



EUROPEAN COMMISSION
DIRECTORATE-GENERAL MIGRATION AND HOME AFFAIRS
DIRECTORATE-GENERAL FOR JUSTICE AND CONSUMERS

Directors-General

Mr. Olivér Várhelyi
Ambassador Extraordinary and
Plenipotentiary, Permanent
Representative
Permanent Representation of Hungary
to the European Union
92-98 Rue de Trèves 1040 Brussels

Dear Ambassador,

The Commission's services have been informed about the recent amendments adopted by the Hungarian Parliament ("Országgyűlés") in July and September 2015, relating in particular to the law on asylum, the penal code, the law on criminal procedure, the law on the border, the law on the police and the law on national defence.

We recall that the Hungarian authorities must formally notify these amendments within the shortest possible delay to the Commission, in order to allow the Commission's services to finalise the examination of their compatibility with EU law, in particular with the EU asylum and borders *acquis* and the Charter of Fundamental Rights.

Although a formal notification of the adopted amendments has so far not been received, a preliminary assessment has already been prepared by the Commission's services, which is attached to this letter. This preliminary assessment reveals a number of concerns and questions on substance and implementation relating *inter alia* to

- a possible quasi-systematic dismissal of applications for international protection submitted at the border with Serbia
- a possible lack of sufficient safeguards in the asylum procedure implemented at the border, including as regards the existence of effective remedies to challenge a decision on the admissibility of an asylum application
- the criminal sanctions introduced relating to the crossing of the border and a possible lack of adequate safeguards ensuring respect of the rights of defence and effective remedies in the criminal proceedings
- the closing of border crossing points
- the powers granted to the military forces in border management and questions as to the existence of adequate safeguards and remedies
- a possible general lack of specific procedures or safeguards for children

You will find more detailed explanations on these and other related points in the annex to this letter. The Hungarian authorities are requested to comment on these preliminary concerns and questions within two weeks from receipt of this letter. These comments, together with the notified text of the adopted amendments, will enable the Commission's services to finalise their assessment.

Yours faithfully



Matthias Ruete



Paraskevi Michou

Annex – Comments and preliminary concerns on recent legislative changes related to the migration crisis

I. On the amendments of the asylum rules

In view of the obligation to provide effective access to asylum¹, the Hungarian authorities are requested to provide statistics on the number of asylum applications made at the border since the entry into force of the new amendments; the number of decisions by the national authorities; the number of appeals lodged; the number of decisions considering an application inadmissible issued and the number of appeals lodged against such decisions and number of rulings and results of these respective court rulings. Please also specify the number of inadmissibility decisions issued on the basis of safe third-country grounds. Please also provide statistics on the number of asylum applications by children, disaggregated by age and status (unaccompanied/separated/with family).

The Hungarian authorities are also requested to comment on the following.

I.1. Specific concerns on the border procedures

Please describe your newly introduced border regime and explain how it is compatible with the relevant provisions of the Asylum Procedures Directive with special regard to concerns expressed by stakeholders² on the slow pace of registration (capacity of Roszke transit zone reported to be able to register 100 person per day) and speed of the procedure (the national authority reported to issue a non-admissibility decision within an hour). In this respect, please allow us to remind you that, in line with the requirements of the Asylum Procedures Directive and the fundamental right to be heard, which is a general principle of EU law pertaining to the rights of defence (see *mutatis mutandis* CJEU judgements in cases Mukarubega and Boudjlida), the asylum procedure, including those implemented at the borders, shall always ensure that sufficient guarantees are in place as to ensure in practice adequate and complete examination of each case.

Hungary has introduced a border procedure applicable for non-vulnerable asylum applicants³, and the law introduces a transit zone at the border. In parallel Hungary has declared Serbia as a safe third country⁴. Information on the application of these rules suggests that applications for international protection made at the border in a border procedure are systematically declared inadmissible on the basis of the fact that applicants have transited through Serbia and that such decisions are accompanied by a one year entry ban to Schengen area.

