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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

HUNGARY

**DRAFT LAW ON AMENDING CERTAIN ACTS
REGARDING MEASURES
AGAINST ILLEGAL IMMIGRATION
(SO-CALLED “STOP SOROS”
DRAFT LEGISLATIVE PACKAGE)**

THE GOVERNMENT OF HUNGARY

Legislative proposal No. T/...

amending certain Acts regarding measures against illegal immigration

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Minister of Interior**

Budapest, May 2018

Act ... of 2018

amending certain Acts regarding measures against illegal immigration

1. Amendment to Act XXXIV of 1994 on the Police

Section 1

Section 1 (2) 10 of Act XXXIV of 1994 on the Police (hereinafter the "Rtv.") shall be replaced by the following provision:

(Within its functions related to crime prevention, law enforcement, state administration and policing specified in the Fundamental Law, this Act or, on the basis of authorisation by another Act, other laws, the Police:)

"10. shall guard the state border, prevent, detect and interrupt the illegal crossing of the state border, carry out immigration and asylum duties vested in them, and participate in preventing illegal immigration."

Section 2

Chapter V of the Rtv. shall be supplemented by the following subtitle:

"Border protection restraining order

46/F. § For the purpose of ensuring the order of the state border and undisturbed border surveillance, police officers shall prevent a person from entering the 8 kilometre zone counted from the borderline or boundary marker corresponding to the external border under Article 2, point 2 of the Schengen Borders Code or shall require a person staying in that area to leave if that person is subject to criminal proceedings for the criminal offence of prohibited crossing of the border fence (section 352/A Btk.), vandalism of the border fence (section 352/B Btk.), obstructing construction works related to the border fence (section 352/C Btk.), human smuggling (section 353 Btk.), facilitating illegal stay (section 354 Btk.) or facilitating illegal immigration (section 353/A Btk.)."

Section 3

Section 91/O of the Rtv. shall be supplemented by the following paragraph (6):

“(6) For the purpose of monitoring compliance with the rules of border protection restraining order, the Police shall, in connection with the criminal proceedings, process the identification data, nationality, address, service address and other data pertaining to the case of the person who is reasonably suspected of committing the criminal offence of prohibited crossing of the border fence (section 352/A Btk.), vandalism of the border fence (section 352/B Btk.), obstructing construction works related to the border fence (section 352/C Btk.), human smuggling (section 353 Btk.), facilitating illegal stay (section 354 Btk.) or facilitating illegal immigration (section 353/A Btk.) and forensic data being processed for the purpose of law enforcement, as of the date when the suspect is notified of the reasonable suspicion against him until the data to be processed in the criminal records are entered in the records.”

2. Amendment to Act XII of 1998 on travelling abroad

Section 4

In section 1 (2) of Act XII of 1998 on travelling abroad, the words “Article XIV (1) of the Fundamental Law” shall be replaced by “Article XIV (2) of the Fundamental Law”.

3. Amendment to Act I of 2007 on the entry and stay of persons with the right of free movement and residence

Section 5

In section 34 (1) of Act I of 2007 on the entry and stay of persons with the right of free movement and residence, the words “in Article XIV (2) of the Fundamental Law” shall be replaced by “in Article XIV (3) of the Fundamental Law”.

4. Amendment to Act II of 2007 on the entry and stay of third-country nationals

Section 6

(1) In section 51 (1) of Act II of 2007 on the entry and stay of third-country nationals (hereinafter the “Harmtv.”), the words “in Article XIV (2) of the Fundamental Law” shall be replaced by “in Article XIV (3) of the Fundamental Law”.

(2) Following section 111, the Harmtv. shall be supplemented by the following subtitle and section 112:

“Compliance with the requirement of the Fundamental Law on cardinality

Section 112 The following provisions of this Act qualify as cardinal on the basis of Article XIV (1) of the Fundamental Law:

- a) section 86/A,
- b) section 86/E,
- c) section 86/I,
- d) section 86/J,
- e) sections 86/L to 86/M,
- f) section 87,
- g) sections 87/L to 87/M,
- h) section 87/N (1).”

