Unofficial translation

Government proposal to Parliament for an Act on Temporary Measures to Combat Instrumentalised Migration

MAIN CONTENTS OF PROPOSAL

The Government proposes that an act on temporary measures to combat instrumentalised migration be enacted. The act would lay down provisions on the conditions under which a government plenary session could decide to restrict the reception of applications for international protection in a limited area on Finland's national border and in its immediate vicinity in order to safeguard the sovereignty or national security of Finland. The existence of a need for a decision on such a restriction would be established in cooperation with the President of the Republic. The decision could be made for a maximum period of one month at a time.

Had the Government made a decision referred to above, a migrant exploited in efforts to exert influence and present in the area referred to in the decision would be prevented from entering the country. A migrant who has entered the country would be removed from the country and guided to move to a place where applications for international protection are received. However, a migrant's application for international protection would be received in certain exceptional cases. The proposed regulation would not restrict the reception of applications for international protection beyond the area referred to in the government decision.

The objective of the proposal is to effectively combat any attempts to put pressure on Finland through instrumentalised migration, to strengthen border security and to prepare for more serious situations of instrumentalised migration.

The proposal implements the objectives of the Government Programme of Prime Minister Petteri Orpo's Government to ensure border security, to proactively prepare for hybrid threats and to pay particular attention to matters of preparedness and resilience in administration.

The proposed act is scheduled to enter into force as soon as possible and it will remain in force for one year from the entry into force.

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RATIONALE

1 Background and preparation

1.1 Background

Finland’s security environment changed fundamentally and for a long time ahead when Russia launched its aggression against Ukraine in February 2022. The security situation in Europe and Finland's neighbouring regions is unstable and difficult to predict. Many European countries have been subjected to hybrid influence activities, including through instrumentalised migration. Tensions in the security environment are reflected in the security of Finland's eastern border. Since autumn 2023, Finland has been faced with instrumentalisation of migrants. Instrumentalised migration is one of the means used in efforts to influence border security, national security and public order in Finland and the European Union. Finland must be prepared for the possibility that the pressure exerted on the country through instrumentalised migration will continue for a long time and in more serious and larger-scale forms.

Section 10 of the Government Programme of Prime Minister Petteri Orpo's Government, entitled *A safe, secure and resilient state governed by the rule of law*, states that the challenges facing our society and our citizens are becoming increasingly complex. These phenomena affect many sectors of society, and we need more cooperation and new practices to identify and address them. Changes in the operating environment also require an increase in the powers and resources of actors in the field of internal security and administration of justice. The rule of law rests on people’s trust in a fair society and justice system. Russia’s invasion of Ukraine and tensions in world politics highlight the importance of society’s resilience. According to the Government Programme, the Government will bolster comprehensive security, resilience and security of supply. Finland will prepare for external and internal security threats realistically and decisively. Russia’s aggression against Ukraine and other changes in the security environment require that border security be further strengthened. The Government Programme states that legislation, including that on powers, will be updated to meet the needs of border security. The powers of the Border Guard will be developed in accordance with the requirements of the security environment.

Hybrid influence activities targeted by individual states against other states has increased, and the range of means used has expanded. The Government Report on Finnish Foreign and Security Policy (Publications of the Finnish Government 2020:30) states that hybrid influence activities have become a bigger security threat than before. Hybrid influence activities do not have an internationally accepted, common definition. Hybrid influence activities are considered to consist of systematic activities in which a state actor or a non-state actor uses a broad range of non-military means to exert influence on the vulnerabilities of a state and to achieve their own objectives. The aim is to put pressure on the targeted parties and cause damage, uncertainty and instability in them. Hybrid influence activities may also be part of a military operation, especially in its early stages. In such cases, the actor, by modifying the operational environment, seeks to make it favourable for the use of military force. Hybrid influence activities may also include operations involving information influence activities and other activities with a diverse content. The Government Report on Finnish Foreign and Security Policy notes that state actors frequently use third-party actors, such as extremists or organised crime groups, for their hybrid influence activities. Migration, refugees or the culpable countries’ citizens residing abroad may also be used for the purposes of hybrid influence activities. Epidemics and pandemics may similarly be used as a pretext for influence activities. Different means of influence may be used simultaneously or successively. Influence activities may already be launched rapidly in normal conditions, and they may be difficult to recognise and verify, especially at the initial stage.

In addition to the concept of hybrid influence activities, the concept of broad-spectrum influencing is used. The Government's Defence Report (Publications of the Finnish Government 2021:78) discusses broad-spectrum influencing as a threat perception used in the context of Finnish military planning. According to the report, broad-spectrum influencing includes hybrid influence activities, but the threat perception also contains the open use of military force between the parties. Connecting factors between hybrid influence activities and broad-spectrum influencing include that the latter, as well, often is systematic, combines various methods, is used over a long period of time and exploits vulnerabilities of society even during normal conditions. Like hybrid influence activities, broad-spectrum influencing may be difficult to recognise.

Hybrid influence activities may also include use of means that are lawful in themselves, and this may make it even more difficult to recognise such activities. The speed of changes in the operating environment in today's world increases the importance of preparedness. When hybrid threats are realised in concrete action, they constitute internal or external security disruptions that must be countered through cooperation between several public authorities. Primarily, the authorities must be able to respond to the threats by virtue of their powers under normal conditions. Moreover, their capacity to prepare for hybrid influence activities and to tolerate the pressure from such activities and their consequences must be improved.

The Government report on changes in the security environment (Publications of the Finnish Government 2022:18) states that as the security environment changes, Finland is preparing for the possibility of becoming a target of exceptional, extensive and multifaceted hybrid influence activities both in the short and long term. Effective prevention of hybrid influence activities is based on the deterrent effect created by society as a whole and all branches of government through preparedness and other activities. Ensuring high-level comprehensive security is a key element in creating a preventive effect. In addition to up-to-date situation awareness, clear lines of authority and responsibility, sufficiently flexible and possibly partially overlapping powers, and an ability to utilise the overall resources of society in an appropriate manner to repel different threats play a key role.

According to the Government report on changes in the security environment, we must use the necessary operational, legal, diplomatic and economic means to respond to the instrumentalisation of migration as a form of hybrid influence activity. Responding to the instrumentalisation of migration requires, in some respects, a different approach than migration management as such. Hybrid influence activities of this kind may cause serious disruptions of public order and security, and they can be used to create tensions between people arriving in the country and groups opposing them. In the most serious situations, the target country must weigh the measures it needs to take to safeguard social stability, legal order, national security, territorial integrity, public order and security or public health while simultaneously complying with the obligation to duly process applications for international protection.

It can be presumed that the number of people seeking to enter Europe will increase in future, and that instrumentalised migration will be used as a means of political pressure. Various global trends and regional conflicts will further accelerate the movement of people in different parts of the world. Entry into Europe is on the rise. In the instrumentalisation of migration, a foreign state starts creating and guiding migration flows as a means of exerting pressure on other states and thus violates their sovereignty.

A key means of preparing for hybrid influence activities involving instrumentalised migration is legislation that provides the public authorities with sufficient powers to act in a preventive and effective manner. Instrumentalised migration may cause an incident under normal

conditions, if the public authorities do not have means to combat the influence activities targeted at Finland by a foreign state.

The Government Report on Internal Security (Publications of the Finnish Government 2021:48) states that border control in Finland is, at the moment, effective and credible. However, hybrid threats have been identified to be a factor of change, among other things. The Government Report states that serious and extensive incidents may become more common. Preparations for extensive incidents and threats are made in accordance with the cooperation model for comprehensive security. According to the Government Report, hybrid influence activities should also be prevented through legislative means. The powers of the security authorities must be developed in a consistent manner and based on a risk assessment, and the operational capacity of public authorities must be ensured, also with regard to sudden and rapidly escalating situations that cannot be completely defined in advance.

In 2022, hybrid threat situations were included in the list of criteria for emergency conditions laid down in the Emergency Powers Act (1552/2011) and provisions on the related additional powers of public authorities, for example the Border Guard, were added to the Act. However, the revision of the criteria for emergency conditions laid down in the Emergency Powers Act does not diminish the need to also continue to develop legislation on normal conditions in view of the changed security threats. When it comes to hybrid threats, as well, response through measures allowed under the legislation governing normal conditions must be the main rule.

The Border Guard’s capacity to prepare for and effectively respond to various incidents under normal conditions was improved by legislative amendments (government proposals HE 201/2017 vp and HE 94/2022 vp) that entered into force on 1 April 2019 and 8 July 2022 respectively. Nevertheless, there is reason to further strengthen the regulation because the legislation in force does not allow Finland to combat severe pressure that a foreign state exerts on Finnish territory in a manner that interferes in Finland's sovereignty. Finland's lack of entitlement to combat severe influence on the country is conducive to seriously endangering the national security of Finland.

