Council of the European Union

Brussels, 1 March 2019
(OR. en)

7035/19

Interinstitutional File: 2019/0057(NLE)

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PROPOSAL

From:	Secretary-General of the European Commission, signed by Mr Jordi AYET PUIGARNAU, Director
date of receipt:	28 February 2019
To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union
No. Cion doc.:	COM(2019) 107 final
Subject:	Proposal for a COUNCIL DECISION on the signing, on behalf of the Union, of the Agreement between the European Union and Bosnia and Herzegovina on actions carried out by the European Border and Coast Guard Agency in Bosnia and Herzegovina

Delegations will find attached document COM(2019) 107 final.

Encl.: COM(2019) 107 final

EUROPEAN
COMMISSION

Brussels, 28.2.2019
COM(2019) 107 final

2019/0057 (NLE)

Proposal for a

COUNCIL DECISION

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

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 Bosnia and Herzegovina the Agreement on actions carried out by the European Border and Coast Guard Agency Bosnia and Herzegovina ('the 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 the migration flows in the region are much lower than in the years 2015 and 2016, organised crime networks quickly adapt their routes and methods for trafficking irregular migrants to any new circumstances. Since beginning of 2018 Bosnia and Herzegovina has been confronted with an increased migratory inflow. With the status agreement in place, the responsible authorities of Bosnia and Herzegovina 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 these developments.

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

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

Negotiations on a status agreement have been opened on 9 July 2018 and a second round took place on 10 October 2018. The status agreement has been initialled by the Heads of the negotiating teams.

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

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

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

- **Consistency with existing policy provisions in the policy area**

Fourteen Member States have bilateral agreements currently in place with Bosnia and Herzegovina: those include a series of joint measures such as border checks, surveillance, patrolling, return etc. A working arrangement between the Ministry of Security of Bosnia and Herzegovina and the European Border and Coast Guard Agency is also already in place; it includes in particular regular participation of the representatives from the Border Police of the Ministry of Security in joint operations coordinated by the European Border and Coast Guard Agency, as observers on Member States' territory, upon agreement of the hosting Member State.

- **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 Bosnia and Herzegovina's borders will also positively affect the EU external borders, in particular the external borders of Croatia as well as the borders of Bosnia and Herzegovina. 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 EU 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 attached agreement with Bosnia and Herzegovina falls within the exclusive competence of the European Union.

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

Not applicable.

- **Proportionality**

In view of organised crime networks adapting quickly their routes and methods for trafficking of irregular migrants, the involvement of the EU is required to improve controls at the borders of Bosnia and Herzegovina. The status agreement in place is necessary in order to enable the responsible authorities of Bosnia and Herzegovina and the EU Member States, coordinated by the European Border and Coast Guard Agency, quickly to respond to such possible developments. It will allow for the deployment of European Border and Coast Guard teams by

[2] COM(2015) 240 final.
[3] COM(2015) 185 final.

the European Border and Coast Guard Agency in Bosnia and Herzegovina in case of a sudden influx of irregular migrants.

- **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.

- **Fundamental rights**

The 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.

5. OTHER ELEMENTS

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

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

Bosnia and Herzegovina 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, Bosnia and Herzegovina 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 Bosnia and Herzegovina to carry out joint operations and rapid border interventions. While this agreement does not extend the scope of the Agreement between the European Community and Bosnia and Herzegovina on the readmission of persons residing without authorisation ('EC-Bosnia and Herzegovina readmission agreement')[4], teams of the European Border and Coast Guard Agency shall also be allowed, in the course of a specific return operation, to assist Bosnia and Herzegovina in identifying the persons to be readmitted to Bosnia and Herzegovina, in line with the EC-Bosnia and Herzegovina readmission agreement.

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

Operational Plan

Before each joint operation or rapid border intervention, an Operational Plan must be agreed between the Agency and Bosnia and Herzegovina. 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 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.

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 national legislation of Bosnia and Herzegovina.

Teams shall only act in the territory of Bosnia and Herzegovina under instructions from and in the presence of border guards or other police officers of Bosnia and Herzegovina.

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

[4] O.J. L 334, 19.12.2007, p. 66.

on their uniforms. They shall also carry an accreditation document in order to be clearly identified by the national authorities of Bosnia and Herzegovina.

Members of the team may carry service weapons, ammunition and equipment as authorised according to their own State's national law and the law of Bosnia and Herzegovina. The Agency shall be beforehand informed by the Border Police of Bosnia and Herzegovina of the permissible service weapons, ammunition and equipment and of the conditions for their use. The Agency shall submit in advance to the Border Police of Bosnia and Herzegovina the list of service weapons of the members of the team (type and serial number of the weapons; type and quantity of ammunitions).