We would like to ask for clarification about how the above rules are applied in practice and would underline that the safe third country concept must be applied in accordance with the specific conditions set out in Article 38 of the Asylum Procedures Directive 2013/32/EU on the concept of safe third country. This involves a number of conditions, including in particular the need to permit the applicant to challenge the application of the safe country concept on the grounds that the third country is not safe in his or her particular

¹ In accordance with the Recital 25 of the Asylum Procedures Directive 2013/32/EU

² http://helsinki.hu/wp-content/uploads/HHC_Hungary_Info_Note_Sept_2015_No_country_for_refugees.pdf

³ Article 71/A (7) of Act LXXX of 2007 on Asylum exempts persons requiring a special treatment

⁴ Government Decree 191/2015 (VII. 21.) on the national list of safe countries of origin and safe third countries

circumstances (Article 38(2)(c) of the Directive), in full respect of the requirements of Article 47 of the Charter of Fundamental Rights on the fundamental right to an effective remedy.

Article 34 of Directive 2013/32/EU establishes special rules on an admissibility interview in order to allow applicants to present their views with regard to the application of the safe country concept in their particular circumstances. Please explain which are the safeguards in place to ensure that the right to be heard is fully respected in this context.

Concerns have also been raised in relation to the difficulties for the applicants to access legal and procedural information free of charge, free legal assistance and representation, as well as translation and interpretation services, also given that, according to the information received by the Commission, human rights organisations do not seem to have access to the transit zones (i.e.: the Hungarian Helsinki Committee stated in particular that they were expressly denied access). In light of the requirements stemming from the applicable EU rules on the procedural guarantees - in particular Article 8(2), Article 12(1) a, and c, of the Asylum Procedures Directive 2013/32/EU - please provide more information about which safeguards are in place to ensure that applicants are granted effective access to legal and procedural information free of charge, free legal assistance and representation, as well as translation and interpretation services, and whether UNHCR and human rights organisations are entitled to enter the border zones to provide the necessary assistance.

The border procedure as introduced by Hungary is not applicable for persons requiring a special treatment (Article 71 A (7) of Act LXXX of 2007 on Asylum). There seems to be no specific rules regarding the accelerated procedure for applicants with special procedural needs. In view of the applicable EU law provisions (Article 24 and 25 of the Asylum Procedures Directive 2013/32/EU), please indicate the ways and means such applicants are identified.

I.2 Reception conditions in the transit zones.

Please provide information on the state of preparedness as regards the reception capacity and the provision of the material reception conditions in the transit zones in accordance with the Reception Conditions Directive - 2013/33/EU. In this regard and in relation in particular to Article 10 of this Directive, let us point to a specific concern regarding a new provision of the Hungarian law which provides the same facilities for the purpose of accommodating and detaining asylum seekers and pre-trial detention of persons accused of committing a criminal offence due to illegal entry via a border fence (Amendments to Act XIX of 1998 on Criminal Procedure, Article 25).

I.3 Conditions of detention

The introduced border procedure foresees to hold asylum seekers in transit zones for up to four weeks (Section 71/A (4) of Act LXXX of 2007 on Asylum). Given that it is to be considered as a form of detention it is of particular concern that relevant safeguards as enshrined in the EU asylum acquis in particular art 8,9,10 and 11 of Directive 2013/33/EU do not seem to be in place. The new provisions in particular do not foresee a reasoned detention order to be issued in writing, nor do these rules foresee information in writing to be provided to the applicant upon detention explaining the reasons for detention and the procedures laid down in national law for having the lawfulness of their detention subject to a speedy judicial review, and the possibility to request free legal assistance and representation (see Article 9 of the Reception Conditions Directive).

I.4 Right to an effective remedy and procedural guarantees in the judicial review of a decision on the admissibility of an asylum application

In view of the obligation of Member States to ensure the right to an effective remedy before a court or a tribunal - as outlined in Article 46 of the Asylum Procedures Directive - 2013/32/EU and in the light of the requirements of Article 47 of the Charter of Fundamental Rights a number of provisions of the new Hungarian rules on the judicial review of non-admissibility decisions taken in a border procedure⁵ and of the introduced accelerated procedure raise concerns.

Pursuant to Article 46(1) of the Asylum Procedures Directive applicants shall have the possibility to lodge an appeal before a court or tribunal against a decision declaring their application inadmissible. This implies that procedural rules are in place, such as rules governing the deadline to lodge an appeal and access to free legal counselling and representation, shall allow applicants to be in a position to fully exercise their right to challenge the reject of their application. In addition, when such a decision is based on the application of the safe third country concept, applicants shall be allowed to remain on the territory of the Member States at least until the time limit for lodging the appeal have expired and, where the appeal has been lodged, pending its outcome. This means that applicants cannot be sent back to Serbia, until then. Please explain how Hungary ensures compliance with this obligation.