International instruments concerning international protection and the domestic law are based on the idea that an individual seeks international protection when he or she is compelled to flee for example from persecution or torture in his or her home country. On the other hand, preparedness for disruptions in migration and for mass influx of migrants has been based on the idea that the reason underlying a situation of mass influx of migrants is for instance a war, conflict, pandemic or sudden environmental catastrophe that makes a large number of people in need of shelter seek entry to the country. In such situations, it is essential that public authorities have means to rapidly ensure that the people receive shelter and the situation is under control.

Nevertheless, incidents in recent years have shown that instrumentalised migration is currently used as a means to cause instability, put pressure on other states or prepare even stronger pressure and ultimately use armed force. A foreign state may try to exert inappropriate influence on another state, to cause instability and distrust towards public authorities within that state, and to undermine national security.

For the time being, there are no legal instruments that the state could apply to effectively combat these kinds of efforts to exert influence on its sovereignty and national security. The European Union has recognised the justified need of the Member States to be able to respond to such situations, but so far, the Member States have only had access to means by which they can keep a mass influx of migrants under control if it is either spontaneous or manoeuvred by a foreign state. On the other hand, EU law does not provide any means for the Member States to combat

a process clearly manoeuvred by a foreign state and intended to influence the internal affairs of another sovereign state. At the level of international law, treaties also do not include any elements that a state could apply to effectively combat pressure exerted on it through instrumentalised migration. The international treaties related to the matter date back to an era when no state had started to pursue its own objectives by abusing the right of people under international treaties to seek international protection.

When another state instrumentalises applicants for international protection for its own political purposes, it is important to maintain the protection afforded by human rights treaties while at the same time seeking ways to combat the reprehensible activities of the instrumentalising state. The interpretation of the human rights treaties is constantly evolving as they are applied. The monitoring bodies of the key human rights treaties of the United Nations and the Council of Europe interpret the provisions of the treaties dynamically to apply them to today's conditions.

Finland has kept the instrumentalised migration at its eastern border under control by taking measures provided for in section 16 of the Border Guard Act (578/2005). However, the Border Guard Act or other legislation do not offer a solution to a situation where efforts to put pressure on the state are increasing and continuing for a long time, instrumentalised migration is spreading to locations between official crossing points and closed border crossing points, and increasingly difficult and dangerous situations are arising. The risk of escalation of the situation is high especially because it is very probable that large numbers of persons exploitable for instrumentalised migration to Finland are currently staying in the vicinity of Finland's national borders. Therefore, legislation on the powers of public authorities to combat influence activities based on instrumentalised migration must be enacted urgently.

1.2 Preparation

On 19 February 2024, the Ministry of the Interior set up a legislative project to combat instrumentalised migration and to bolster border security. The project was to examine and prepare legislative amendments that will help strengthen border security and effectively combat any attempts to put pressure on Finland by way of instrumentalised migration. The mandate was to give due consideration to the authorities' ability to respond to the most serious forms of instrumentalised migration and to explore the possibility of enacting provisions on the matter following the procedure for constitutional enactment.

Preparation of the proposal was commenced by a working group chaired by the Border Guard Department of the Ministry of the Interior, with the participation of representatives of the Migration Department of the Ministry of the Interior, the Ministry of Justice, and the Ministry for Foreign Affairs. In accordance with the decision of the Ministry of the Interior dated 11 March 2024, the proposal was finalised by public officials.

The Government's draft proposal was circulated for comments from 15 to 25 March 2024. Opinions were requested from key ministries, authorities and other stakeholders. Opinions were issued upon request by the Ministry of Justice, the Ministry of Defence, the Ministry of Social Affairs and Health, the Ministry for Foreign Affairs, the Ministry of Finance, the Parliamentary Ombudsman, the Chancellor of Justice, the National Bureau of Investigation, the Finnish Immigration Service (no comment), the National Police Board, the Defence Command, the Finnish Security and Intelligence Service, Finnish Customs, the Office of the Prosecutor General, the Supreme Administrative Court, the Helsinki Administrative Court, the Eastern Finland Administrative Court, the Turku Administrative Court, the Ombudsman for Children, the Intelligence Ombudsman, the Non-Discrimination Ombudsman, the Trade Union for the Public and Welfare Sectors JHL, the Institute Officers Union of the Finnish Defence Forces and

the Border Guard, the Border Security Union, the Finnish Officers' Union, Aleksanterinliitto, the Amnesty International Finland, the Human Rights Centre, the Finnish League for Human Rights, the Central Union for Child Welfare, the Mannerheim League for Child Welfare, MONIKA – Multicultural Women's Association, Finland, the National Council of Women of Finland, the Finnish Refugee Advice Centre, Save the Children Finland, the Migration Institute of Finland, the Finnish Bar Association, the Finnish Refugee Council, Finnish Red Cross, Support for Asylum Seekers (Turvapaikanhakijoiden tuki ry), UNHCR, UNICEF Finland, and the Finnish Disability Forum.

Opinions were also issued by the Office of the President of the Republic, the Church Council, the European Institute for Crime Prevention and Control, affiliated with the United Nations (HEUNI), Familia, the Legal Policy Association in Finland (Demla), the UN Association of Finland, Academician of Science Martti Koskenniemi, Professor Elina Pirjatanniemi, Professor Martin Scheinin, Professor Thomas Wallgren, Docent Matti Muukkonen, Postdoctoral Researcher Aura Kostiainen, and six individual commenters.

The Ombudsman for Equality stated that it would not issue a statement on the matter.

The working documents underlying the proposal are available to the public at https://intermin.fi/hankkeet with the identifier SM004:00/2024.

2 Current situation and its assessment

2.1 Hybrid influence activities and risks posed by instrumentalised migration

Russia's illegal war of aggression against Ukraine is entering its third year, and spring 2024 will mark the tenth anniversary of the illegal occupation of the Crimean peninsula and Russia's actions to destabilise Ukraine. Russia's invasion of Ukraine changed bilateral relations between Finland and Russia fundamentally and permanently. The security tensions are also palpable in highly concrete terms at Finland's borders and in its coastal waters. Finland has been subjected to hybrid influence activities in several ways. The country's geographic location makes it exposed to regional security tensions. Said tensions affect Finland's core security interests, and the release of these tensions could be fatal for the country.

Attempts have been made to undermine Finland's public order, national security and sovereignty. Underlying these developments are the views expressed by a foreign state designed to limit Finland's sovereignty, undermine its fundamental security solutions as well as weaken its partnerships. It is said that Finland's choices will have dire consequences. One such consequence is hybrid influence activities that we may already have witnessed in the form of instrumentalised migration. Other consequences and the ultimate objectives are something on which there is basically no specific information available, because they relate to the political objectives of a foreign state. In early 2022, Russia included Finland on the list of unfriendly countries by presidential decree, along with other countries that have imposed sanctions against Russia. This is also reflected in Russia's attitude towards Finland.

Instrumentalised migration is a recognised and common means of undermining the national security and sovereignty of a sovereign state. As it is, a foreign state seeks to determine, at the expense of Finland's public order and national security, who enters Finland and when and for what purpose. A foreign state may seek to undermine law and order by overburdening the authorities, increasing polarisation and creating suspicion in society, and possibly infiltrating into the country extremists, people with a military background as well as criminals. The effects may be immediate or have a creeping long-term impact on society. Influence activities can be

based on an attempt to instrumentalise hundreds of people to the country in large groups per week, or the goal can be pursued with smaller numbers, which, however, exceed the public authorities' planned management capacity. Such actions are most likely designed to harm Finland and trigger developments that are contrary to Finland's interests while serving the purposes and objectives of a foreign state.

Hybrid influence activities are a way of identifying vulnerabilities and weak spots in society. Identified vulnerabilities motivate the foreign state to commence harmful influencing. Hybrid influence activities may be enduring and proceed in small steps, eroding society, public order and national security more or less imperceptibly. A foreign state may seek to create a crisis-ridden area at Finland's eastern border in an attempt to construct a situation alien to the region and contrary to Finland's interests that will serve such a foreign state and its purposes. Ultimately, Finland would be facing a fait accompli. Another possibility is a major one-off instance of influencing consisting of a set of actions. Moreover, the objectives in respect of the eastern border may range from nearly imperceptible efforts to a situation in which hybrid influence activities, for example in the form of instrumentalised migration, serve as a way of preparing the ground for more serious forms of hybrid action, including the use of armed force. However, influencing may be prevented and counteracted by preparing for the worst-case scenarios and passing legislation reinforcing such preparedness.

Finland's quickly changed security environment, the deteriorating security situation in Europe and the expansionist ambitions of some countries based on the use of military force are compelling us to review the situation, increase preparedness and look for entirely new options to restore stability in the face of the deteriorating security situation, for example at the national borders.

