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NOTE

From: General Secretariat of the Council

To: Permanent Representatives Committee/Council

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Subject: Directives for the negotiation of an agreement between the European Union and the Republic of Serbia on actions carried out by the European Border and Coast Guard Agency in the territory of the Republic of Serbia

DIRECTIVES FOR THE NEGOTIATION OF AN AGREEMENT BETWEEN

the European Union and the Republic of Serbia on actions carried out by the European Border and Coast Guard Agency in the territory of the Republic of Serbia

The model status agreement¹ adopted by the Commission, and modified as enclosed, serves as a basis for the negotiations of a status agreement with the Republic of Serbia. There are no specific reasons to derogate from the modified status agreement as enclosed. Therefore, the Commission should aim to preserve the essence of the modified status agreement during the negotiations, and in particular:

Territorial scope of the agreement

The agreement shall cover the Republic of Serbia. This agreement shall not cover Kosovo². This is without prejudice to Member States' position on the status of Kosovo.

Purpose of the agreement

The agreement should provide for the possibility to carry out joint operations and rapid border interventions, as well as return operations.

Tasks and powers of the teams

Members of the teams should be entitled to perform all the tasks and exercise all the executive powers required for border control (border checks and border surveillance) and return operations; they should be entitled to carry service weapons, ammunition and equipment and use them in accordance with the law of the Republic of Serbia.

¹ Communication COM(2016) 747 final from the Commission to the European Parliament and the Council – Model status agreement as referred to in Article 54(5) of Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard, 22.11.2016.

² 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.

Privileges and immunities of the members of the teams and Frontex staff

The agreement should foresee strong protection for the members of the teams and Frontex staff who are not team members but who are sent in the context of a specific operation (e.g. a coordinating officer). In particular, they should enjoy a full immunity from the criminal jurisdiction of the Republic of Serbia under all circumstances. They should also enjoy immunity from civil jurisdiction of the Republic of Serbia for the acts performed by them in the exercise of their official functions. The other provisions on the privileges and immunities of the members of the team as enshrined in the model status agreement should be replicated in the status agreement as far as possible.

The agreement should state that members of team and Frontex staff who would stay in the Republic of Serbia more than 90 days do not need a long stay visa; it shall also state that members of the team are not obliged to register in the nearest police station within 24 hours of their entry on the territory of Serbia.

Fundamental rights

The agreement should enshrine strong provisions on fundamental rights. The safeguards provided for in Article 8 of the model status agreement should be considered as minimum standards.

Situation of the Schengen associated countries

The status agreement should take into account the special position of Norway, Iceland, Switzerland and Liechtenstein. Joint declarations should state the desirability that agreements should be concluded between Serbia and each of those associated countries in similar terms as the Agreement with the Union.

Model status agreement between the European Union and [third country] on actions carried out by the European Border and Coast Guard Agency in [third country]

THE EUROPEAN UNION,

and [*THIRD COUNTRY*],

Hereinafter referred to as 'the Parties',

WHEREAS situations may arise where the European Border and Coast Guard Agency coordinates operational cooperation between EU Member States and [*third country*], including on the territory of [*third country*],

WHEREAS a legal framework in the form of a status agreement should be established for the situations where the team members of the European Border and Coast Guard Agency will have executive powers on the territory of [*third country*],

CONSIDERING that all actions of the European Border and Coast Guard Agency on the territory of [*third country*] 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 European Border and Coast Guard Agency that may take place in the territory of [*third country*] whereby team members of the European Border and Coast Guard Agency have executive powers.
2. This Agreement shall only apply in [*the territory of the third country or parts thereof*].

Article 2

Definitions

For the purposes of this Agreement, the following definitions apply:

- (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 [*third country*] neighbouring a Member State and deployed in the territory of [*third country*].
- (3) 'rapid border intervention' means an action aimed at rapidly responding to a situation of specific and disproportionate challenges at the borders of [*third country*] neighbouring a Member State and deployed in the territory of [*third country*] 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 [*third country*];
- (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 of a team of 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 [*third country*] 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

Operational Plan

An Operational Plan, that has the agreement of the Member State or Member States bordering the operational area, shall be agreed between the Agency and [*third country*] for each joint operation or rapid border intervention. The plan shall set out in detail the organisation 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, 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 [*third country*] and by the Agency.

Article 4

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 [*third country*].
3. Members of the team may only perform tasks and exercise powers in the territory of [*third country*] under instructions from and, as a general rule, in the presence of border guards or other relevant staff of [*third country*]. [*Third country*] shall issue, where appropriate, instructions to the team in accordance with the Operational Plan.