Foremost let us express preliminary concerns as regards the new rule according to which it is not allowed for the court to refer to new facts and circumstances, as this would seem prima facie not to be compatible with Article 46(3) of the EU Asylum Procedures Directive and relevant case law (C-482/01 Orfanopoulos and Oliveira) according to which Member States are under an obligation to ensure that the judicial review of a decision concerning the inadmissibility of an application should provide, at least in appeals procedures before a court or tribunal of first instance, for a full and ex nunc examination of both facts and points of law.

We would like to receive clarifications on the manner the rights of defence and in particular the fundamental right to a public hearing will be ensured in that context in order to allow applicants to present their case effectively considering that the personal hearing of the applicant is optional and, when held, can be done (in the case of a border procedure) through a telecommunications network.

In the border procedure, the new provisions foresee that "a court secretary" (or "court clerk" - not yet appointed judge - "birosagi titkar") shall be entitled to act in the judicial review, including taking decisions on the merits of the case. This raises concerns as to the respect of the requirements enshrined in Article 47 of the Charter of Fundamental Rights with regard to the notion of "court" or "tribunal", interpreted in light of relevant case-law of the Court of Justice of the European Union, i.e. an independent and impartial tribunal previously established by law, with a permanent nature, adopting binding decisions.

We would also express concerns as regards access in practice to legal assistance, in particular in the context of the border procedure (see above) and in the context of the appeal procedure (see Article 20 of the Asylum Procedures Directive - Directive 2013/32/EU).

⁵ Amendments to Act LXXX of 2007 on asylum, Section 12 – Procedure implemented at the border

Please provide information on how free legal assistance is provided in Hungary in this regard.

Finally please clarify how compliance with Article 46(4) of Directive 2013/32/EU will be ensured given the very short deadline of appeal (three days for an inadmissibility decision and for accelerated procedure and eight days in a standard procedure), to be considered in light of the fact that no remedy is available to challenge the decision in the first instance review procedure.

I.5. Other issues related to the asylum system in general

According to the new Hungarian rules⁶ any applicant without identity documents is required to "make best efforts for the clarification of his/her identity", in particular by contacting his family members, relatives, legal representative, and -in the event of non-state or non-state linked actors of persecution - the authorities of his country of origin. This requirement might be problematic as regards the confidentiality of the procedure and the applicant's safety. Please explain how Hungary ensures that the new rules are compatible with its obligations under EU law.

In addition there seems to be no automatic suspensive effect of appeals against negative asylum decisions for "normal" (non-accelerated) procedures, which is of concern in view of the EU provisions allowing for this option only in specific cases (Asylum Procedures Directive Article 46 (5) and (6)). Please describe the relevant legal framework in Hungary and explain how it is compatible with the relevant provisions of the EU acquis.

II. Issues concerning the treatment of children

In addition to all the concerns raised above, the amendments generally lack any specific procedure or safeguards for children and raise serious concerns about the effective respect of the rights of the child, including best interests of the child assessment. This concerns in particular:

II. 1. Reception conditions

The amendments lack specific provisions concerning the treatment of children and their reception conditions, at the border and in transit zones, aimed at ensuring that the safeguards of the Reception Conditions Directive indicated in art 11(2),(3),23,24 are fully applied. This is particularly important since, as mentioned above, confinement at the border and in the transit zones amounts in fact to detention.

II. 2. Specific safeguards for children applying for asylum during the procedure to be implemented at the border

The Hungarian authorities should provide the Commission with relevant information concerning the existence of specific safeguards concerning the treatment of children applying for asylum during the accelerated asylum procedure, in light of the standards set by Article 25 of the Directive 2013/32/EU and articles 11(2),(3),23 and 24 of the Directive 2013/33/EU.

⁶ Article 5(3) of Act LXXX of 2007 on Asylum

Although the law stipulates that asylum seekers with special needs shall not be subject to the border procedure⁷, and normally this category includes unaccompanied minors and other children, the lack of specific procedural safeguards and the rapidity of the procedure point to a high risk that this safeguard is very likely to remain ineffective in practice.

In this context, the express provision that no specialised authority shall take part in the asylum procedure implemented at the border⁸ may be particularly problematic with a view to ensuring adequate treatment of children in line with art 23(2) and 24 of Directive 2013/33/EU, e.g. on special guarantees for unaccompanied minors, including the exemption of the refugee authority from the obligation to appoint a case guardian for unaccompanied minor asylum seekers⁹.