2.2 Instrumentalised migration at Finland's eastern border

The serious disruption to security on Finland's eastern border, which started in 2023, and the threat of instrumentalised migration will continue. Given the conditions that have prevailed on Finland's eastern border for decades, these new developments are anomalous. More than 1,300 people have entered Finland via border crossing points in the course of this manoeuvre. People even tried to cross the border between official crossing points in the middle of winter, which is a highly unusual and disconcerting development. Previously, instrumentalised migration occurred in 2015–2016. At that time, it ended after bilateral negotiations. Before 2015 and 2016 and up until 2023, there have been a few dozen persons arriving annually in Finland across the country's eastern border who do not satisfy the necessary conditions for entry, excluding the applicants for temporary protection due to the war in Ukraine. During the period 2015–2016 and since 2023, this phenomenon has been entirely atypical in terms of numbers compared with the previous years, while a foreign state's involvement is manifest. The room for negotiations in 2024 is far more limited than previously experienced. Efforts need to be made to prepare for a deteriorating situation, both in terms of practical border controls and the possibilities offered by legislation.

The situation on Finland's eastern border reflects the international security situation. What we are facing here is instrumentalised migration facilitated by another state or other party. The objective is to exert pressure on Finland. The developments on the eastern border are irregular and highly disconcerting when seen in the context of Finland's changing security environment and the security situation in Europe. Finland too is subject to aggressive foreign ambitions, which have been verified and voiced in various ways.

The involvement of a foreign state and other actors in the developments on Finland's eastern border is manifest and substantial in terms of its overall impact. A major change took place in the actions of the Russian authorities during the autumn of 2023. This is not natural evolution. Instead, the current situation is the result of active measures taken by the Russian authorities. As the Russian border zone and border crossing points are closely controlled, it is not possible to move in the area without permission or control to the extent we have witnessed. The Russian border authorities are not independent actors; instead, they operate under the strict direction of the government. The Russian border guard service is part of the FSB security agency. An authoritarian state in which the security authorities play an important role in maintaining social order leads to the conclusion that instrumentalised migration can only emerge with the complicity or approval of the centrally controlled authorities. Organised crime, the facilitation of illegal entry, corruption and social media are an integral part of this phenomenon. Being under the control of government authorities, they serve the government's purposes.

For example, when the borders were open in December 2023, hundreds of people, assisted by the Russian authorities, gathered at the crossing points over a short period of time. The number of potential additional comers was substantially higher. Traffic became severely congested, normal border crossings had to be halted, and the migrants crammed in the immediate vicinity of the border posed a threat to road safety, public order and security. At times, there was an imminent threat of large numbers of migrants entering the country en masse or by resorting to violence at Vaalimaa. The Russian authorities did not participate in the management of traffic flows. At times, it appeared that the situation was not under the control of the Russian authorities, not even in the immediate vicinity of the border. Instead, the authorities kept the flow of migrants coming, timing and directing them to the appropriate spots.

The fact that the phenomenon is spreading to locations between official crossing points is an indication of continued efforts to exert pressure irrespective of how spontaneous the crossings may be. The incidents at these locations along the border are a tell-tale sign of the pressures created by people seeking to enter into Finland. They are prepared to take new risks to get into the country. There is a risk that the number of crossings between the official border crossing points will increase beyond what we have witnessed to date. Moreover, summer will offer the Russian authorities an opportunity to intensify their hybrid influence activities and make it easy for irregular migrants to cross the border at locations other than official crossing points. The Finnish authorities should be able to control the situation, especially at these locations along the border, where the border authorities of both countries have a duty to prevent, detect and investigate illegal border crossings. Managing the situation in the areas between official border crossing points calls for a new way of thinking and an extension of powers.

Cooperation under the border agreement between Finland and Russia (Finnish Treaty Series 32/1960) has continued to a certain extent. Finland has sought to pursue practical cooperation. However, cooperation has been curtailed against Finland's wishes. Negotiations with the border authorities to resolve the situation have failed to yield any results.

Instrumentalised migration also benefits and is associated with significant cross-border and transnational crime. This type of crime is highly lucrative and the risks are low. As a result of the use of criminal elements, the authorities' role becomes blurred and the activity more self-directed. The provision of visas, travel services as well as transportation and means of transport appears to be pre-planned. Border crossings are facilitated despite the lack of appropriate documents, or people are helped across the border illegally. Moreover, suitable open routes, as well as ancillary services, are actively advertised in social media. Once a route is established, it is challenging to block it and suppress the route-related expectations by unilateral action. New routes or alternative ways of crossing the border are actively sought and marketed, including

the most risky ones. Facilitators of illegal entry have the ability to react quickly and are motivated to continue their operations when conditions allow it. Criminals and social media have an impact that is hard to foresee. The Russian authorities could eradicate the phenomenon in the border areas if they only wished to do so. Traditionally, Russia has controlled its border areas very closely.

In instrumentalised migration, people are exploited to exert pressure on a state. The objectives of such activity include the congestion of the asylum system and registrations, erosion of social cohesion and the infiltration into Finnish territory of persons who can be exploited on behalf of a foreign state. The goal is to complicate the work of Finnish authorities and throw society into disarray. This ties up a substantial amount of the authorities' resources as they seek to maintain border security and public order. Despite the resources deployed, border security and public order have been seriously compromised by isolated massive inflows of asylum seekers. Among those who have entered into Finland, dozens of people have been identified who may, on various grounds and due to their background, be deemed to pose a threat to public order. Around 15 per cent of asylum seekers have dropped out of the process over a period of a few months and are no longer covered by the Finnish asylum system.

Instrumentalised migration is specifically an activity manoeuvred and controlled by foreign authorities and an attempt to exert pressure on Finland. Attempts have been made to influence Finland's decision-making and choices, to undermine social cohesion and to secure benefits for Russia that Finland would not of its own volition be prepared to accept. In this respect, the pressure exerted by the number of asylum seekers witnessed to date and the threat of the continuation of this pressure are also perceived as a serious threat to national security. There has been a significant change in the profile of asylum seekers and in the way and quality of their arrival in the country within a short period of time. One observation made in this context is that the challenges related to the direct management of this phenomenon have grown time and again on both sides of the border whenever the border crossing points have been opened and an effort has been made to permit cross-border traffic. While due preparations have been made in view of the developments mentioned above, stronger action is called for to respond to any increase in pressure.

The threat of instrumentalised migration at Finland's eastern border will remain high for the time being. The Russian authorities claim that they continue to lack any legal ways of preventing people legally residing in Russia from leaving the country via border crossing points. This is an indication of Russia's willingness to allow this type of migration to continue and its ability to control it. Throughout the winter of 2023–2024, there have been people staying in areas close to Finland's eastern border and waiting for the opportunity to come to Finland. While this has been going on, it has transpired that the transit of would-be migrants from their country of origin to Finland's border may only take a few days when manoeuvred and controlled by Russian authorities. It is not easy or even possible to obtain reliable and comprehensive information on the number of migrants in the vicinity of Finland. The smuggler organisations are monitoring the situation closely, as facilitation of illegal entry is also a highly lucrative business for them. The Russian authorities have failed to actively address the possible causes of the phenomenon, such as the issuance of visas in the countries of origin, allowing entry to and illegal residence in Russia. Most likely, this is going to be an enduring state of affairs.

2.3 Potential aggravation of the security situation

The Finnish authorities are making every effort to prepare for a continuation or aggravation of the situation at the eastern border. The eventuality that the situation worsens must also be

anticipated at the legislative level. Possibly, the border situation will become substantially aggravated during the spring or later.

In such an essentially aggravated situation, the pressure on Finland will intensify. As Finland is a member of the EU and NATO, these organisations are also, at least indirectly, affected by efforts to exert influence. Finland is also responsible to the EU and NATO for border control and the countering of threats. Should Finland open border crossing points, dozens or even hundreds of migrants could be given access, directed and compelled to go to the border. The situation could become uncontrollable, starting at the national border. Several hundred or even thousands of asylum seekers could arrive in Finland via border crossing points every week, depending on the number of open crossing points. There could be public disturbances at the crossing points. Those trying to enter the country could carry instruments with the intent to harm the authorities. Frustration and the instructions given to those trying to enter the country could give rise to violent incidents. Normal cross-border traffic might not be possible.

Migrants could also be directed to closed border crossing points or even forced to go over temporary barriers. Violent attempts to forcibly enter the country by taking advantage of large numbers of migrants could be prevented, but dozens of people could manage to slip in as a result of these incidents. Violent crossings of border barriers and attempts to do so could lead to health-threatening incidents and the use of force, as a result of which both migrants and officials could be injured. Feelings would be running high and could spiral into something even more sinister and violent.

The facilitator of instrumentalised migration could also give access to groups of migrants and transport them in a controlled manner to different areas along the border. Hundreds of asylum seekers could enter into Finland across the terrain over a short period of time. All the people arriving in Finland might not be detected and caught in the border area. This situation could also be exploited for other hybrid influencing purposes. The situation could escalate into coastal areas and the archipelago. Whatever the circumstances, the movements and motivation of the migrants trying to enter Finland are likely to pose a risk to the lives and health of those who set out on the journey. At the same time, this would give tools to blame Finland for the problems of the persons brought to the Finnish border.

