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Liitteenä myös keskustelun pohjana toiminut epävirallinen ns non-paper, joka on lähetetty valiokunnille jo aikaisemmin.

Ystävällisin terveisin,
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MINISTRY OF JUSTICE
FINLAND

10 June 2022
Meeting memo

Possible measures to counteract hybrid threats at the Finnish Border

On 10th of May 2022, representatives of the Ministry of Justice of Finland, the Ministry of the Interior of Finland and the European Commission (DG Home) held a virtual meeting to discuss the Finnish non-paper concerning planned legislative actions to counteract hybrid threats at the Finnish border. The main issue elaborated was how far and by what mechanisms Finland is allowed, according to EU law, to close its border in response to a possible instrumentalisation of migration. The discussion had the nature of an informal exchange of views. The views expressed therein are to be considered as preliminary statements of the responsible Commission service, and therefore should not be understood as a formal Commission position on this matter.

Experts from the Finnish ministries clarified that the matter of particular concern was not only either a matter of large scale migration *or* of instrumentalisation of migration, but a combination of both. It was also important for Finland to clarify on what terms Finland could react in a situation of a state of emergency.

The Commission services stated their appreciation of Finnish efforts to discuss upstream the compliance of the planned legislative measures with EU legislation, and recognised the importance of having tools to counteract instrumentalisation of people. The Commission services expressed understanding towards Member States that are experiencing instrumentalisation of migration. They pointed out that measures taken should meet certain conditions and that any measure must preserve the essence of the right to asylum and comply with the asylum and border acquis. The Commission services referred to Commission proposals aimed at allowing Member States to respond to these kinds of events under certain conditions (COM(2021)752 final and COM(2021) 890 final).

The Commission services further stated that the matter in question was a difficult one that had involved a great deal of thought when considering how appropriately to counteract instrumentalisation of migration in response to the challenges faced by Latvia, Lithuania and Poland last autumn. The Commission services' view was that a possible approach could be to limit the number of open border crossing points (see proposal COM(2021)891). That approach, in itself, would also require further evaluation of certain preconditions in order to guarantee the right to asylum. The Commission services did not consider the alternatives discussed in the Finnish non-paper i.e. closing the border completely or regulating the number of asylum seekers admitted to the country, as viable for legislative action for the reasons set out in COM(2021) 890 final.

The Finnish experts informed the Commission services that it has seen other examples of measures taken in some EU countries to prevent instrumentalisation of migration. The Finnish experts were hoping for a clarification as to why measures to close the border have been possible in some countries, but would not be possible in Finland.

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The Commission services underlined that from a legal perspective, closing the borders completely or regulating the number of asylum seekers to be admitted into the country, which were alternatives discussed in the non-paper, are not easy to reconcile with Article 18 of the Charter (on Fundamental Rights) and the principle of *non-refoulement*. The Commission services recalled that there is a preliminary ruling case before the European Union Court of Justice regarding the Lithuanian emergency laws that could provide guidance on the limits and conditions for the measures Member States can take in situations such as instrumentalisation of migrants.

The Finnish experts asked whether the interpretation of the European Court of Justice in case C-808/18 *Commission v. Hungary* regarding Article 72 of the Treaty on the Functioning of the European Union would be seen as a suitable legal basis for legislative actions countering the instrumentalisation of migration. The Commission services stated that in their interpretation, the Court of Justice has not allowed Member States to derogate from the obligations laid down in secondary legislation. It has to be seen whether Article 72 TFEU would allow deviations from the other primary obligations, but in the Commission services' view the right to asylum cannot be suspended. The Commission services also reminded that the principle of *non-refoulement*, as interpreted by the European Court of Human Rights, is absolute and that *NT and ND* ruling did not assess *refoulement* and referred to very specific circumstances; furthermore, the Commission services reminded that European Convention of Human Rights does not include the right to asylum.

The Commission services took the view that Finland could consider the alternative that concerned limiting the number of open border crossing points, as outlined in the non-paper. The starting point could be that Finland declares a state of emergency, but at the same time ensures genuine and effective access to international protection. It was noted that also in this situation, this alternative still requires to address the proportionality of the measure. The Commission services highlighted that it is possible to close border crossing points, but that the proportionality of such action must be ensured. The question of what is a reasonable amount of border crossing points should be evaluated case-by-case.

The Finnish experts agreed with the need of taking care of fundamental rights and the principle of proportionality. However, they were of the view that States should have modern possibilities to counteract modern problems, and in general, it is important to find innovative solutions. In the end, this possible scenario could compromise the functioning of the society. The Commission services recognized the severity of any such situation and of the measures used in hybrid warfare. For this reason it has tabled the above-mentioned proposals which should give more tools to control the situation in the country.

