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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:	ANNEX to the 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

Delegations will find attached document COM(2018) 71 final ANNEX.

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ANNEX

ANNEX

to the

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

ANNEX

THE EUROPEAN UNION, hereinafter referred to as 'the Union'

and

THE SWISS CONFEDERATION, hereinafter referred to as 'Switzerland',

Hereinafter referred to as 'the Parties'

HAVING REGARD to the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen *acquis*¹ ('Association Agreement with Switzerland'),

WHEREAS:

- (1) The Union established the instrument for financial support for external borders and visa, as part of the Internal Security Fund by Regulation (EU) No 515/2014 of the European Parliament and of the Council².
- (2) Regulation (EU) No 515/2014 constitutes a development of the Schengen *acquis* within the meaning of the Association Agreement with Switzerland.
- (3) As Regulation (EU) No 514/2014 of the European Parliament and of the Council³ has a direct impact on the application of the provisions of Regulation (EU) No 515/2014, thus affecting the latter's legal framework, and as the procedures set out in the Association Agreement with Switzerland have been applied for the adoption of Regulation (EU) 514/2014 which was notified to Switzerland, the Parties acknowledge that Regulation (EU) No 514/2014 constitutes a development of the Schengen *acquis* within the meaning of the Association Agreement with Switzerland insofar as it is necessary for the implementation of Regulation (EU) No 515/2014.
- (4) Article 5(7) of Regulation (EU) No 515/2014 provides that the countries associated with the implementation, application and development of the Schengen *acquis* – among which Switzerland – participate in the instrument in accordance with its provisions and that arrangements should be concluded to specify financial contributions by those countries and 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.
- (5) The instrument for financial support for external borders and visa, as part of the Internal Security Fund ('the ISF – Borders and Visa') constitutes a specific instrument in the context of the Schengen *acquis* designed to provide for burden sharing and financial support in the field of external borders and visa policy in Member States and associated States.

¹ OJ L 53, 27.2.2008, p. 52.

² 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).

³ 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 (OJ L 150, 20.5.2014, p. 112).

- (6) Article 60 of Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council⁴ provides for rules on indirect management that are applicable where third countries, including associated States, are entrusted with budget implementation tasks.
- (7) Article 17(4) of Regulation (EU) No 514/2014 provides for the eligibility of expenditure incurred in 2014 by a Responsible Authority not yet formally designated, thereby ensuring a smooth transition between the External Borders Fund and the Internal Security Fund. Similarly it is important that the same concern be reflected in this Agreement. Given that this Agreement did not come into force before the end of 2014, it is essential to ensure the eligibility of expenditure incurred before and until the formal designation of the Responsible Authority, provided that the management and control systems applied before are essentially the same as the ones in force after the formal designation of the Responsible Authority.
- (8) To facilitate the calculation and use of the annual contributions due by Switzerland to the ISF – Borders and Visa, its contributions for the period 2014-2020 will be paid in five annual instalments from 2016 to 2020. From 2016 to 2018, the annual contributions are set in fixed amounts while the contribution due for the years 2019 and 2020 will be determined in 2019 on the basis of the gross domestic product of all States participating in the ISF – Borders and Visa taking into account the payments effectively made,

HAVE AGREED AS FOLLOWS:

Article 1

Scope

This Agreement sets out the supplementary rules necessary for the participation of Switzerland in the ISF – Borders and Visa in accordance with Regulation (EU) No 515/2014.

Article 2

Financial management and control

1. Switzerland shall take the necessary measures to ensure compliance with the provisions relevant for the financial management and control which are laid down in the Treaty on the Functioning of the European Union ('TFEU') and in Union law based on the TFEU.

The provisions of the TFEU and of the secondary law referred to in the first subparagraph are the following:

- (a) Article 287(1), (2) and (3) TFEU;
- (b) Articles 30, 32 and 57, Article 58(1)(c)(i), Article 60 and Articles 79(2) and 108(2) of Regulation (EU, Euratom) No 966/2012;

⁴ Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002 (OJ L 298, 26.10.2012, p. 1) as last amended by Regulation (EU, Euratom) No 547/2014 of 15 May 2014 (OJ L 163, 29.5.2014, p. 18).

- (c) Articles 32, 38, 42, 84, 88, 142 and 144 of Commission Delegated Regulation (EU) No 1268/2012⁵;
- (d) Council Regulation (Euratom, EC) No 2185/96⁶;
- (e) Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council⁷.

The Parties may decide to amend this list by mutual agreement.

2. Switzerland shall apply the provisions referred to in paragraph 1 in its territory in accordance with this Agreement.

Article 3

Respect for the principle of sound financial management

The funds allocated to Switzerland under the ISF – Borders and Visa shall be used in accordance with the principle of sound financial management.