II. 3. Respect of the rights of the child, including assessments of the child's best interests, when issuing expulsion orders for persons convicted of illegal entry via a border fence and other offences related to the border fence

The rules concerning postponing the expulsion of pregnant women and mothers of children aged less than one year convicted for criminal offences related to border crossing¹⁰ only envisage the postponement for mothers of children aged less than one year. The fact that there is no consideration whatsoever of the best interests of the child assessment for all other situations involving children raises serious concerns as to the respect of the obligations indicated in art 5 , 9 and 10 of Directive 2008/115/EU read in conjunction with Article 24 of the Charter. The Hungarian authorities should provide clarifications as to how the rights of the child and the best interests of the child assessment are ensured in this context in all situations involving children, irrespective of their age.

III. On the amendments of the penal code

III. 1. Criminalisation of illegal entry

The new section 352/A of the Criminal Code sanctions illegal entry via a border fence with imprisonment of up to three years. You are invited to comment on whether such legislation can be considered in line with the EU Return Directive as interpreted by the European Court of Justice in cases El Dridi (C-61/11), Sagor (C-430/11) and Achughbabian (C-329/11).

In addition, it also raises questions as regards the principle of proportionality referred to in particular by Article 4(3) of the Schengen Borders Code, read in light of the requirements of Article 49 of the Charter.

Furthermore, in so far as these criminal sanctions fall within the scope of Article 4(3) Schengen Borders Code, please explain how they are applied in line with Article 31 of the Geneva Convention, given that this Article requires Member States (under the conditions laid down therein) not to impose sanctions on asylum seekers for their illegal entry.

⁷ Section 71/A(7) of Act LXXX of 2007 on Asylum

⁸ Act LXXX of 2007 on asylum, Section 71/A(8) - Procedure implemented at the border

⁹ Act LXXX of 2007 on asylum, Section 46(f)

¹⁰ Amendments to Act CCXL of 2013 on the imposition of punishments, criminal measures, certain coercive measures and confinement for administrative offences, Section 43/A(3) - Postponing the enforcement of expulsion

III. 2. Excessive length of return related entry bans

The new section 60(2a) of the Criminal Code provides for the systematic issuing of entry bans equalling twice the duration of time of the imprisonment imposed under section 352/A, which may amount to $2 \times 3 = 6$ years. According to Article 11(2) of the Return Directive the maximum length of entry bans is five years. Only in cases of serious threat to public policy, public security or national security, entry bans may be issued for a longer period. Factors which may be taken into account by Member States for determining such threat may be criminal offences as well as serious administrative offences (repeated use of false identity documents; repeated and deliberate violations of migration law). The Commission considers that mere illegal entry via a border fence (offence covered by section 352/A) cannot be considered as a serious threat within the meaning of Article 11(2) of the Return Directive and that the maximum length of entry bans must therefore be limited to five years.

III. 3. Compliance of the issuing of expulsion orders with Directive 2008/115/EU

We would ask Hungarian authorities to clarify whether sufficient safeguards are in place in order to ensure that any decision concerning removal is in line with the obligations of Article 5 of Directive 2008/115/EU to take due account of the best interest of the child, family life, the state of health of the third country national and the respect of the principle of non refoulement, as well as Article 9 concerning the postponement of the removal.

In particular, the new section 43/A "postponing the enforcement of expulsion" of Act CCXL of 2013 does not contain an obligation to postpone removal when it would violate the principle of non-refoulement. The Commission would like to remind that even if Member States decide – in accordance with Article 2(2)(a) - not to apply the Return Directive to "border cases" , they must nevertheless ensure - in accordance with its Article 4(4) - that the level of protection for affected persons is not less favourable than that set out in Article 9(2) which obliges Member States to postpone removal when it would violate the principle of non-refoulement. This right to non-refoulement is absolute and must not be restricted under any circumstances, even if foreigners are a threat to public order or have committed a serious crime.

As regards the issuing of entry bans, please provide more information on the practice in this regard, whether they are issued in parallel to declaring the asylum claim inadmissible on safe third country grounds and before the deadline for a possible appeal elapsed.

III.4. Amended sanctions for facilitators of unauthorised border crossing

The new section 353, paragraphs 1-6 of the Hungarian Criminal Code (Btk) raise the level of sanctions for facilitators of unauthorised border crossing, from a custodial sentence of "up to three years" to one "between one to five years". It also introduces additional aggravating circumstances, including raising penalties to imprisonment "between two to eight years", in case of "destroying or damaging a facility or asset ensuring the protection of the order of the state border", and to "ten to 20 years" for the organiser or coordinator of the criminal offences, when conducted under the aggravating circumstances defined in paragraphs (3) and (4).

