the European Border and Coast Guard Agency.

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.

2019/0041 (NLE)

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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

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 77(2)(b) and (d) and Article 79(2)(c), in conjunction with Article 218(5), thereof,

Having regard to the proposal from the European Commission,

Whereas:

(1) Pursuant to Article 54(4) of Regulation (EU) 2016/1624 of the European Parliament and of the Council[4], in cases where it is envisaged that European Border and Coast Guard teams will be deployed to a third country in actions where the team members will have executive powers, or where other actions in third countries require it, a status agreement is to be concluded by the Union with the third country concerned. That status agreement should cover all aspects that are necessary for carrying out the actions.

(2) On 16 October 2017, the Council authorised the Commission to open negotiations with Montenegro for a status agreement on actions carried out by the European Border and Coast Guard Agency in Montenegro.

(3) The negotiations were successfully finalised by the initialling of the Status Agreement between the European Union and Montenegro on actions carried out by the European Border and Coast Guard Agency in Montenegro ('the Agreement').

(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[5]; 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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4 Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC (OJ L 251, 16.9.2016, p. 1).

5 Council Decision 2000/365/EC 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* (O.J. 1.6.2000, L 131/43).

(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[6]; Ireland is therefore 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 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) Therefore, the Agreement should be signed on behalf of the Union, subject to its conclusion at a later date and the attached Declarations should be approved,

HAS ADOPTED THIS DECISION:

Article 1

The signing of the Status Agreement between the European Union and Montenegro on actions carried out by the European Border and Coast Guard Agency in Montenegro ('the Agreement'), is hereby approved on behalf of the Union,, subject to the conclusion of the said Agreement.

The text of the Agreement is attached to this Decision.

Article 2

The Declaration attached to this Decision is approved on behalf of the Union.

Article 3

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 4

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

Done at Brussels,

For the Council
The President

[6] Council Decision 2002/192/EC of 28 February 2002 concerning the Ireland's request to take part in some of the provisions of the Schengen *acquis* (OJ L 64, 7.3.2002, p. 20).