Article 4

Respect for the principle on conflict of interest

All financial actors and any other person involved in budget implementation and management, including acts preparatory thereto, audit or control acting in the territory of Switzerland shall be prohibited from taking any action which may bring their own interests into conflict with those of the Union.

Article 5

Enforcement

Decisions taken by the Commission which impose a pecuniary obligation on persons other than States shall be enforceable in the territory of Switzerland.

Enforcement shall be governed by the rules of civil procedure in force in Switzerland. The order for its enforcement shall be appended to the decision, without other formality than verification of the authenticity of the decision, by the national authority which the government of Switzerland shall designate for this purpose and shall make known to the Commission.

When these formalities have been completed on application by the Commission, the Commission may proceed to enforcement in accordance with the national law, by bringing the matter directly before the competent authority.

⁵ Commission Delegated Regulation (EU) No 1268/2012 on the rules of application of Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council on the financial rules applicable to the general budget of the Union (OJ L 362, 31.12.2012, p. 1).

⁶ Council Regulation (Euratom, EC) No 2185/96 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities (OJ L 292, 15.11.1996, p. 2).

⁷ Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999 (OJ L 248, 18.9.2013, p. 1).

Enforcement may be suspended only by a decision of the Court of Justice of the European Union. However, the courts of Switzerland shall have jurisdiction over complaints that enforcement is being carried out in an irregular manner.

Article 6

Protection of the financial interests of the Union against fraud

1. Switzerland shall
 - (a) counter fraud and any other illegal activities affecting the financial interests of the Union through measures which shall act as a deterrent and be such as to afford effective protection in Switzerland;
 - (b) take the same measures to counter fraud affecting the financial interests of the Union as they take to counter fraud affecting its own financial interests; and
 - (c) coordinate its action aimed at protecting the financial interests of the Union with the Member States and the Commission.
2. Switzerland shall adopt equivalent measures to those adopted by the Union in accordance with Article 325(4) TFEU which are in force at the date of signature of this Agreement.

The Parties may decide by mutual agreement to adopt equivalent measures to any subsequent measures adopted by the Union in accordance with this Article.

Article 7

On-the spot checks and inspections by the Commission (OLAF)

Without prejudice to its rights under Article 5(8) of Regulation (EU) No 514/2014, the Commission (the European Anti-Fraud Office OLAF) shall be authorised to carry out on-the spot checks and inspections in the territory of Switzerland as regards the ISF – Borders and Visa in accordance with the terms and conditions laid down in Regulation (Euratom, EC) No 2185/96.

The authorities of Switzerland shall facilitate on-the-spot checks and inspections which may, if those authorities so wish, be carried out jointly with them.

Article 8

Court of Auditors

In accordance with Article 287(3) TFEU and with Part One, Title X, chapter 1 of Regulation (EU, Euratom) No 966/2012, the Court of Auditors shall have the possibility to perform audits on the premises of any body which manages revenue or expenditure on behalf of the Union in the territory of Switzerland as regards the ISF – Borders and Visa including on the premises of any natural or legal person in receipt of payments from the budget.

In Switzerland, audits by the Court of Auditors shall be carried out in liaison with national audit bodies or, if these do not have the necessary powers, with the competent national departments. The Court of Auditors and the national audit bodies of Switzerland shall cooperate in a spirit of trust while maintaining their independence. These bodies or departments shall inform the Court of Auditors whether they intend to take part in the audit.

The Court of Auditors shall have at least the same rights as the Commission as laid down in Article 5(7) of Regulation (EU) No 514/2014 and Article 7 of this Agreement.

Article 9

Public procurement

Switzerland shall apply its national law on public procurement in accordance with the provisions of Annex 4 to the Agreement Establishing the World Trade Organization (Agreement on Government Procurement)⁸ and the Agreement between the European Community and the Swiss Confederation on certain aspects of government procurement⁹.

Switzerland shall provide the Commission with a description of its public procurement procedures.

Moreover, it shall provide information on the public procurement procedures applied in each annual implementation report referred to in Article 54 of Regulation (EU) No 514/2014.

Article 10

Financial contributions

1. For the years 2016 to 2018, Switzerland shall make annual payments to the budget of the ISF – Borders and Visa in accordance with the following table:

(All amounts in EUR)

	2016	2017	2018
Switzerland	25 106 140	25 106 140	25 106 140

2. The contributions of Switzerland for the years 2019 and 2020 shall be calculated in accordance with its respective Gross Domestic Product (GDP) as a percentage of the GDP of all States participating in the ISF – Borders and Visa in accordance with the formula described in the Annex.
3. The financial contributions referred to in this Article shall be due by Switzerland irrespective of the date of adoption of its national programme referred to Article 14 of Regulation (EU) No 514/2014.