Regarding the question on using Finland's representations abroad (embassies and consulates) as points where international protection could be applied for, the Commission services stated that this issue is not regulated under EU law and in any case this could be seen only as a complementary option but not the only route for applying for international protection. Whilst underlining that robust border control is legitimate, there must always be a possibility to access the territory of the Union. The Commission services also underlined that Member States can have robust border surveillance in place, but in practice, also in view of the obligations towards the EU citizens, it is not possible to shut down all the border crossing points and thus prevent also the access of persons legally entitled to enter the country. It also has to be noted that the measures cannot be made in a way that discriminates against citizens of a certain country.

The Finnish experts also asked about using legal avenues for border control. The Commission services stated that robust border control would be legitimate, but push backs would not. It is one thing to prevent irregular crossing of the green border and another, to push-back a person. However it is not defined which measures would be interpreted as robust border control. It is however clear that all measures should always respect fundamental rights, including the right to asylum and the principle of

non-refoulement. The Commission services noted that in Article 13 of proposal COM/2021/891 it has proposed more guidelines on the border surveillance in the situation of instrumentalisation and that this proposal is still being negotiated. The Commission services also noted that not all measures have to be of a legislative nature, and that it might be useful to think also of the importance of actions to be taken in the external dimension (e.g. the role of international transport companies, contacts with countries of origin), as shown in the context of the instrumentalisation by the Belarusian regime).

Discussions on the matter will be continued between Finland and the Commission services, if necessary.

The meeting was attended by representatives from Directorate General Migration and Home Affairs from the European Commission, including Director Michael Shotter. From the Finnish side the meeting was attended by Head of Unit Timo Makkonen, Senior Adviser (legislative issues) Marietta Keravuori-Rusanen, Ministerial Adviser Perttu Wasenius and Senior Specialist Heidi Mäntylä from the Finnish Ministry of Justice, and Head of Unit Sanna Sutter, Head of Unit Matti Pitkäniitty, Head of Unit Jussi Napola, Senior Adviser (legislative issues) Tiina Ferm, Senior Adviser (legislative issues) Sanna Montin, Senior Adviser (legislative issues) Tiina Sinkkanen, Senior Adviser (legislative issues) Kukka Krüger and Senior Adviser (legislative issues) Anne Ihanus from the Finnish Ministry of the Interior.

NON-PAPER 4.5.2022 / MINISTRY OF JUSTICE, FINLAND

Finland is in need of urgently / a.s.a.p. making amendments to the national Emergency Powers Act (*valmiuslaki*, 1552/2011) to make sure that we have efficient tools to counteract different kinds of so-called hybrid threats. Perhaps the most topical issue in this exercise is how to make the Finnish – Russian border as safe as possible. Or, in other words: how far and by what mechanisms are we allowed to close the border which is also the border of the European Union.

In order to ensure that we can draft effective legislation that also complies with the obligations of our EU-membership, we would need some assistance from the Commission. The following non-paper has been written to describe the situation and to formulate our questions.

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Factual background

The Finnish-Russian border extends to 1.340 km in length. It also constitutes an external border of the EU and of the Schengen area. It is widely held that already in the past, Russia has conducted hybrid operations against Finland by way of facilitating the arrival of migrants to the border. Taking into account the Russian military aggression against Ukraine and the heightened international security tensions related thereto, and the fact that Finland is currently about to take decisions concerning matters of national security (including possible joining to NATO), Finland must take immediate and effective legislative action to guard against further hybrid operations involving instrumentalisation of migrants. Such operations not only endanger public order and safety as such, but are conducted with a view to destabilizing Finland and the EU, and putting pressure on the decision makers, thus challenging even the very concepts of state sovereignty and democracy. It is therefore of utmost importance that there are effective measures against any possible hostile action involving instrumentalisation of migration, in particular large-scale migration.

Legal background

The legal framework that concerns the arrival of third country nationals seeking international protection is comprised of the Schengen Borders Code (SBC) and regulations and directives that form the Common European Asylum System (CEAS). At the moment, this legislation applies both under normal conditions as well as in times of instrumentalisation of migration. As noted in the SBC, border control should help to combat illegal immigration and trafficking in human beings, and to prevent any threat to the Member States' internal security, public policy, public health and international relations.

We are aware of the Commission's *Proposal for a Regulation addressing situations of instrumentalisation in the field of migration and asylum* (COM/2021/890 final) and of the *Proposal for a Regulation amending Regulation 2016/399 on a Union Code on the rules governing the movement of persons across borders* (COM(2021) 891 final).