Asylum seekers could arrive in population centres near the border and apply for asylum in different parts of Finland. Some would probably be able to continue their journey to other Schengen countries without any contact with and registration by the authorities. On the Finnish side, facilitators of illegal entry could also become active in the border areas. Confrontations might ensue in the course of interaction between the irregular migrants and those living in the country permanently.

Aside from its in-house resources, the Border Guard would have to rely on the support of national and international partners to manage the situation in such cases. Despite all the resources available, there would be a risk of exhaustion of resources if the situation were to deteriorate on several fronts at the same time.

Due to the pressure at border crossing points, only limited resources could be allocated to control the other areas along the border. In reality, in the absence of technical surveillance, illegal crossings at areas other than official border crossing points could only be detected on inland roads or in built-up areas, from where the migrants would be rounded up and transported to registration centres. A significant percentage of illegal border crossings would probably go undetected at the border, or they could not be dealt with immediately due to a lack of resources.

The process of registering the migrants would likely become congested to the extent that some would remain unregistered for weeks despite the fact that they were staying at a registration centre. A managed increase in reception capacity would not meet the need and the migrants would probably be placed in emergency accommodation in municipalities. Once the detention units filled up, less rigorous precautionary measures would have to be adopted, which would lead to people absconding from the process. While steps have been taken to respond to aggravated situations, the overall capabilities of the Finnish authorities could be seriously compromised, if a highly inflamed situation at the border were to persist for a prolonged period of time.

Some asylum seekers arriving in the country would be likely to pose risks to public order and security. Such persons may have a record of violent crimes, be trained soldiers, suspected war criminals, or be potentially radicalised or otherwise highly challenging to the social order. Unstable circumstances would also allow for the infiltration of persons who pose a serious threat to national security, such as persons acting on behalf of a foreign state or gathering intelligence. If the phenomenon continued and expanded, it could also incite protests, ferment confrontation between native and minority opinions, contribute to overall polarisation in society, and pose risks to public order or endanger the safety of the new arrivals themselves. If the trend persisted, it could constitute a long-term threat to national security because the newcomers would stay in the country and their arrival in Finland would be beneficial for the facilitators of instrumentalised migration. A situation could arise that would not be under the control of the authorities.

Overall, the situation could deteriorate simultaneously at the national border and inland as a result of a massive influx of asylum seekers. The growing challenges to managing the asylum system, the disruption of public order, the emerging risks to national security and the simultaneous deterioration in citizens' sense of safety and security would be unprecedented and their consequences difficult to predict. The high unpredictability of increased risks would expose society to other attempts to influence developments or achieve a gradual change, which would be advantageous to a foreign state and its most sinister ambitions.

The situation could also be aggravated from the perspective of information influence activities. In all the conceivable scenarios, Finland’s actions could be misrepresented as disproportionate and constituting violations of the rights of the migrants.

The situation would turn particularly threatening if Finland, aside from the influx of irregular migrants, were simultaneously exposed to a growing military threat or other serious hybrid action in areas other than border security. Such simultaneity would increase the tasks of the authorities and their complexity and complicate the prioritisation of tasks. In the military thinking of different countries, hybrid influence activities are closely linked to military thinking, and their use is also weighed in the context of military operations and the use of armed force. As far as preparedness is concerned, this cannot be ruled out and needs to be taken into account.

As a whole, it should be noted that instrumentalised migration may also constitute an unconventional approach in Russia's military thinking and may be used in an effort to exert influence. Based on its doctrine, Russia does not distinguish between conventional military and unconventional means. The objective is more important than the means. That objective may be to use unconventional means, such as instrumentalised migration, to slowly and indirectly exert influence on Finland, the EU and NATO by causing disunity, uncertainty, conflicts and confrontation that would not occur without this external influence. Hybrid influence activities seek to weaken the other party and increase the influencing party’s own relative power, or they are used for preparing the ground for potentially more serious efforts to exert influence that will

follow. Hybrid influence efforts aim at creativity, unconventionality, efficiency and denial. Often true intentions are concealed behind lies or other deception. The range of tools is wide and in line with the objective. These tools include political and economic pressure, instrumentalised migration and the use of criminals, cyber operations, information influence activities and destruction of critical infrastructure.

In order to safeguard national security and to ensure Finland's sovereignty, it is imperative for Finland to be able to defend itself more directly and effectively against instrumentalised migration and the pressures exerted by a foreign state. The current legislation limits the authorities' scope of action to what is being done now. To improve defences, new powers need to be granted. The goal should be to make the foreign state realise that instrumentalised migration is ineffective in terms of exerting pressure on Finland and achieving such state's objectives.

2.4 The Border Guard Act

The amendments to section 16 of the Border Guard Act, which entered into force in July 2022 (Government Proposal 94/2022 vp), provide for the possibility of instrumentalised migration facilitated by a foreign state or other actor. Under section 16, subsection 1 of the Border Guard Act, where it is deemed necessary to prevent a serious threat to public order, national security or public health, the Government may decide to close border crossing points for a fixed period or until further notice. Any immediate actions necessary in urgent situations are decided by the Ministry of the Interior until the matter is decided by the Government. The Ministry of the Interior shall present its decision to the government plenary session without delay.

According to section 16, subsection 2, the Government may decide to centralise the submission of applications for international protection at one or more border crossing points at Finland's national border, if this is necessary to prevent a serious threat to public order, national security or public health, and where it involves an exceptionally high number of migrants in a short period of time or information or a justifiable suspicion that entry is taking place due to the influence of a foreign state or another actor. Subsection 3 stipulates that if the Government has made the decision referred to in subsection 2, international protection may be applied for at Finland's national border only at the border crossing point where application submissions for international protection are centralised. A derogation from this may be made in individual cases, taking into account the rights of children, people with disabilities and other persons in a particularly vulnerable position.

Under subsection 4, border crossing points shall not be closed, cross-border traffic shall not be restricted or the submission of applications for international protection shall not be centralised more than is deemed necessary to prevent a serious threat to public order, national security or public health. Such decisions shall be repealed when they are no longer necessary to prevent any of the said threats. The Ministry of the Interior shall provide a sufficient degree of information on the decision. According to section 16, subsection 5, the measures referred to in said section may not prevent the right of Finnish citizens from arriving in the country or the right of anyone from leaving the country, or violate the rights of those covered by European Union law on free movement or anyone's right to international protection.

The Constitutional Law Committee reviewed the current section 16 of the Border Guard Act at the time of its enactment. In its statement, the Constitutional Law Committee explained the ruling of the European Court of Human Rights on the prohibition of collective expulsion with reference to the case *N.D. and N.T. v. Spain* (8675/15 and 8697/15). The Constitutional Law Committee pointed out that, according to said ruling, for Contracting States whose border also

constitutes the external border of the Schengen area, the effective exercise of rights under the ECHR requires that States provide legal channels of entry for persons arriving at their borders. In its ruling, the ECtHR held that Spain had not violated the prohibition of collective expulsion by returning to the Moroccan side of Spanish territory people who had forcibly crossed the border fence, as Spain had offered people a de facto possibility of legal entry through a single border crossing point. The assessment was not affected by the fact that access to the place in question could have been physically challenging (Constitutional Law Committee statement PeVL 37/2022 vp, paragraph 29).

The Constitutional Law Committee found that in the case of instrumentalised migration, there is no legal impediment that would prevent the state from determining the number or location of border crossing points. The Constitutional Law Committee went on to say that, under highly anomalous circumstances, a short-term total closure of the border may be possible, provided that such a measure, limited in time only to what is strictly necessary, is capable of safeguarding the correctness of the entry procedure (Constitutional Law Committee statement PeVL 37/2022 vp, paragraph 30). 'Short term' is not defined in more detail in the statement of the Constitutional Law Committee.

In the view of the Constitutional Law Committee, the above-mentioned considerations must be taken into account in the decision-making by the authority applying section 16 of the Border Guard Act and in the implementation of the provision (Constitutional Law Committee statement PeVL 37/2022 vp, paragraph 30). Similarly, the Administration Committee underlined the importance of a case-by-case assessment of the situation at hand (Administration Committee statement HaVM 16/2022 vp).

So far, the hybrid influence activities levelled against Finland have been met by resorting to the measures foreseen in section 16 of the Border Guard Act. As of 16 November 2023, the Government has taken several decisions to close border crossing points and to centralise the submission of applications for international protection at the land border between Finland and Russia. According to the Government decision (SM/2024/19) in force at the time the proposal was submitted, all border crossing points on the eastern border, with the exception of the Vainikkala border crossing point, and the border crossing points for maritime traffic at Haapasaari, the port of Nuijamaa and Santio intended for leisure boating are closed for the time being. In addition, the submission of applications for international protection at Finland's external borders has been centralised at the border crossing points for air and maritime traffic referred to in sections 6 and 8 of the Government Decree on Border Crossing Points and the Division of Border Check Duties at Border Crossing Points (901/2006), with the exception of the closed border crossing points at Haapasaari, the port of Nuijamaa and Santio.