The Commission is concerned about the risks of applying in these exceptional circumstances disproportionate criminal sanctions to persons providing humanitarian assistance to migrants. In this respect we would like to recall that while Directive 2002/90/EC obliges Member States to provide for effective, proportionate and dissuasive criminal penalties for persons who intentionally assists a third country national to enter, or transit across, the territory of a Member State in breach of the laws on the entry or transit of aliens, Member States are still bound by the respect of the principle of proportionality in view of the requirements of Article 49 of the Charter (irrespective of whether they made use of the optional clause provided in Article 1(2) of the Directive). Therefore, the Commission would ask the Hungarian authorities to provide for clarification on the application of the new provisions and, more specifically, further information concerning the numbers of persons investigated and prosecuted in the last 90 days, based on each of the above mentioned paragraphs of section 353 Btk.

III.5. Compliance with EU standards related to the rights of the defence in criminal proceedings

In fast track criminal procedures such as the one introduced by Hungary in relation to offences related to crossing the border, it is crucial to monitor that all safeguards related to the fundamental right of defence, including those contained in the EU Directives on right to interpretation, right to information (including access to a case file), are properly applied. A number of provisions contained in the amendments to the code of criminal procedure already raise concern over the respect of the above mentioned EU standards and fundamental rights as enshrined in the Charter. These are in particular:

a) Lack of safeguards concerning the right to interpretation

Every person who does not speak or understand the language of the criminal proceedings and who is suspected or accused of having committed a criminal offence has the right to interpretation and translation during all stages of the criminal proceedings, in accordance with Directive 2010/64/EU. This includes the right to have interpretation available for communication between these persons and their lawyers, in connection with any questioning or hearing, or lodging of an application. These persons shall also benefit from a written translation of all essential documents of the proceedings (including deprivation of liberty, any charge or indictment, and any judgement). A summary or an oral translation may be provided only as an exception. Hungary had time until 27 October 2013 to transpose this Directive.

The Hungarian amendments provide that in criminal proceedings launched for offences concerning the crossing of the borders, existing provisions on translation (Articles 219(3) on language of indictment and 262(6) on language of final judgement of the Code on criminal procedure) shall not apply. This poses clear problems of compatibility with the above mentioned provisions of EU law on the right to interpretation in criminal proceedings.

b) Lack of safeguards concerning the right to information

Every suspect and accused person must be informed promptly, either orally or in writing, of his or her rights (such as access to a lawyer, right to interpretation and translation and the right to remain silent) according to Directive 2012/13/EU on the right to information in criminal proceedings (to be transposed by Member States by 2 June 2014), regardless of a person's legal status, citizenship or nationality. If those persons are arrested, they must receive promptly a Letter of Rights written in simple language they understand.

In addition, suspects or accused persons must be provided promptly with information about the criminal act they are suspected of having committed and (at the latest before trial) with detailed information on the accusation. If they are arrested or detained, they shall also be

informed about the reasons for this arrest or detention. They must also have access to the materials of the case to allow the effective exercise of their rights of defence.

Strong doubts exist whether the fast track criminal proceedings enable the effective respect of the right to information, including as regards the communication of formal documents related to the criminal proceedings to the accused. Hungary should provide guarantees as to the effective respect of this right in order to comply with the obligations from Directive 2012/13/EU.

IV. Questions related to border control

IV. 1. On closing Border Crossing Points

The Commission recognises that it is a prerogative of the Government of Hungary to decide where along the external border it would establish (open or close) a border crossing point as well as to set fixed opening hours. It is possible for the Hungarian authorities to close temporarily a border crossing point for the maintenance of law and order or other justified reasons. As such closing one or more border crossing points is not contrary to EU legislation provided that the borders are not completely sealed off and that not all border crossing points are closed.

However, having regard to Art. 3(b) of the Regulation establishing the Schengen Borders Code, stating that it shall apply without prejudice to the rights of refugees and persons requesting international protection, in particular as regards the principle of non-refoulement, we would like to invite you to provide for detailed information on the recent closure of certain border crossing points at the external borders with Serbia. In this respect, it should be noted that access to the asylum procedure may also be considered to be hampered where, in practice, asylum seekers are not able to safely and easily reach a crossing point or a transit zone to submit their asylum application because of the manner in which border infrastructure, including border fences, have been built. In light of the above, we would like to know in particular: which border crossing points were closed; how many other BCP's remained open; and whether at those BCP's which were not affected by the emergency measures taken, third-country nationals who would have liked to apply for international protection could do so and be referred to the competent asylum authority.

