

To EU Commission
Commissioner for Home Affairs
Mrs. Ylva Johansson

Date 14 December 2021

Subject Commission Proposal on Emergency Measures at the Belarussian Border

**Meijers
Committee**
Standing
committee of
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international
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criminal law

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Dear Commissioner Johansson,

With this letter, the Meijers Committee wishes to express its concern regarding the European Commission's proposal to provide for emergency measures in response to the instrumentalisation of migrants at the Belarussian border.

While the Meijers Committee applauds the Commission's initiative to address the current situation, it does not believe that the proposal provides an answer to the blatant violations of European and international refugee law, including the violation of the principle of non-refoulement. Instead, the Meijers Committee is of the view that the current legislative framework, including the possibility to apply border procedures under the Asylum Procedures Directive (Art. 43 Directive 2013/32/EU), is already capable of adequately addressing the refugee and migrant situation at the external borders. Rather than additional measures taken under article 78(3) TFEU, the situation requires the application of EU border and asylum law as it stands. Moreover, EU Agencies such as EASO and Frontex could – and should – have already been deployed to provide active support in the area based on their respective mandates.

Article 78(3) TFEU allows the Council to take provisional measures in the event of a sudden inflow of third country nationals. Although recent arrivals as a result of the actions of the Belarussian regime could arguably be qualified as “sudden”, the actual numbers cannot establish an “emergency situation” that would jeopardize “the normal functioning of the EU common asylum system”.¹ Instead, the current humanitarian emergency results from disregard for existing European standards on the treatment of refugees at the common external borders.

The Meijers Committee does not deny that a tense geopolitical situation and the instrumentalisation of asylum seekers and migrants are at the root of this situation. Art. 78(3) TFEU, however, provides the legal basis to address emergency situations in the functioning of the EU common asylum system, not

¹ Compare CJEU 6 September 2017, C-643/15, Slovakia v. Council, para 114, available [here](#).

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the EU's external relations. Compromising EU standards in asylum law will not solve a geopolitical crisis. Instead, it will weaken the EU's image to the world as a community of values.

Likewise, the Committee notes that the affected Member States have declared the state of emergency to set aside EU law unilaterally. Although EU law respects Member States' ultimate responsibility for their national security (Art. 4(2) TEU and Art. 72 TFEU), it is required that Member States prove that recourse to such derogations is necessary to safeguard those interests. The Meijers Committee does not consider this to be the case.²

Regarding the substance of the current proposal, there are four aspects that the Committee considers to be particularly problematic. It is of the view that the proposed provisional measures risk falling short of the protection granted by the EU Charter on Fundamental Rights on all four accounts. Most notably, this includes the provisions guaranteeing protection against refoulement, the right to asylum, the right to liberty, the right to effective judicial protection and the right to dignity.

These measures are:

- The broad possibilities to apply an accelerated border procedure without consideration of personal circumstances other than particular health issues;
- The excessively lengthy period granted to Member States for registering an asylum application and granting access to their territory, likely to result in large scale *de facto* detention at the external borders;
- Withholding automatic suspensive effect of appeals in the 'emergency migration and asylum management procedure'; and
- The lowering of reception conditions to the basic minimum, which is not further defined in the proposal, and risks not being able to address the particular needs of asylum seekers as a vulnerable group in need of special protection.

The Committee notes that the Commission's proposal for provisional measures in effect seeks to apply several elements from the proposed Asylum Procedures Regulation, which was presented in September 2020 as part of the Commission's New Pact on Migration and Asylum, to the situation at the Belarussian borders. Regarding this proposal, the Committee already voiced its concerns in an earlier note:

Accelerated procedures

Short time limits may make it impossible for the applicant to substantiate his asylum application and for the authorities to conduct an appropriate examination of the application. The obligation to follow an accelerated procedure in these situations may lead the determining authority to refrain from a rigorous examination of the application. The ECtHR has held that the

² Compare CJEU 2 April 2020, C-715/17, Commission v Poland, (Relocation), para. 147 ff, available [here](#).

speed of the procedure cannot undermine the effectiveness of the procedural guarantees which aims to protect the applicant against arbitrary refoulement. The CJEU has also recognised in its case law that short time limits may impede the effective exercise of EU procedural rights, such as the right to be heard (p.3).

Border procedure and de facto detention

Although the asylum border procedure does not necessarily entail detention, applicants subject to the asylum border procedure are not authorised to enter the Member State's territory. This will in all probability lead to a considerable increase in the use of detention of applicants for international protection. (p. 3)

Automatic suspensive effect

It is of importance to note that the ECtHR has held that in view of the importance of Article 3 of the Convention and the irreversible nature of the damage which may result if the risk of torture or ill-treatment materialises in cases in which a State Party decides to remove an alien to a country where there are substantial grounds for believing that he or she faces a risk of that nature Article 13 requires that the person concerned should have access to a remedy with automatic suspensive effect (p. 5).³

The Meijers Committee calls upon the Commission to withdraw its current proposal for provisional measures, and instead work closely together with the Member States in addressing the situation at the Belarussian border. Most importantly, the Commission should provide adequate financial and technical support through Union agencies to ensure a treatment of migrants and refugees in line with European and international refugee law and human rights standards.

As always, we are available for your questions and remarks.

Yours faithfully,



Prof. dr. A.B. Terlouw, Chairwoman

³ See CM2104 Meijers Committee Comments on the Migration Pact –Asylum Procedures Regulation, available [here](#).