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

Bosnia and Herzegovina may, upon request, communicate relevant information contained in national databases to members of the team if necessary for fulfilling operational aims.

Privileges and immunities of the members of the team

Members of the team shall enjoy immunity from the criminal jurisdiction of Bosnia and Herzegovina 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 Bosnia and Herzegovina.

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, acting expeditiously, shall certify 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 border guard or other relevant staff and by the competent authorities of Bosnia and Herzegovina.

Privileges granted to members of the team and immunity from the criminal jurisdiction of Bosnia and Herzegovina 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 jurisdiction of Bosnia and Herzegovina may be waived by the Member State that has deployed the concerned border guard or other relevant staff. Such a waiver must always be an express waiver.

The agreement provides for a mechanism to compensate damages. The compensation mechanism is based on Article 42 of Regulation (EU) 2016/1624 on the European Border and Coast Guard. If the damage is caused by a member of a team 'on duty', Bosnia and Herzegovina 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', Bosnia and Herzegovina may request via the Executive Director of the Agency that compensation be paid by the participating Member State concerned. If a staff of the Agency causes the damage, Bosnia and Herzegovina 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 criminal or 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 that may be in force in Bosnia and Herzegovina with respect to services rendered for the Agency. They shall also be exempt from any form of taxation in Bosnia and Herzegovina on the salary and emoluments paid to them by the Agency or their Member States, as well as on any income received from outside Bosnia and Herzegovina.

The authorities of Bosnia and Herzegovina 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 other duties and 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 Bosnia and Herzegovina. 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.

The competent authorities of Bosnia may oblige members of the team, who are witnesses, to provide evidence, with full respect of the provisions on immunity from criminal, civil and administrative jurisdiction.

Accreditation document

The Agency shall, in cooperation with Bosnia and Herzegovina, issue an accreditation document to members of the team for the purposes of identification vis-à-vis the authorities of Bosnia and Herzegovina 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 Bosnia and Herzegovina without the need for a visa or prior authorisation; it will be returned to the Agency at the end of the action.

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 or sexual orientation. 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 Regulation (EU) 2016/1624 on the European Border and Coast Guard and therefore satisfies this obligation. The Ombudsmen of Bosnia and Herzegovina ('the Institution of Human Rights Ombudsman of Bosnia and Herzegovina') could deal with such allegations, except if Bosnia and Herzegovina decides to set up a mechanism specifically tasked to deal with complaints lodged under this Agreement.

Processing of personal data

Members of the team shall process personal data when necessary and proportionately in accordance with the rules applicable to the Agency and the EU Member States. Processing of personal data by the authorities of Bosnia and Herzegovina shall be subject to its national laws.

The Agency, the participating Member States and the authorities of Bosnia and Herzegovina 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, as well as to the competent authorities of Bosnia and Herzegovina. The Agency's Fundamental Rights Officer and Data Protection Officer shall report to the Executive Director of the Agency.

Suspension and termination of the action

Both the Agency and the Border Police of Bosnia and Herzegovina 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.

Disputes and interpretation

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

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

Joint Declarations

Both parties take note that the European Border and Coast Guard Agency will support Bosnia and Herzegovina to control efficiently its border with any country that is not a member of the European Union by other means than deployments of European Border and Coast Guard teams with executive powers.

The close association of Norway, Iceland, Switzerland and Liechtenstein to the implementation, application and development of the Schengen acquis is reflected in a joint declaration to the Agreement.

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COUNCIL DECISION

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

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) Article 54(4) of Regulation (EU) 2016/1624 of the European Parliament and of the Council[5] provides that, in cases where it is envisaged that European Border and Coast Guard teams are deployed to a third country to carry out actions for which the team members have executive powers, or where it is required by other actions in third countries, a status agreement is to be concluded by the Union with the third country concerned. That 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 Bosnia and Herzegovina for an agreement on actions carried out by the European Border and Coast Guard Agency in Bosnia and Herzegovina (the 'Agreement').

(3) The negotiations were successfully concluded by the initialling of 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[6]; 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.

(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[7]; Ireland 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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5 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 (O.J. L 251, 16.9.2016, p. 1).

6 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. L 131, 1.6.2000, p. 43).

7 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* (O.J. L 64, 7.3.2002, p. 20).

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

Article 2

The Declarations attached to this Decision are 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