With regard to proposal COM/2021/890 we note that proposed Article 6 and pp 5 recognise that Member States may provide that applications for international protection are registered only at specific registration points, which may include border crossing points. We further note that pp 10 recognizes national competence with regard to the how border security is maintained: "Where the Member State concerned is confronted at its external border with violent actions, including in the context of attempts by third country nationals to force entry en masse and using disproportionate violent means, the Member State concerned should be able to take the necessary measures in accordance with their national law to preserve security, law and order, and ensure the effective application of this Regulation."

With regard to proposal COM/2021/891 we note that pp 12 recognises that in a situation of instrumentalisation, it should, where necessary, be possible for the Member State concerned to limit border traffic to the minimum by closing some border crossing points, while guaranteeing genuine and effective access to international protection procedures. We also note that Article 13 recognizes that the main purpose of border surveillance shall be to detect and prevent

unauthorised border crossings, to counter cross-border criminality and to take measures against persons who have crossed the border illegally. In pp 15 the proposal notes that in the event of instrumentalisation of migrants, the Member State concerned should reinforce border control, including, as appropriate, through additional measures preventing illegal crossings. The proposal does not specify the means of prevention, which we thus consider to be left within national competence. Importantly, it is underlined in the proposal that the proposed measures concerning the instrumentalisaton of migrants complement the existing provisions on checks at the border crossing points and on border surveillance, and that they are designed to clarify the applicable rules.

These proposals are still being discussed in the Council working group.

We do also recognise the applicability e.g. of the EU Fundamental Rights Charter Article 18 which provides for the right to asylum as well as the ruling of the European Court of Justice in case European Commission v Hungary C-808/18, regarding applying for international protection .

Questions

As described above, Finland needs to introduce new national legislation urgently and prior to the proposed new EU legislation, to address the imminent threat of large-scale instrumentalisation of migration. With a view to ensuring that the action taken is in conformity with the EU law, we wish to pose the following questions to the Commission:

1. Is it compatible with the EU law to close down a border completely, including all border crossing points, from persons seeking international protection? We note that several EU-countries (e.g. Poland, Greece) have responded to instrumentalisation of migrants by closing the border and preventing unauthorized crossing of the border. If the answer to this part of the question is in the negative, would the answer be different if a state of emergency prevails in the said country?
2. Is it compatible with the EU law to regulate the number of asylum seekers that are taken into the country, meaning that when the maximum number of applicants has crossed the border, it would be legal to prevent the access of further asylum seekers to the country? If the answer to this part of the question is in the negative, would the answer be different if a state of emergency prevails in the said country?
3. Third alternative is to amend the Emergency Powers Act (*valmiuslaki*, 1552/2011), which means that the provisions would be used only where there is a state of emergency. The main idea would be to control large-scale instrumentalisation of migrants, while at the same time offering a genuine access to international protection in Finland. The main elements of the planned amendment would be:
    - To limit border traffic by giving the Government powers to restrict the number of border crossing points where it is possible to seek international protection.
    - At least one border crossing point would be left open to those seeking international protection. It would have to offer genuine and effective access to international protection.
    - It would not be allowed to seek international protection at any other border crossing points.

- Those crossing the border illegally would be prevented from doing so, and instead be obliged to make use of available legal avenues for crossing the border.
- If it would be clear, due to the prevailing international poltical situation, that instrumentalisation is used as a means of putting pressure on Finland, international protection could be accessed at the Finnish representation abroad, in addition to, or in place of, a border crossing point.

In legal terms, the proposal rests to an extent on the judgment of the Grand Chamber of the European Court of Human Rights in the case of *N.D and N.T v. Spain* (8675/15 and 8697/15). The Grand Chamber recognized that where arrangements for genuine and effective access to means of legal entry exist, “the Convention does not prevent States, in the fulfilment of their obligation to control borders, from requiring applications for such protection to be submitted at the existing border crossing points. Consequently, they may refuse entry to their territory to aliens, including potential asylum-seekers, who have failed, without cogent reasons, to comply with these arrangements by seeking to cross the border at a different location, especially, as happened in this case, by taking advantage of their large numbers and using force.” (para 210, references omitted). We note that under Article 52 of the EU Fundamental Rights Charter, in so far as the Charter contains rights which correspond to rights guaranteed by the European Convention on Human Rights, the meaning and scope of those rights shall be the same as those laid down by the said Convention.

We would therefore like to hear the Commissions opinion on the compatibility of the above legal reasoning with the prevailing EU law. Due to the urgent nature of the national legislative process, it is necessary to make the Commission’s answer public as part of the reasoning of the forthcoming proposal.