5. Amendment to Act LXXX of 2007 on asylum

Section 7

(1) Section 51 (2) of Act LXXX of 2007 on asylum (hereinafter the "Met.") shall be supplemented by the following point *f*):

(The application shall be inadmissible if)

"*f*) the applicant arrived through a country in which he is not subject to persecution under section 6 (1) or is not at risk of serious injury under section 12 (1) or if there is an appropriate level of protection in the country through which the applicant arrived in Hungary".

(2) Section 51 of the Met shall be supplemented by the following paragraph (12):

"(12) If paragraph (2) *f*) is applied, the applicant may declare, immediately after being informed of this fact but within no more than 3 days after the communication, that in his individual case the conditions under paragraph (2) *f*) were not met regarding the country concerned."

(3) In

a) section 2 *i*) *ic*),

b) section 25/A,

c) section 45 (1)

of the Met., the words "in Article XIV (2) of the Fundamental Law" shall be replaced by "in Article XIV (3) of the Fundamental Law".

(4) In section 6 (1) of the Met, the words "in Article XIV (3) of the Fundamental Law" shall be replaced by "in Article XIV (4) of the Fundamental Law".

(5) Section 93 of the Met shall be supplemented by the following subtitle and section 94:

"Compliance with the requirement of the Fundamental Law on cardinality

Section 94 The following provisions of this Act qualify as cardinal on the basis of Article XIV (5) of the Fundamental Law:

a) section 1 (2),

b) section 5,

c) sections 31/A to 31/F,

d) section 31/I,

e) section 32/C *a*),

f) sections 32/D to 32/F,

g) section 32/G (1),

h) section 32/Q (1) to (3) and (7) to (8),

i) section 32/R,

j) section 32/S."

6. Amendment to Act LXXXIX of 2007 on the state border

Section 8

Section 5 of Act LXXXIX of 2007 on the state border shall be supplemented by the following paragraph (1c):

„(1c) Those subject to criminal proceedings for the criminal offence of prohibited crossing of the border fence (section 352/A Btk.), vandalism of the border fence (section 352/B Btk.), obstructing construction works related to the border fence (section 352/C Btk.), human

smuggling (section 353 Btk.), facilitating illegal stay (section 354 Btk.) or facilitating illegal immigration (section 353/A Btk.) under Act C of 2012 on the Criminal Code shall not stay in the area under paragraph (1a).

7. Amendment to Act XLVII of 2009 on the criminal records system, the registration of judgments adopted against Hungarian nationals by courts of the Member States of the European Union and the registration of criminal and law enforcement biometric data

Section 9

Section 68 (2) c) of Act XLVII of 2009 on the criminal records system, the registration of judgments adopted against Hungarian nationals by courts of the Member States of the European Union and the registration of criminal and law enforcement biometric shall be replaced by the following provision:

(The Police shall be authorised to receive the following data through direct access:)

“c) in the course of performing tasks of public order protection and border policing
ca) the data set out in section 23 c) and h), for the purpose of checking the enforcement of coercive measures,
cb) the data set out in section 23 c), for the purpose of checking compliance with the rules of border protection restraining order, provided that the person concerned has been subjected to criminal proceedings on well-founded suspicion of the criminal offence of prohibited crossing of the border fence (section 352/A Btk.), vandalism of the border fence (section 352/B Btk.), obstructing construction works related to the border fence (section 352/C Btk.), human smuggling (section 353 Btk.), facilitating illegal stay (section 354 Btk.) or facilitating illegal immigration (section 353/A Btk.);”

8. Amendment to Act II of 2012 on infractions, infraction procedure and the infraction records system

Section 10

(1) Section 201 (4) of Act II of 2012 on infractions, infraction procedure and on the infraction registration system (hereinafter: “Szabs. tv.”) shall be replaced by the following provision:

“(4) Anyone who violates the rules of staying in the area under section 5 (1c) of the Act on the state border commits an infraction.”

(2) Section 201 of the Szabs. tv. shall be supplemented by the following paragraph (5):

“(5) Proceedings for an infraction specified in paragraphs (1) to (4) shall fall under the material competence of the Police.”