Article 11

Use of financial contributions

1. The total of the annual payments of 2016 and 2017 shall be assigned as follows:
 - (a) 75% to the mid-term review referred to in Article 8 of Regulation (EU) No 515/2014;
 - (b) 15% to the development of IT systems referred to in Article 15 of Regulation (EU) No 515/2014, subject to the adoption of the relevant Union legislative acts by 30 June 2017;

⁸ OJ L 336, 23.12.1994, p. 273.

⁹ OJ L 114, 30.4.2002, p. 430.

- (c) 10% to Union actions referred to in Article 13 of Regulation (EU) No 515/2014 and emergency assistance referred to in Article 14 of Regulation (EU) No 515/2014.

Where the amount referred to in point (b) is not allocated or spent, the Commission shall, pursuant to the procedure set in the second sub-paragraph of Article 5(5)(b) of Regulation (EU) 515/2014, re-allocate it to the specific actions referred to in Article 7 of Regulation (EU) No 515/2014.

If this Agreement does not enter in force or is not applied on a provisional basis by 1 June 2017, the full contribution of Switzerland shall be used in accordance with paragraph 2 of this Article.

- 2. The total of the annual payments of 2018, 2019 and 2020 shall be assigned as follows:
 - (a) 40% to specific actions referred to in Article 7 of Regulation (EU) No 515/2014;
 - (b) 50% to the development of IT systems referred to in Article 15 of Regulation (EU) No 515/2014, subject to the adoption of the relevant Union legislative acts by 31 December 2018;
 - (c) 10% to Union actions referred to in Article 13 of Regulation (EU) No 515/2014 and emergency assistance referred to in Article 14 of Regulation (EU) No 515/2014.

Where the amount referred to in point (b) is not allocated or spent, the Commission shall, pursuant to the procedure set in the second sub-paragraph of Article 5(5)(b) of Regulation (EU) 515/2014, re-allocate it to the specific actions referred to in Article 7 of Regulation (EU) No 515/2014.

- 3. The additional amounts assigned to the mid-term review, Union actions, specific actions or the programme on the development of IT systems shall be used in accordance with the relevant procedure laid down in one of the following provisions:
 - (a) Article 6(2) of Regulation (EU) No 514/2014;
 - (b) Article 8(7) of Regulation (EU) No 515/2014;
 - (c) Article 7(3) of Regulation (EU) No 515/2014;
 - (d) the second subparagraph of Article 15 of Regulation (EU) 515/2014.
- 4. Each year, the Commission may use up to 181 424 EUR of the payments made by Switzerland to finance the administrative expenditure related to staff or external staff necessary for supporting the implementation by Switzerland of Regulation (EU) No 515/2014 and this Agreement.

Article 12

Confidentiality

Information communicated or acquired in any form whatsoever pursuant to this Agreement shall be covered by professional secrecy and protected in the same way as similar information is protected by the provisions applicable to the Union institutions and by the laws of Switzerland. Such information shall not be communicated to persons other than those within the Union institutions, in the Member States or in Switzerland whose functions require them

to know it, nor may it be used for purposes other than to ensure effective protection of the financial interests of the Parties.

Article 13

Designation of Responsible Authority

1. Switzerland shall notify the Commission of the formal designation at ministerial level of the Responsible Authority responsible for the management and control of expenditure under the ISF – Borders and Visa, as soon as possible after the approval of the national programme.
2. The designation referred to in paragraph 1 shall be made subject to the body complying with the designation criteria on internal environment, control activities, information and communication, and monitoring laid down in or on the basis of Regulation (EU) No 514/2014.
3. The designation of a Responsible Authority shall be based on an opinion of an audit body, which may be the Audit Authority, which assesses the Responsible Authority's compliance with the designation criteria. That body may be the autonomous public institution responsible for monitoring, evaluating and auditing the administration. The audit body shall function independently of the Responsible Authority and shall carry out its work in accordance with internationally accepted audit standards. Switzerland may base its decision on designation on whether the management and control systems are essentially the same as those in place for the previous period and whether they have functioned effectively. If the existing audit and control results show that the designated body no longer complies with the designation criteria, Switzerland shall take the necessary measures to ensure that deficiencies in the implementation of the tasks of that body are remedied, including by ending the designation.

Article 14

Definition of financial year

For the purpose of this Agreement, the financial year referred to in Article 60(5) of Regulation (EU, Euratom) No 966/2012 shall cover expenditure paid and revenue received and entered into the accounts of the Responsible Authority in the period commencing on 16 October of the year 'N-1' and ending on 15 October of year 'N'.

Article 15

Eligibility of expenditure

By way of derogation from Article 17(3)(b) and (4) of Regulation (EU) No 514/2014, expenditure shall be eligible where it has been paid by the Responsible Authority before the Responsible Authority's formal designation in accordance with Article 13 of this Agreement,

provided that the management and control systems applied before are essentially the same as the ones in force after the formal designation of the Responsible Authority.