The Government decisions are designed to stop instrumentalised migration and restore border traffic to normality. While the measures foreseen in section 16 of the Border Guard Act may help manage the situation at the eastern border, they are only capable of preventing the facilitation of instrumentalised migration by a foreign state to a limited extent. The complete closure of the eastern border crossing points will prevent normal border crossings across the land border between Finland and Russia and will, therefore, have a significant impact on the enjoyment of fundamental and human rights by a large number of people. In particular, such complete closure have a considerable adverse effect on the freedom of movement, the protection of private and family life, the protection of property, the freedom to engage in commercial activity and the fundamental right to work.

Official assessments and the findings of the Board Guard suggest that instrumentalised migration would continue as before, if any border crossing points were open. The phenomenon

has resumed and at times become more difficult to manage when Finland has tried to open border crossing points for other traffic. Hence, it is advisable to explore and adopt optional measures to stop instrumentalised migration. At the same time, it is necessary to prepare for more serious developments in the context of such migration.

Parliament is currently discussing a government proposal on the use of technology in maintaining border security (HE 25/2024 vp). The government proposal for amending the Border Guard Act and certain related acts proposes extensions to the technical surveillance carried out by the Border Guard and new regulation on surveillance based on radio technology. The proposed regulation and new technology would allow for better situational awareness and foresight in the Border Guard's operational activities and contribute to more comprehensive decision-making on border security. Such new resources could enhance the Border Guard's performance capabilities and support the Government's decision-making in the face of instrumentalised migration.

2.5 Asylum procedures

The national regulation on the asylum procedure is based on Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast, hereinafter the *Asylum Procedures Directive*). The Asylum Procedures Directive defines an exhaustive set of rules under which Member States must examine all applications for international protection. However, neither the Asylum Procedures Directive nor the provisions of the Aliens Act (301/2004) regarding asylum procedures foresee a situation in which a foreign state makes use of instrumentalised migration to further its own purposes.

According to section 94, subsection 1 of the Aliens Act, an application based on a need for international protection which is lodged with the authorities at the Finnish border or on Finnish territory is processed in the asylum procedure. Subsection 2 of the same section stipulates that an alien who invokes his or her endangered human rights is considered to be applying for asylum unless he or she specifically states otherwise. Hence, there is no specific format for the request for international protection. According to the preliminary work on the Aliens Act (government proposal HE 28/2003 vp, p. 180), the authorities are required to interpret the applicant's intent in a way that is in their best interest.

Provisions on the asylum examination are set out in section 97 of the Aliens Act. Section 97, subsection 1 stipulates that the Finnish Immigration Service determines the identity, travel route and entry into the country of aliens applying for a residence permit on the grounds of international protection, and establishes orally the information necessary to determine the State responsible for processing the application for asylum. According to subsection 2, the Finnish Immigration Service conducts an asylum interview to establish orally the grounds given by the applicant for the persecution he or she has faced in his or her home country or country of permanent residence or for other violations of his or her rights or related threats.

Section 95 of the Aliens Act states that an application for international protection shall be lodged with police or border control authorities upon entry into the country or as soon as possible after the entry. The application is promptly registered by the police or border control authority.

Section 98 of the Aliens Act stipulates that applications for international protection are examined in a normal or accelerated procedure. The requirements for issuing a residence permit are assessed individually for each applicant. Due consideration in the process is given to the evidence provided by the applicant on their circumstances in the state in question and to up-to-

date information on such state available from various sources. According to section 98a of the Aliens Act, decisions on applications for international protection shall be made within six months of the lodging of the application, if the application is processed following the regular procedure. Under special circumstances, the process may be extended up to a maximum of 21 months. Decisions on the applications are always made by the Finnish Immigration Service, which is the competent authority to grant residence permits in response to applications for international protection, as provided in section 116 of the Aliens Act. If the decision on international protection is negative, a decision on removal from the country is issued in the same decision, if necessary.

According to section 104 of the Aliens Act, an application for international protection may be examined in an accelerated procedure if the application is considered manifestly unfounded under section 101. An application may be considered manifestly unfounded if: 1) no grounds specified in section 87, subsection 1 or section 88, subsection 1 or other grounds that are related to non-refoulement have been presented, or if the claims presented are clearly implausible; 2) the applicant obviously intends to abuse the asylum procedure: a) by deliberately giving false, misleading or deficient information on matters that are essential to the decision on the application; b) by presenting forged documents without an acceptable reason; or c) by lodging his or her application only for the purpose of delaying or frustrating the enforcement of a decision already made or imminent that would mean his or her removal from the country; or 3) the applicant comes from a safe country of origin where he or she may be returned. An application examined using the accelerated procedure must be decided within five months of its submission.

For the Finnish Immigration Service, using the accelerated procedure means that the application must be examined and the decision made more quickly than in the so-called regular procedure. When the accelerated procedure is used, the appropriate authority must examine the application just like any other application and declare it unfounded. After that, the application can be processed by applying the rules for accelerated procedure if any of the criteria for the accelerated procedure is met. Hence, the application can never be rejected simply because one of the criteria for the accelerated procedure is satisfied in a given situation. For the applicant, the accelerated procedure usually means that there is no automatic right to remain in the Member State pending the outcome of any appeal procedure. However, the applicant has the right to apply to a court of law for the right to stay pending the outcome of the request for review or appeal, as well as the right to stay pending the decision of the court as to their right to stay pending the outcome of the actual appeal.

An application for international protection may be inadmissible, if the criteria set out in section 103 of the Aliens Act are met. Under said section, the application may be considered inadmissible if the applicant 1) has arrived from such a safe country of asylum defined in section 99 or a safe third country defined in section 99a where he or she may be returned; 2) may be sent to another State which, under the Council Regulation on determining the State responsible for examining an asylum application, is responsible for processing the asylum application; 3) has been granted international protection in another EU Member State, to which he or she may be sent; or 4) has made a subsequent application which does not meet the conditions laid down in section 102, subsection 3, for the admissibility of an application. Even if the application is found inadmissible, the Finnish Immigration Service will still interview the applicant in person and issue a reasoned decision.

Chapter 13 of the Aliens Act sets out the provisions on a judicial review. Under section 190 of the Aliens Act, a judicial review of decisions on international protection, etc., may be requested by way of appeal. Appeals are governed by the Administrative Judicial Procedure Act

(808/2019). Under Section 196 of the Aliens Act, an administrative court decision on international protection, etc., may be appealed to the Supreme Administrative Court if the Supreme Administrative Court gives leave to appeal. The criteria for granting leave to appeal set out in the Aliens Act are slightly stricter than those specified in the Administrative Judicial Procedure Act.

As a rule, a decision on refoulement in an international protection case cannot be enforced until the case has been finally decided. However, section 201 of the Aliens Act contains exceptions to the criteria for legal validity in the context of enforcement with regard to accelerated procedures applied to cases of international protection. Even so, the applicant has the right, under section 198b of the Aliens Act, to file a petition with the administrative court for the prohibition or suspension of enforcement and the right to stay in the country to wait for the decision in response to such a petition. According to section 198b of the Aliens Act, the petition must be filed within seven days of the service of the decision on the applicant, and the court of law is also required, under section 199 of the Aliens Act, to make the decision on the petition within seven days.

2.6 Legislation on disruptions affecting the asylum procedures

The Aliens Act only recognises the disruptive effect of large numbers of third-country nationals or stateless persons applying for international protection at the same time. Under section 95, subsection 3 of the Aliens Act, the time limit for the registration of the application may be extended up to 10 weekdays and the time limit for processing the application up to 21 months, as provided in section 98a.

If the number of migrants entering the country is exceptionally high, which makes it impossible to establish that the conditions for entry are met and to register the aliens in the normal procedure, the Government may, under section 133 of the Aliens Act, decide that persons whose conditions for entry or identity are unclear may be sent to the registration centre referred to in section 3 of the Act on the Reception of Persons Applying for International Protection for the purposes of registration. During the registration period, the migrant is obliged to stay at the registration centre, unless their state of health or other important personal circumstances require otherwise.