9. Amendment to Act C of 2012 on the Criminal Code

Section 11

(1) Following section 353, Act C of 2012 on the Criminal Code (hereinafter the “Btk.”) shall be supplemented by the following subtitle and section 353/A:

„Facilitating illegal immigration

Section 353/A (1) Anyone who engages in organising activities in order

a) to facilitate that persons who are not persecuted in their native country, in the country of their habitual residence or in the country through which they arrived in Hungary for reasons of race, nationality, the membership of a particular social group, religious or political beliefs, or do not have a well-founded reason to fear direct persecution initiate asylum proceedings in Hungary, or

b) for persons entering or staying illegally in Hungary to acquire title of residence, shall be punished with confinement unless a more serious criminal offence is committed.

(2) Anyone who provides material resources for the criminal offence specified in paragraph (1) or carries out such organising activities on a regular basis shall be punished with imprisonment for up to one year.

(3) Anyone who commits the criminal offence specified in paragraph (1)

a) for financial gain,

b) by assisting more than one person, or

c) within the 8 kilometre zone counted from the borderline or boundary marker corresponding to the external border under Article 2, point 2 of the Schengen Borders Code, shall be punished in accordance with paragraph (2).

(4) The punishment of the perpetrator of the criminal offence specified in paragraph (1) may be reduced without limitation or, in cases deserving special consideration, may be waived if the perpetrator reveals the circumstances of committing the criminal offence not later than at the time the indictment is filed.

(5) For the purposes of section 353/A, organising activities shall include in particular

a) organising a border watch for a purpose specified in paragraph (1) at the borderline or boundary marker corresponding to the external border of Hungary according to Article 2, point 2 of Regulation (EU) 2016/399 of the European Parliament and of the Council on a Union Code on the rules governing the movement of persons across borders,

b) preparing or distributing information materials or entrusting another with such acts,

c) building or operating a network.”

(2) Section 364 Btk. shall be replaced by the following provision:

“Section 364 Perpetrators of human smuggling, prohibited crossing of the border fence, vandalism of the border fence, obstructing construction works related to the border fence, facilitating illegal stay, facilitating illegal immigration or organising prohibited gambling may be banned from certain areas as well.”

10. Final provisions

Section 12

This Act shall enter into force on the first day of the month following its promulgation.

Section 13

Sections 1 and 2 of this Act qualify as cardinal on the basis of Article 46 (6) of the Fundamental Law.

General justification

The Hungarians made it clear in the parliamentary election of 8 April, in national consultations held in recent years and in the migrant quota referendum in 2016 that they do not want Hungary to become an immigration country. The Government of Hungary is bound by this desire. It is our firm opinion that immigration poses serious risks and therefore is a national security issue.

We need an action plan to protect Hungary and this action plan is the STOP Soros legislative package.

The Hungarian people rightfully expect the Government to take action against illegal immigration and activities facilitating illegal immigration using all means. The STOP Soros Act serves this purpose by criminalising the activity of organising illegal immigration. With this legislative proposal, we intend to prevent Hungary from becoming an immigration country.

Hungarians want to live in safety and therefore expect and support the Government in taking further measures for the purpose of ensuring the safety of Hungary and preventing the organisation of illegal immigration. The STOP Soros Act, which strengthens the protection of the country and creates another obstacle to Hungary's becoming an immigration country, serves this purpose.

For us, Hungary comes first!

Detailed justification

to section 1

The core duties of the police, as defined by the Fundamental Law, are the prevention and investigation of criminal offences, and the protection of public safety, public order, and the order of state borders. Such protection is ensured by means of lawful restriction of the rights of persons showing unlawful conduct. With a view to the provisions of the Fundamental Law and the pressure that migration puts on Hungary, it is appropriate to establish the powers of the police to take action against illegal immigration. According to Recital (6) of the Schengen Borders Code, border control should help to combat illegal immigration and trafficking in human beings. As border control in Hungary is a function performed by the police, this function needs clarification by adding the responsibilities of preventing illegal immigration to it.