Article 16

Request for payment of the annual balance

1. By 15 February of the year following the financial year, Switzerland shall submit to the Commission the documents and information required in points (b) and (c) of the first subparagraph of Article 60(5) of Regulation (EU, Euratom) No 966/2012.

By way of derogation from Article 44(1) of Regulation (EU) No 514/2014 and in accordance with the third subparagraph of Article 60(5) of Regulation (EU, Euroatom) No 966/2012, Switzerland shall submit to the Commission the opinion referred to in the second subparagraph of Article 60(5) of Regulation (EU, Euratom) No 966/2012 by 15 March of the year following the financial year.

The documents submitted referred to in this paragraph shall serve as the request for payment of the annual balance.

2. The documents referred to in paragraph 1 shall be drawn up according to the models adopted by the Commission on the basis of Article 44(3) of Regulation (EU) No 514/2014.

Article 17

Implementation report

By way of derogation from Article 54(1) of Regulation (EU) No 514/2014 and in accordance with the third subparagraph of Article 60(5) of Regulation (EU, Euratom) No 966/2012, Switzerland shall submit to the Commission an annual report on the implementation of the national programme in the previous financial year by 15 February each year until and including 2022 and may, at the appropriate level, publish this information.

The first annual report on the implementation of the national programme shall be submitted on 15 February following the entry into force of this Agreement or the start of its provisional application.

The first report shall cover the financial years from 2014 onwards until the financial year before the first annual report was due in accordance with the second subparagraph.

Switzerland shall submit a final report on the implementation of the national programme by 31 December 2023.

Article 18

Electronic data exchange system

In accordance with Article 24(5) of Regulation (EU) No 514/2014, all official exchanges of information between Switzerland and the Commission shall be carried out using an electronic data exchange system provided for by the Commission for that purpose.

Article 19

Entry into force

1. The Secretary General of the Council of the Union shall act as depositary of this Agreement.
2. The Parties shall approve this Agreement in accordance with their own procedures. They shall notify each other of the completion of those procedures.
3. This Arrangement shall enter into force on the first day of the first month following the day of the last notification referred to in paragraph 2.
4. Except for Article 5, the Parties shall apply this Agreement provisionally as from the day following that of its signature, without prejudice to constitutional requirements.

Article 20

Validity and termination

1. Either the Union or Switzerland may terminate this Agreement by notifying the other Party of its decision. The Agreement shall cease to apply three months after the date of such notification. Projects and activities in progress at the time of termination shall continue according to the conditions laid down in this Agreement. The Parties shall settle by mutual agreement any other consequences of termination.
2. This Agreement shall be terminated when the Association Agreement with Switzerland is terminated in accordance with Article 7(4), Article 10(3) or Article 17 of the Association Agreement with Switzerland.

Article 21

Languages

This Agreement shall be drawn up in a single original in the Bulgarian, Croatian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish, and Swedish languages, each of those texts being equally authentic.

ANNEX

FORMULA TO CALCULATE THE FINANCIAL CONTRIBUTIONS FOR THE YEARS 2019 AND 2020 AND PAYMENT DETAILS

- (1) The financial contribution of Switzerland to the ISF – Borders and Visa referred to in the second and third subparagraphs of Article 5(7) of Regulation 515/2014 is calculated as follows for the years 2019 and 2020:

For each single year from 2013 to 2017, the final figures of the Gross Domestic Product (GDP) of Switzerland available on 31 March of 2019 shall be divided by the sum of the GDP figures of all the States participating in the ISF – Borders and Visa for the respective year. The average of the obtained five percentages for the years 2013 to 2017 shall be applied to the sum of the actual annual appropriations for the ISF – Borders and Visa for the years 2014 to 2019 and the annual commitment appropriation for the ISF – Borders and Visa for the year 2020 as included in the draft General budget of the European Union for the financial year 2020 adopted by the Commission to obtain the total amount to be paid by Switzerland over the whole period of implementation of the ISF – Borders and Visa. From this amount, the annual payments effectively made by Switzerland in accordance with Article 10(1) of this Agreement shall be subtracted in order to obtain the total amount of its contributions for the years 2019 and 2020. Half of this amount shall be paid in 2019 and the other half in 2020.

- (2) The financial contribution shall be paid in Euro.
- (3) Switzerland shall pay its respective financial contribution no later than 45 days after receiving the debit note. Any delay in payment of the contribution shall give rise to the payment of default interest on the outstanding amount from the due date. The interest rate shall be the rate applied by the European Central Bank to its main refinancing operations, as published in the C series of the Official Journal of the European Union, in force on the first calendar day of the months in which the deadline falls, increased by 3.5 percentage points.