In the event of the above-mentioned disruptions, the various EU bodies and agencies may also be called upon to assist with the various stages of the asylum application examination. Pursuant to Sections 95 and 133 of the Aliens Act, a member of the team seconded from the European Border and Coast Guard's permanent corps pursuant to Regulation (EU) 2019/1896 of the European Parliament and of the Council on the European Border and Coast Guard Agency and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624 (hereinafter the *European Border and Coast Guard Regulation*) and a member of the team seconded from the European Border and Coast Guard's permanent corps pursuant to Regulation (EU) No 2021/2303 of the European Parliament and of the Council repealing Regulation (EU) No 439/2010 (hereinafter referred to as the *EU Agency for Asylum Regulation*) may assist the police and the border control authority in tasks related to the registration of an application for international protection. Additionally, according to section 116a of the Aliens Act, a member of an asylum support team deployed to Finland may perform tasks related to asylum examinations under section 97 and effect service referred to in section 205, subsection 4.

Hybrid influence activities exercised by a foreign state by way of instrumentalised migration is not recognised as a disruptive condition in the provisions of the Aliens Act regarding asylum procedures.

2.7 Detention of aliens

Detention is a precautionary measure of last resort. Pursuant to section 121 of the Aliens Act, an alien may be detained on the basis of an individual assessment, if the other precautionary measures provided for in the Aliens Act are insufficient. The other precautionary measures under the Aliens Act currently in force, namely the obligation to report, the obligation to hand over a travel document or travel ticket to the authorities, the provision of security and the residence obligation, are less severe precautionary measures than detention and so take precedence over detention.

The provisions on the general conditions for imposing precautionary measures are set out in section 117a of the Aliens Act. Precautionary measures referred to in the Act may be imposed on an alien if this is essential and proportionate for establishing that the alien meets the conditions for entry into or stay in the country, or for preparing a decision to remove the alien from the country or ensuring the enforcement of such a decision, or otherwise supervising his or her departure from the country.

Once the necessary general conditions for the imposition of precautionary measures exist, potential detention needs to be assessed in the light of the specific criteria for detention listed in section 121 of the Aliens Act. According to section 121, subsection 1 of the Aliens Act, if the other precautionary measures referred to in the Aliens Act are insufficient, the alien may be detained on the basis of an individual assessment, if, taking account of the alien's personal or other circumstances, there are reasonable grounds to believe that the alien will hide, abscond or in some other way considerably hinder the issue of a decision concerning him or her or the enforcement of a decision to remove him or her from the country; detention is necessary for establishing the alien's identity; the alien has committed or is suspected of having committed an offence and the detention is necessary to secure the preparations for or the enforcement of a decision on removal from the country; the alien has, while in detention, lodged a new application concerning international protection predominantly for the purpose of delaying or disrupting the enforcement of a decision on removal from the country; the detention is based on Article 28 of the Council Regulation on determining the State responsible for examining an asylum application; or taking account of the alien's personal and other circumstances, there are reasonable grounds to believe that he or she will pose a threat to national security. When it comes to activities that endanger law and order and public security or national security, any process to deprive aliens of their liberty is primarily based on the mechanisms available under the Police Act, the Criminal Investigation Act and the Coercive Measures Act just as in the case of Finnish nationals.

Decisions on detention and the processing of the decision by district courts are governed by the provisions set out in sections 123 through 129 of the Aliens Act. According to section 123 of the Aliens Act, a decision to detain an alien, when taken by the police, is made by a commanding officer in the local police department, the National Bureau of Investigation or the Finnish Security and Intelligence Service, and when taken by the Border Guard, by a public official of the Border Guard with the power of arrest or a border guard holding at least the rank of lieutenant. Any decision on detention must be submitted to a district court for a review. The district court determines whether the criteria for detention are satisfied.

Section 123a of the Aliens Act stipulates that a detained alien shall, as soon as possible, be placed in a detention unit referred to in the Act on the Treatment of Detained Aliens and on Detention Units (116/2002, hereinafter *Detention Act*). Subsection 2 states that a public official making the decision on detention may decide to place a detained alien exceptionally in police custody facilities if the detention units are temporarily full, or the alien is detained far from the

nearest detention unit, in which case the detention in police custody facilities may last up to a maximum of four days. Under the Aliens Act, a detained alien may not be placed in an ordinary prison for prisoners sentenced to imprisonment.

The period of detention is limited. According to section 127 of the Aliens Act, a detained alien shall be released as soon as the criteria for detention cease to apply and no later than six months after the decision on detention was made. For reasons related to removal from the country, the period of detention may be longer than this, however not exceeding 12 months.

According to section 122 of the Aliens Act, for a child to be detained, it is necessary that the general and special preconditions for detention are met and that an individual assessment concludes that the other precautionary measures referred to in the relevant section have been ascertained to be insufficient and detention is declared necessary as a measure of last resort. Additionally, a child must be heard as provided in section 6, subsection 2 of the Act before any decision is made, and a social worker assigned by the institution responsible for social welfare must be provided an opportunity to be heard. Moreover, if a child is held in detention together with his or her custodian, a further precondition for detention is that it is essential for maintaining the family contact between the child and his or her custodian. Under the same provision, an unaccompanied child under 15 years of age may not be detained. An unaccompanied child who has reached 15 years of age who is applying for international protection may not be detained before a decision on his or her removal from the country has become enforceable. A detained unaccompanied child shall be released no later than 72 hours after the start of the detention. For special reasons the detention may be extended by up to 72 hours.

Most detention orders are issued for reasons related to removal from the country. For all practical purposes, detention is the only precautionary measure that can ensure that the person stays at the predetermined location at the time of removal. Detentions in the early stages of the asylum procedure, for example for the purpose of verifying identity, are rare. Under the Asylum Procedures Directive, a person may not be detained simply because they have applied for international protection.

2.8 Amendments to asylum procedures legislation currently under preparation

2.8.1 General

The Ministry of the Interior has prepared several legislative amendments related to international protection and asylum procedures. Some are currently being discussed by Parliament. The amendments will make it possible to adopt the stricter rules and best practices allowed under the various directives, which will improve the efficiency and quality of the asylum system, while at the same time tightening the Finnish asylum policy as a whole.

2.8.2 Border procedure

Parliament is currently discussing a government proposal (HE 30/2024 vp) for introducing a border procedure in Finland based on the Asylum Procedures Directive. The border procedure will make it possible to examine asylum applications that are likely to be unfounded quickly at or near the external border. An application may be deemed to be apparently ill-founded if it can be processed using the accelerated procedure in accordance with the Asylum Procedures Directive, or if it is inadmissible. When the border procedure is applied, applications must be examined individually within four weeks. All the provisions on inadmissibility and accelerated procedure also apply to the border procedure and the applicants are also entitled to reception

services under the Act on the Reception of Persons Applying for International Protection and on the Identification of and Assistance to Victims of Trafficking in Human Beings (hereinafter the *Reception Act*).

The border procedure differs from, say, the accelerated procedure in that the applicant must remain at or near the border or transit area during the examination of the application. The purpose of the border procedure is to ensure that the applicant is not admitted into the country during the asylum procedure. From the applicant's standpoint, the border procedure means, first and foremost, that they are not allowed to move freely in the territory of the country involved. This is what is known as a "legal fiction", because in reality and in such a situation the person is physically present on the territory and within the jurisdiction of the state involved and hence within the scope of Union law, but they are not yet deemed to be present on the territory of the Member State. However, the restriction of freedom of movement is not a precautionary measure, but a procedural restriction. Even detention is conceivable as a measure of last resort, subject to individual assessment and a decision by the district court. However, detention cannot be automatic in respect of all applicants even when the border procedure is applied. For example, when applied to minors, it must be used with great restraint.

As in all asylum procedures, the border procedure requires a thorough and fair examination of the application and should be carried out with due regard to all the fundamental principles and guarantees provided in the Asylum Procedures Directive as well as the rights of the applicants. Hence, the adoption of the border procedure does not change the fact that applicants must be interviewed and the grounds for asylum examined just as thoroughly as in other asylum procedures. The applicant should be guaranteed the normal legal remedies, such as individual processing of applications, access to legal assistance and interpretation services as well as the right to appeal the decision. With persons requiring special procedural guarantees (e.g. victims of psychological, physical and sexual violence) and unaccompanied minors, the border procedure may only be applied to a limited extent.

If the application is denied, the applicant will not have an automatic right to remain in the country to await the decision of the court of appeal. The Asylum Procedures Directive makes specific provision for appeals in relation to the border procedure. The applicant must have access to interpretation and legal aid services and be given at least one week to prepare a request to the court to remain in the area pending the outcome of the appeal. The maximum four-week time limit for processing required under the Asylum Procedures Directive does not include the time used for filing an appeal. The applicant has the right to file a petition with a court of law for the prohibition of the enforcement of removal from the country and wait for the final outcome in the country involved.

The border procedure would provide a new tool for more efficient processing of applications and improve the capability for managing the situation once the applicants are on the Finnish side of the border and have lodged an asylum application. One particular benefit offered by the border procedure is that an applicant who needs to stay at or near the border and is likely to have their asylum application rejected will not be able to proceed to other parts of Finland or further on to Europe during the procedure. At the EU level, the border procedure is considered one of the most effective means of preventing further migration from one Member State to another while the application is being examined. However, the real benefits of the border procedure will only be realised if the returns are organised efficiently. If an applicant could not be returned to their country of origin or to another safe country, they would inevitably be allowed entry at some point, as restrictions on freedom of movement or detention can only be extended within the time limits laid down by law.