to section 2

Chapter V of the Act XXXIV of 1994 on the Police (hereinafter the "Rtv.") concerning police measures is supplemented by the subtitle "Border protection restraining order" in order to ensure that no person who is subject to criminal proceedings for the criminal offence of prohibited crossing of the border fence (section 352/A Btk.), vandalism of the border fence (section 352/B Btk.), obstructing construction works related to the border fence (section 352/C Btk.), human smuggling (section 353 Btk.), facilitating illegal stay (section 354 Btk.) or facilitating illegal immigration (section 353/A Btk.) enters the 8 kilometre zone counted from the borderline or boundary marker of Hungary corresponding to the external border as defined by Article 2, point 2 of the Schengen Borders Code or that the police may make such persons leave that area. This provision enables Hungary to comply with the provisions of Article 13 (2) of the Schengen Borders Code, which prescribes that surveillance shall be carried out in such a way as to prevent and discourage persons from circumventing the checks at border crossing points. Act XC of 2017 on the Code of Criminal Procedure, which enters into force on 1 July 2018, provides that, if at the time the suspect is notified of the suspicion against him, the suspicion was not founded, the prosecution service

adjudicating the complaint shall find in its decision that the statutory conditions for suspicion have not been met. In this case, the status of the suspect as such ceases when the decision on the complaint is adopted. Legislation determines several cases where the restriction of the rights of a person who is subject to criminal proceedings is required. As a result, the person may be prohibited from practicing certain activities or creating certain relationships. These restrictions apply despite the fact that the principle of presumption of innocence also applies to the person concerned. Such rules are laid down in Acts such as the Act on health care, the Act on armed security guards, and on the guard service for nature conservation and fields, the Act on the rules of personal and property protection activities and the activities of private investigators, as well as the Act on the service status of professional members of organs performing law enforcement duties.

to section 3

The forensic data of the suspect are entered in the criminal records several days after the date when the suspect is notified of the suspicion against him. This means that, despite the prohibition to this effect by the Act on the state border, the suspect concerned is able, for several days after he is notified of the suspicion, to enter the 8 kilometre zone counted from the borderline or boundary marker, in such a way that the prohibition remains undiscovered during a police check.

The proposal gives the police the freedom to process, with regard to the criminal offences mentioned, the forensic data of suspects, also in the period before the forensic data of the suspects are entered into the criminal records.

to sections 4 and 5

The amendment of Article XIV of the Fundamental Law makes it necessary to introduce the proposed technical amendments. These amendments will adjust the static references to the Fundamental Law.

to section 6

Pursuant to the Seventh Amendment to the Fundamental Law, the fundamental rules on submitting applications for residence in Hungary by foreigners who do not have the right to free movement must be laid down in a cardinal Act; therefore, the requirement on cardinality must have been set for certain procedural provisions with respect to some provisions of Act II of 2007 on the entry and stay of third-country nationals as specified by the Fundamental Law.

to section 7

If the applicant arrives in Hungary through a country in which he was not subject to persecution and was not at risk of serious injury that would justify his being recognised as needing protection, or in which he was granted or could have been granted an adequate level of protection if he had claimed such protection, it is justified that the applicant should apply for protection provided by the community of nations in that country. This provision is in line with Article 31 (1) of the Geneva Convention which offer protection only to those who are coming directly from a territory where their life or freedom was threatened. The level of protection is deemed to be appropriate if the applicant was entitled to reside in that country on any legal basis (i.e. employment, residence for humanitarian reasons).

Pursuant to the Seventh Amendment to the Fundamental Law, the basic rules for granting asylum must be laid down in a cardinal Act, and this required that, in line with the requirement of the Fundamental Law on cardinality, provisions on cardinality be adopted with regard to the procedural rules of the Act LXXX of 2007 on asylum (hereinafter the "Met.")

In the light of the above, it is appropriate to provide that, in view of section 5 (2) of the Seventh Amendment to the Fundamental Law, certain procedural provisions of the Met. qualify as cardinal.

to section 8

It needs to be laid down in the Act on the state border that a person subject to criminal proceedings for a criminal offence relating to border protection or the order of state borders must not stay in the area defined in section 5 (1a).

to section 9

For the police to carry out its duty concerning border protection restraining order, it is necessary to create the opportunity to obtain data from criminal records. Obtaining data will only be possible if the person to be checked is subject to criminal proceedings for any of the criminal offences listed in the provision.

to section 10

The Act on the state border specifies the group of persons who, due to their unlawful conduct violating the Btk., are prohibited from staying in the zone defined in the Act on the state border. It is in the power of the police to control this, yet it needs to be ensured that the police have appropriate options for sanction in cases where the person concerned does not comply with this obligation as prescribed by law.

The Act does provide the gradual procedural rules for events of repeated infraction, which may be applied accordingly in this case.

to section 11

The change in the character of and increasing danger in the effect of organising and supporting activities related to illegal immigration justifies the amendment of the Btk. and its supplementation with the statutory definition of a new criminal offence.