IV. 2. On the violent clashes between the Hungarian Police and migrants at the Röszke BCP on 16 September 2015

The Commission is aware of allegations of violent clashes between the Hungarian Police and migrants at the Röszke BCP on 16 September 2015, where allegedly persons, including women and children were beaten with police batons.

Member States are under an obligation to ensure that all border control operations are carried out in full compliance with EU law, in particular fundamental rights. In this respect it is underlined that any credible allegation of a violation of fundamental rights triggers a positive obligation to effectively investigate, in a prompt and impartial fashion, the substance of such allegations, in line with the requirements of the Charter of Fundamental Rights, and in particular the fundamental right to an effective remedy enshrined in Article 47.

In case that the alleged violence occurred in the exercise of the maintenance of law and order, it must be recalled that the use of forces must remain proportionate.

We would therefore appreciate if you could share with us the relevant information on the circumstances surrounding these events enabling us to make an appropriate assessment.

IV. 3. Amendments to the National Defence Act

Amendment to the National Defence Act enabled the involvement of the military in addressing mass immigration.

Member States are within their right to assign the tasks related to the implementation of the Schengen acquis on the control on persons at the external border to any national authority which they deem appropriate and which is well trained for the purpose. If the need arises for exceptional situations, Member States may assign auxiliary tasks to other national authorities, including the army for the purpose of assisting the border guard authorities with a view to maintain efficient control at the external borders as well as the law and order at the border area.

However those authorities carrying out such auxiliary tasks must be bound by the same legal obligations governing the activities of the border guard authorities, including the provisions safeguarding the rights of refugees and persons requesting international protection, in particular as regards the principle of non-refoulement.

Measures taken by the border guards or other authorities assisting them - especially those implying use of coercive measures - must be proportionate and subject to effective control.

In particular it is to be underlined that, as with the police forces, any involvement of military forces in border management must fully respect EU law, in particular fundamental rights.

The involvement of such forces may require appropriate safeguards strictly regulating the use of coercive measures in order to avoid any abuses and disproportionate actions.

We note the fact that the military forces, when taking part in operations at the border based on the new Section 36(1)(h) of the National Defence Act, may use rubber bullets, teargas, nets and any other coercive means not specified in the Act which may cause physical injury, provided that these are not aimed at taking a person's life. In this respect, please provide relevant information as to which rules will be applied in deciding on the use of military force, and the procedure to be followed in making such decisions. Clarifications are also requested as to the extent to which suitable training is provided for members of the military forces to assess, with due regard to fundamental rights, whether or not it is necessary to use coercive measures in types of situations which fall outside the scope of their normal duties.

In addition, it should be recalled that also for any measures taken by the military forces in border management, domestic courts must have full jurisdiction to review their legality and justification, in particular where these measures constitute an interference with fundamental rights. Please clarify which legal remedies can be invoked against measures taken by the military forces when taking part in operations at the border, and which courts will be competent to review those measures. This is particularly relevant in light of the fact that, when coercive measures are used in the context of an assignment under the new Section 36(1)(h), the new Section 61(2) of the National Defence Act¹¹ envisages a derogation from the obligation upon the superior in duty to notify within eight days the person against whom

¹¹ Act CXIII of 2011 on national defence and the Hungarian defence forces

coercive means have been used illustrating his/her assessment of the use of such means. This derogation, in fact, raises serious concerns as to the existence of a real possibility for those who are subject to coercive measures in this context to effectively exercise their fundamental right to an effective remedy and have the legality of such measures reviewed by a court or tribunal.

V. On the rights of persons enjoying the right of free movement

It is not clear whether and to what extent the legislative amendments in question affect the rights of persons enjoying the right of free movement under the EU law, namely Union citizens and their family members, including third country national family members.

In case such rights are affected by the said legislative amendments, the Commission wishes to receive clarifications, whilst recalling that:

- (1) border controls should respect the rights of persons enjoying the right of free movement (Article 21 TFEU and Article 45 of the Charter);
- (2) any measures restricting the right to free movement of Union citizens and their family members must fully respect the material and procedural safeguards of Directive 2004/38/EC.