2.8.3 Accelerated procedure

In the same government proposal (HE 30/2024 vp) as the border procedure, it is proposed that all the grounds for the accelerated procedure enabled by the Asylum Procedures Directive that have not yet been included in the Aliens Act be included in the Act. These criteria apply to situations where a person has made a subsequent application that is not inadmissible; the person has entered the country illegally or continues to reside there illegally; the applicant refuses to comply with the obligation to consent to the taking of fingerprints for Eurodac; and there are serious grounds for regarding the applicant a threat to the national security or public order of a Member State. Moreover, regulation will be clarified by using, where possible, the same wording as in the Directive when legislation on the criteria for the accelerated procedure is drafted. This will ensure that the procedures can be applied in all situations covered by the Asylum Procedures Directive.

Amendments to the accelerated procedure may also improve the capabilities for managing the situation and enhance efficiency throughout the asylum procedure. The incorporation of the said criteria set out in the Directive into the Aliens Act would make it possible to apply the provisions to the extent and for the purposes intended by the Directive. The changes may be expected to increase the number of applications diverted to the border procedure to some extent.

2.8.4 Detention legislation

Preparations are also being made by the Ministry of the Interior for amending the legislation on detention. The legislative project is based on the agreements on detention and entry bans in the Government Programme. As part of the same project, the Ministry will update the provisions on entry bans and prepare amendments to make it possible to withdraw a permanent residence permit and impose an entry ban on an alien residing outside Finland.

As far as detention is concerned, a new criterion would be added to the specific conditions for detention set out in the Aliens Act, under which a person who repeatedly causes significant disturbance or poses an imminent and present danger to public order and the security of others in or near a reception centre may be detained if apprehension for up to 24 hours under the Police Act is found to be insufficient. This would make it possible to respond to organised disruptive incidents in the reception system requiring the intervention of several police patrols. An apprehension period longer than that permitted under the Police Act is intended to restore calm to reception centres by segregating repeatedly disruptive persons from the other clients of the centre for longer periods than is currently possible. Another new detention criterion would make it possible to detain asylum seekers at the point of entry if they pose a threat to human security. Any detention would still require an individual assessment, and not all asylum seekers could be automatically detained.

Aside from the new criteria, preparations are being made to extend the maximum duration of detention. EU legislation allows the maximum period of detention to be extended from 12 to 18 months. The need to extend detention periods beyond 12 months would only be necessary in few isolated cases. Usually, such a need would relate to return and the problems facing the police in obtaining the necessary travel documents for a return to the country of origin. As a result of these amendments, aliens would be obligated to cooperate with the authorities throughout the return process. The obligation to cooperate would also be added to the criteria related to the risk of absconding. Failure to cooperate would increase this risk, thereby justifying detention. Additionally, the concept of the absconding risk would be clarified by including in the law an unambiguous list of the criteria applied in assessing the risk of absconding and by

eliminating the requirement for imposing less severe precautionary measures in preference to detention when a risk of absconding is present.

2.9 International human rights obligations

Among the human rights provisions of special relevance to this government proposal are, in particular, the principle of non-refoulement based on the ECHR Article 2 (right to life) and Article 3 (prohibition of torture) of the Convention for the Protection of Human Rights and Fundamental Freedoms (Finnish Treaty Series 18 and 19/1990; as subsequently amended by Finnish Treaty Series 71 and 72/1994, Finnish Treaty Series 85 and 86/1998, Finnish Treaty Series 8 and 9/2005, Finnish Treaty Series 6 and 7/2005 and Finnish Treaty Series 50 and 51/2010; hereinafter the ECHR), as well as the prohibition of collective expulsion referred to in Article 4 of Protocol No. 4 to the ECHR.

Also relevant are the Geneva Convention relating to the Status of Refugees (Finnish Treaty Series 77 and 78/1968) and the principle of non-refoulement in Article 33(1) thereof, the International Covenant on Civil and Political Rights (Finnish Treaty Series 7 and 8/1976, hereinafter ICCPR) and the principle of non-refoulement in Articles 2 and 6 (right to life) and 7 (prohibition of torture) thereof, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Finnish Treaty Series 60/1989, hereinafter the Convention against Torture) and the explicit principle of non-refoulement in Article 3 thereof.

Finland is a party to these Conventions, as are all the other EU Member States. All 46 Member States of the Council of Europe are parties to the EHRC. The ICCPR has 174 signatories and the Convention against Torture 173.

The International Convention for the Protection of All Persons from Enforced Disappearance (Finnish Treaty Series 20 and 21/2023) also contains an explicit non-refoulement provision (Article 16). Finland became a party to this Convention in 2023.

As far as persons in a particularly vulnerable position are concerned, Conventions of particular relevance in this context include the Convention on the Rights of the Child (Finnish Treaty Series 59 and 60/1991); the Convention on the Rights of Persons with Disabilities (Finnish Treaty Series 26 and 27/2016); the Convention on the Elimination of All Forms of Discrimination against Women (67 and 68/1986); the Council of Europe Convention on preventing and combating violence against women and domestic violence (Finnish Treaty Series 52 and 53/2015); and the Council of Europe Convention on Action against Trafficking in Human Beings (Finnish Treaty Series 43 and 44/2012).

2.9.1 Applicability and jurisdiction of the human rights conventions

The scope of international human rights conventions is determined by the provisions contained in the conventions. According to Article 1 of the ECHR, the Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of the Convention. The concept of jurisdiction within the meaning of Article 1 of the ECHR is central to assessing the scope of a state's obligations under the ECHR and the rights guaranteed under the ECHR in respect of individuals. According to the case law established under the ECHR, states only have an obligation to ensure the rights protected by the ECHR in respect of persons within its jurisdiction. In its case law, the ECtHR has primarily emphasised the territorial nature of the jurisdiction, although Article 1 has also been applied in certain extraterritorial contexts. The interpretation of Article 1 made by the ECtHR regarding border crossing and entry situations is relevant to the current proposal. In its case law, the ECtHR has held that the actions

of the state border guards or the police at the land border are within the territorial jurisdiction of the state, for example in a situation where an asylum application has not been received and entry is refused (*M.A. and Others v. Lithuania*, 59793/17, § 70; *M.K. and Others v. Poland*, 40503/17, §§ 129-132; *D.A. and Others v. Poland*, 51246/17, §§ 33-34). The ECtHR has also applied Article 1 to the activities of the coast guard on the high seas.

2.9.2 Non-refoulement

Non-refoulement refers to the principle that no one may be returned to a territory where they would face the death penalty, torture, persecution or other inhuman or degrading treatment. A non-refoulement order is mandatory when there are reasonable grounds to believe that a person would be subjected, inter alia, to torture, crimes against humanity, genocide or slavery. Under Article 33(1) of the Geneva Convention relating to the Status of Refugees, the principle of non-refoulement is a contractual obligation binding on Finland, too. The Article provides that no Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

While the ECHR does not contain any explicit provision on non-refoulement, the ECtHR has, in its case law, effectively derived the principle from the Convention. According to the ECtHR's established case law, no one may be extradited or expelled to a country where there is a risk of violation of Articles 2 (right to life) or 3 (prohibition of torture) of the ECHR (*F.G. v. Sweden*, 43611/11, §§ 110-111).

The right to life within the meaning of Article 2 and the prohibition of torture within the meaning of Article 3 of the ECHR are absolute in nature, i.e., they cannot be derogated from or limited, not even in a state of emergency. As non-refoulement is based on these rights, it is absolute as well. Hence, these rights do not involve any element of proportionality or necessity – unlike the restriction on freedom of expression or the right to privacy – either in principle or even in a state of emergency. These rights have also been considered independent of the conduct of the person concerned (e.g. *A and others v. United Kingdom*, 3455/05, paragraph 126).

In its case-law, the ECtHR has stressed the importance of non-refoulement, paying particular attention to whether the individual is effectively protected against arbitrary direct or indirect return to the country from which they have fled (*M.S.S. v. Belgium and Greece*, 30696/09, § 286). If there are reasonable grounds to suspect that a person runs a real risk of being subjected to treatment contrary to Article 3 (torture and inhuman or degrading treatment or punishment), an obligation not to return the person to that country follows (*Saadi v. Italy*, 37201/06, §§ 125-126). Moreover, states also have an obligation under Article 3 to assess the returnee's risk of being subjected to treatment contrary to Article 3 before removal from the country (*Ilias and Ahmed v. Hungary*, 47287/15, § 163), and such an assessment must be thorough (*F.G. v. Sweden*, 43611/11, § 113).