The abusive manner in which asylum proceedings are applied for and the increasing peril that the organising activity supporting the stay of illegal immigrants in our country brings to public order and public security all prove that such conduct needs to be fought by the application of the most severe legal means, even by criminal law sanctions.

With that in mind, the chapter of the Btk. on criminal offences against the order of public administration is supplemented with the statutory definition of a new criminal offence, that of facilitating illegal immigration.

The protected legal interest of this new criminal offence is, through the protection of the state border, the public order and public security of our country. This criminal offence has a statutory purpose, so it may only be committed intentionally.

Any conduct can qualify as conduct leading to this criminal offence if it facilitates that, by misleading the authorities, the person indicated in the statutory definition is granted international protection, or that the person who entered or stays illegally in Hungary obtains a legal basis for residing in Hungary. It is not possible to specify the exhaustive content of such organising activities in full, hence point (5) of the new statutory definition sets out, by means of appropriate abstraction, the most typical organising part-activities as interpretative provisions. The statutory definition lays down, besides penalising the most typical conducts of this criminal

offence, the possibility of sanctioning any other kind of conduct which corresponds in practice to an organising activity.

It is appropriate to sanction those conducts as well, by which persons illegally entering or staying in Hungary attempt to legalise their stay by applications for residence permits or cards, if the organising activity behind such intent can be proven. After or in order to avoid their expulsion, foreigners often submit applications to settle their stay, enter into marriages with Hungarian nationals, acknowledge with full effect their paternity regarding children of Hungarian nationality or, in relation to their children, Hungarian nationals acknowledge their paternity with full effect. The organised character behind applications of this type is often clear.

No result or consequence is required for this criminal offence (immaterial criminal offence), thus it is not needed for the full completion of the criminal offence for the person to indeed initiate the asylum proceedings or obtain the legal basis for residing in Hungary.

The statutory definition is subsidiary; it may only be established if the conduct of the perpetrator has not resulted in a more serious criminal offence, such as human smuggling.

Under the statutory definition, those who commit a qualified case of the criminal offence by providing material resources for the organising activities in any form, that is, financing such activities, or by carrying out such organising activities on a regular basis, receive a more severe punishment. On a regular basis means, in accordance with the established practice, that the criminal offence is committed at least twice in a short interval.

Under the statutory definition, those who commit the criminal offence for financial gain, by assisting more than one person, or within the 8 kilometre zone counted from the borderline or boundary marker corresponding to the external border under Article 2, point 2 of the Schengen Borders Code, receive a more severe punishment for committing a qualified case of the criminal offence. These conducts pose an increased level of danger as, in one case, it is the organiser who enjoys the financial gain, while in the other two cases, the higher level of the punishment scale is justified by the fact that with his single action the perpetrator assists more than one person, or he commits the criminal offence at the scene having the best conditions for perpetration (within the 8 kilometre zone).

It constitutes a privileged case of the basic offence if the perpetrator reveals the circumstances of perpetration not later than at the time the indictment is filed. In this case, punishment may be reduced without limitation or, in cases deserving special consideration, even may be waived.

It is important to emphasise that the rules in force provide for the possibility for the court to apply the punishment of a ban from certain areas against the perpetrator, either together with another punishment or alone, which serves individual prevention more effectively by banning the person who was condemned in a final and binding judgment for having committed the criminal offence of facilitating illegal immigration from the 8 kilometre zone counted from the borderline or boundary marker corresponding to the external border under Article 2, point 2 of the Schengen Borders Code. Anyone who violates the rules of a ban from certain areas or of disqualification shall be liable for an infraction.

Practical cases prove that those illegally entering or staying in Hungary are aided in their entry into the country not only by international but also by Hungarian organisations, against which it is appropriate to take action by means of the criminal law. With the introduction of the new statutory definition, the responsibility of the legal persons providing the organisational, personal and material background for such activities may be examined as well, and they shall be sanctionable if the conditions as defined by Act CIV of 2001 on the criminal measures applicable against legal persons are met in their case.

to section 12

Specifies the date of entry into force of the amendments concerned.

to section 13

Contains a clause on cardinality in consideration of the provisions of the Rtv.