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Copy:
Aleš Hojs
Minister of Interior of Slovenia, President of the Home Affairs Council

7 October, 2021

Re: Adaptation of the EU legal framework to new realities

Dear Vice-President, dear Commissioner,

Recent developments at the external borders of the European Union (EU) indicate that the EU needs to adapt the existing legal framework to the new realities, enabling us to adequately address attempts of instrumentalisation of illegal migration for political purposes and other hybrid threats. Our Union has to be prepared for possible similar challenges in the future.

In her 2021 State of the Union address, the President of the European Commission Ursula von der Leyen explicitly recognised that the EU is facing a hybrid attack, its aim is to destabilise Europe, but this can never be tolerated.

We welcome the initiatives of the European Commission to address the emerging challenges. A very important aim of the recently presented EU action plan against migrant smuggling is to further develop all operational, legal, diplomatic and financial tools at the EU's disposal to respond to the instrumentalisation of illegal migration by State actors. We fully agree that it is important to set out new ways to respond to such aggression and ensure unity in protecting our external borders. We welcome the intention of the European Commission to consider strengthening the EU's legal framework to ensure a common approach to better protect the external borders and the essential interests of the EU and its Member States, while always respecting fundamental rights.¹

To ensure the integrity and normal functioning of the Schengen area, all our external borders must be protected with maximum level of security. At the same time, our migration and asylum policy must be abuse-resistant. No third country should be able to make use of our asylum system for the purposes of exerting political pressure and blackmailing the EU and its Member States, or exploit the present situation in Afghanistan.

We need swift and concrete solutions and strong response to counter the instrumentalisation of illegal migration and other hybrid threats. In response to the current situation, some EU Member States adopted resolute measures at the national level. However, as these threats are targeting the EU as a whole, we need common solutions at EU level. Safeguards in the EU law allowing Member States to act swiftly and proportionally to the threat, in defence of their national security and the security of whole EU, are needed urgently. These safeguards should ensure strong

¹https://ec.europa.eu/commission/presscorner/detail/en/qanda_21_4907

protection of EU external border and provide effective measures to prevent illegal border crossings.

In its Communication of June 2nd, 2021 "**A strategy towards a fully functioning and resilient Schengen area**", the European Commission stated: „*Building on the lessons learnt from these experiences, the Commission intends to put forward a new proposal for an amendment of the Schengen Borders Code by the end of this year. <...>. To deal with any future Schengen-wide challenges, a revised Schengen Borders Code would address situations where a **serious threat**, including a threat to public health, such as that created by the COVID-19 pandemic, would arise.*“ When drafting these amendments, not only cases of pandemics, but also acts of instrumentalisation of illegal migration and other hybrid threats should be taken into account.

Therefore, we consider important suggesting the following:

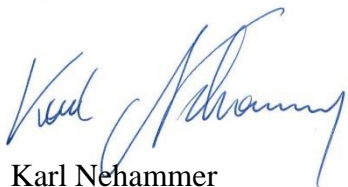
- 1) Schengen Borders Code (SBC) does not sufficiently address the **illegal** crossings of the external land and sea borders. There are **no clear rules** as to what actions **may** Member States take in case of a **hybrid attack** characterised by an artificially created large scale inflow of irregular migrants, facilitated, organised and/or pushed by a third country for the purposes of exerting political pressure, or in cases of similar challenges.
- 2) Article 28 of the SBC addresses situations requiring **immediate action** in case of a **serious threat** to public policy or internal security. However, the measure foreseen in such cases only concerns **reintroduction of internal border control**, which based on recent experiences of pandemic crisis management proved to have undesirable implications. Whereas no specific measures are foreseen for protection of EU’s external borders.
- 3) Recital 6 of SBC in force states that „*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.*“ External border control consisting only of border checks carried out at border crossing points and border surveillance² regrettably can’t achieve the above-mentioned goals.
- 4) No measure, except for border surveillance, is foreseen to **prevent the illegal border crossings**. Article 13 of the SBC states that „*The main purpose of border surveillance shall be to **prevent unauthorised border crossings**, to **counter cross-border criminality** and to take measures against persons who have crossed the border illegally.*“ However, in practice border surveillance does not stop persons from attempting illegal border crossings and it would therefore be useful to complement it with further preventive measures.
- 5) Border surveillance is important for situational awareness and contributes to ensuring high level of security in the EU. Therefore, further development of **common standards** of the EU border control and in particular of the external border surveillance should be considered, with due respect for the responsibility of the Member States.
- 6) SBC does not foresee a **physical barrier** as a measure for protection of the EU external borders. Physical barrier appears to be an effective border protection measure that serves the interest of whole EU, not just Member States of first arrival. This legitimate measure should be **additionally** and **adequately funded** from the EU budget as a matter of priority. This should also apply at the Green Line, in the case of Cyprus, which does not constitute an external border.

²The definition of „border control“ is set out in paragraph 10 of Article 2 of SBC (<https://eur-lex.europa.eu/eli/reg/2016/399/oj>)

To ensure an effective and immediate response to the instrumentalisation of the migration flows, we need European solutions without any delay. We are convinced that it is more pertinent and sustainable to proactively focus on stronger border protection, common standards for external border surveillance and prevention of illegal border crossings. We need new tools that would let us to avoid rather than deal afterwards with grave consequences of overburdened migration and asylum systems and exhausted accommodation capacities, eventually negatively affecting public's trust in our ability to act decisively when needed.

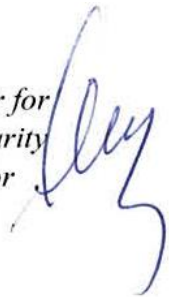
At the same time, these European solutions should aim at safeguarding the Common European Asylum System by reducing pull factors. We should also foresee ways to stop the abuse of the asylum system and manipulating human lives by any State actors or criminal networks.

We call the European Commission to address new challenges and consider tabling relevant legislative proposals, including in the context of other amendments to the SBC that the Commission is planning to present later this year. Meanwhile, detailed discussions on the Migration and Asylum Pact and the comprehensive reform of the EU asylum system should be continued in parallel, seeking for sustainable, long term solutions based on European values.



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