The Agency, through its Coordinating Officer, may communicate its views to [*third country*] on the instructions given to the team. In that case, [*third country*] 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 [*third country*], members of the team shall at all times carry an accreditation document referred to in Article 7.

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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. [*Third country*] 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 relevant legal framework and 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 the home Member State and [*third country*], in the presence of border guards or other relevant staff of the [*third country*] and in accordance with the national law of the [*third country*]. [*Third country*] may authorise members of the team to use force in the absence of border guards or other relevant staff of [*third country*].
7. [*Third country*] 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. [*Third country*] 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 [*third country*].

Article 5

Suspension and Termination of the Action

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

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3. In particular, the Executive Director of the Agency or [*third country*] 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 6

Privileges and Immunities of the members of the team

1. Members of the team shall not be subject to any form of arrest or detention in [*third country*].
2. Papers, correspondence and property 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 [*third country*] under all circumstances. Privileges granted to members of the team and immunity from the criminal jurisdiction of [*third country*] do not exempt them from the jurisdiction of the home Member State.

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4. Members of the team shall enjoy immunity from the civil and administrative jurisdiction of [*third country*] in respect of all acts performed by them in the exercise of their official functions. If any civil proceeding is instituted against members of the team before any [*third country*] 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 and the competent authority of the home Member State shall certify to the court whether the act in question was performed by Members of the team in the exercise of their official functions. 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 and the competent authority of the home Member State shall be binding upon the jurisdiction of [*third country*] which may not contest it. 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. The immunity of members of the criminal, civil and administrative jurisdiction of [*third country*] in accordance with paragraphs 3 and 4 of this article may be waived by the home Member State as the case may be. Such a waiver must always be an express waiver.
6. Members of the team shall not be obliged to give evidence as witnesses.
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 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.

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8. The immunity of members of the team from the jurisdiction of [*third country*] 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 [*third country*].
10. Members of the team shall be exempt from any form of taxation in [*third country*] 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 [*third country*].
11. [*Third country*] 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. [*Third country*] shall also allow the export of such articles.
12. The personal baggage of members of the team shall be exempt from inspection, unless there are serious grounds for considering 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 [*third country*]. 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 member of the team.

Article 7

Accreditation document

1. The Agency shall, in cooperation with [*third country*], issue a document in the official language(s) of the [*third country*] and in an official language 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 [*third country*] and as proof of the holder's rights to perform the tasks and exercise the powers referred to in Article 4 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.

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2. The accreditation document, in combination with a valid travel document, grants the member of the team access to [*third country*] 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 8

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 9

Processing of personal data

1. Processing of personal data shall only take place when necessary for the implementation of this Agreement by [*third country*], the Agency or participating Member States.
2. Processing of personal data by [*third country*] shall be subject to its national laws.
3. Processing of personal data for administrative purposes by the Agency and the participating Member State(s), including in case of transfer of personal data to [*third country*], 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 [*third country*], 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 the [*third country*] accordingly.
5. Personal data collected for administrative purposes during the action may be processed by the Agency, the participating Member States and [*third country*] in line with the applicable data protection legislation.

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6. The Agency, the participating Member States and [*third country*] 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 10

Disputes and interpretation

1. All issues arising in connection with the interpretation or application of this Agreement shall be examined jointly by representatives of the Agency and [*third country*]'s competent authorities, which shall consult the Member State or Member States neighbouring [*third country*].
2. Failing any prior settlement, disputes concerning the interpretation or application of this Agreement shall be settled exclusively by negotiation between [*third country*] and the European Commission, which shall consult any Member State neighbouring the third country.

Article 11

Entry into force, duration 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.
3. This Agreement shall be valid indefinitely. Either Party may notify in writing the other Party of its intention to terminate this Agreement. The termination shall take effect six months after the date of the notification.

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4. The Agreement may be terminated by written agreement between the Parties or unilaterally by either Party. In this last case, the Party wishing to terminate it shall notify in writing the other Party thereof. The termination shall take effect the first day of the month following the month notification was given.
5. Notifications made in accordance with this Article shall be sent, in the case of the European Union, to the General Secretariat of the Council of the European Union and, in the case of the [*third country*], to [*to be determined*].

Done at on in the [*one of the Union's languages*] and [*third country's language(s)*] languages, both texts being equally authentic.

Signatures:

For the European Union	For [<i>third country</i>]
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