In its case law, the ECtHR has applied Article 3 to situations where persons have been prevented from applying for asylum at the border or where asylum applications have not been admitted and where a person has been returned or expelled from the border without the asylum application being examined. The Court has concluded that the respondent State had violated Article 3 in situations at the border where persons who had sought asylum or expressed fear for their security were removed to the immediate country of transit without substantive consideration of their asylum applications (*M.K. and others v. Poland*, 40503/17, § 184–186). The European Court of Human Rights (ECtHR) does not examine the applicants' asylum applications, but it has considered in its case law whether the respondent State has effectively

protected applicants against arbitrary return. If the respondent state has decided to turn the applicant away, it must assess whether the person would have access to an appropriate asylum procedure in a country of transit which offers effective protection against refoulement (Ilias and Ahmed v. Hungary, § 137). This assessment must be made at the initiative of the state involved, with due regard to what is then known about the country concerned and its asylum procedure (Ilias and Ahmed v. Hungary, § 148). Furthermore, it has been considered that the appellant must have the opportunity to demonstrate that the country concerned is not safe for them (*Ilias and Ahmed v Hungary*, § 148). The Court has emphasised the particular importance of this assessment in situations where the transit country is not a state party to the ECHR (*M.A. and others v. Lithuania*, 59793/17, § 104). In the absence of sufficient guarantees, it has been considered that the respondent State must also allow the asylum seeker to stay in its territory until the application has been properly examined (*M.K. and others v. Poland*, § 185; *D.A. and others v. Poland*, 51246/17, § 59). It has also been held that the State cannot deny access to its territory to persons alleging that they may be subjected to ill-treatment in the country of transit, unless adequate measures are taken to eliminate such risk (*M.K and others v. Poland*, § 178–179). If the State suspects that an asylum application is unfounded, the State still has an obligation under Article 3 either to conduct a substantive asylum examination or to assess thoroughly whether the person would have access in the receiving country to a proper asylum procedure providing protection against non-refoulement (*Ilias and Ahmed v. Hungary*, 47287/15, § 138).

In its most recent judgment in this case, *Sherov and others v. Poland*, 54029/17 (4 April 2024), the ECtHR has, on the above-mentioned grounds, reiterated a violation of Article 3 in a situation where Poland refused to accept applications for international protection from Tajik asylum seekers seeking to enter Poland from Ukraine and returned them to Ukraine without further examination. In its judgment, the ECtHR stated that Poland had violated the procedural limb of Article 3 of the Convention, as it had not examined whether Ukraine was a safe country for the applicants, whether they would have access to an effective and adequate asylum procedure there or whether they would be exposed to risk of chain refoulement from Ukraine or treatment contrary to Article 3. In the case, the Court held that the prohibition of collective expulsion (Article 4 of Protocol No. 4 to the ECHR) and the right to an effective remedy (Article 13 of the ECHR) taken in conjunction with Article 3 of the Convention and Article 4 of Protocol No. 4 to the Convention were violated. This case did not involve instrumentalised migration.

2.9.3 Prohibition of collective expulsion

Article 4 of Protocol No. 4 to the ECHR prohibits the collective expulsion of aliens. According to the ECtHR case law, collective expulsion means any measure compelling a group of aliens to leave the country without the opportunity to present their individual views against expulsion (*Khlaifia and others v. Italy*, 16483/12, § 237).

The ECtHR has held that removing persons from the country under Article 4 of Protocol No. 4 means that persons are removed from the territory of a State to the territory of another State against their will. It must be assessed separately whether removal from the country is collective expulsion by nature, that is, whether the persons are offered a genuine and effective opportunity to present claims concerning the expulsion in an interview, for example. No minimum number of people nor membership in a certain group is required for an expulsion to be considered a collective expulsion. Instead, the assessment is based on whether the matter has been examined in a reasonable, objective and individual manner.

A complaint under Article 4 of Protocol No. 4 to the ECHR can be lodged with the ECtHR by an individual claiming to be a member of a group that has been subject to collective expulsion.

Access to legal means of entry at the border and valid reason not to use such legal means

In its judgment *N.D. and N.T. v Spain* (8675/15 and 8697/15), the ECtHR held that for contracting states whose border also constitutes the external border of the Schengen area, the effective exercise of ECHR rights requires that states provide legal means of entry for persons arriving at their borders.

In its case law, the ECtHR has developed a two-tier test for assessing potential violations of Article 4 of Protocol No. 4. The test is carried out by first assessing whether the state provided effective and efficient access to legal means of entry and, second, whether the person had a valid reason, attributable to the contracting state, not to avail themselves of such legal means.

When assessing effective access to means of legal entry, it is first necessary to consider whether the State has made available genuine and effective access to means of legal entry, in particular border procedures, in order to allow all persons who face persecution to submit an application for protection, based in particular on Article 3, under conditions which ensure that the application is processed in manner consistent with the international norms.

The burden of proof as to whether persons have had effective and efficient access to legal entry procedures rests with the state involved. This assessment is made with due regard to, *inter alia*, the location of border crossing points, the modalities for lodging asylum applications, the availability of interpreters and legal assistance to inform asylum seekers of their rights, and documentation showing that asylum applications have actually been lodged at these border crossing points (*N. D. and N.T. v. Spain*, §§ 212-217; *A.A. and Others v. North Macedonia*, 55798/16 and 4 others, §§ 116-122; *Shahzad v. Hungary*, 12625/17, §§ 63-67 and M.H. and Others v. Croatia, 15670/18 and 43115/18, §§ 295-304).

Secondly, where the aforementioned legal means of entry exist, but the person has not made use of them and has entered the country illegally, it must be examined whether the person had a serious reason attributable to the contracting state (e.g. an over-regulated reception of asylum applications) for not making use of this legal means. In the absence of such a valid reason attributable to the contracting state, the illegal entry of the person may be attributed to the person's own activities, which could justify the lack of individual identification.

Culpable conduct

According to the established case-law of the ECtHR, the prohibition of collective expulsion is not violated if the absence of an individual expulsion order can be attributed to the applicant's own conduct *(Khlaifia v. Italy*, § 240, *Hirsi Jamaa v. Italy*, 27765/09, § 184 and M.A. v. Cyprus, § 247). However, this has been considered to require that an opportunity to lodge an application for international protection was actually available (*N.D. and N.T. v Spain*, §§ 131-132).

In the case *N.D. and N.T. v Spain*, the ECtHR held that there had been no violation of the ECHR Article 13 or Article 4 of Protocol No. 4, since, according to its settled case-law, the prohibition of collective expulsion is not considered to have been violated if the lack of an expulsion decision is due to the expellee's own culpable conduct. Aside from the large number of migrants (600 people) and their violent behaviour, the outcome of the judgment is essentially explained by the fact that, according to the ECtHR, Spain had actually offered people a real possibility of legal entry, since there had been one legal crossing point on the approximately 13 kilometre-long border between Spain and Morocco that was actually accessible (*N.D. and N.T. v. Spain*, § 201, § 218, § 222 and § 231).

Consideration of individual circumstances and situations

In situations where migrants enter the territory of a state without authorisation, despite the possibility of entering through a legal route and following the correct border procedure, the ECtHR has not applied the two-tier test mentioned above. Instead, the ECtHR has assessed (in order to determine whether the expulsion was of a 'collective' nature) whether persons were given the opportunity, before the expulsion decision was taken, to present their individual claims against expulsion and whether there are sufficient guarantees to show that their individual situation was effectively and individually taken into account (*Asady v. Slovakia*, 24917/15, § 62). The assessment is broadly similar to that applied to persons arriving at a legal point of entry, such as a border checkpoint (*M.K. v. Poland*, 40503/17, §§ 204-211, D.A. v. Poland, 51246/17, §§ 81-84 and *M.A. v. Latvia*, 25564/18, §§ 67-69).

The ECtHR has, in its assessment of individual circumstances and taking account of the situation, paid attention to the following: whether the authorities are trained to conduct interviews; whether information is provided in a language that the persons understands; the possibility of lodging an asylum application and requesting legal aid; the presence of interpreters and the real possibility of consulting a legal adviser (*Hirsi Jamaa v. Italy*, § 185; *Sharifi v. Italy* and Greece, 16643/09, §§ 214-225; *Khlaifia v. Italy*, §§ 245-254; *Asady v. Slovakia*, 24917/15, §§ 63-71; *M.K. v. Poland*,40503/17, §§ 206-210; *D.A. and Others v. Poland*, §§ 81-83 and *M.A. v. Latvia*, §§ 67-69.

As far as the prohibition of collective expulsion is concerned, the decisive criterion for characterising an expulsion as collective is whether the case of each individual alien in the group of people has been examined adequately, objectively and individually.

2.9.4 Effective legal remedies available to asylum seekers

Any restriction on the right to seek asylum must take into account the provision of Article 13 of the ECHR on the right to an effective remedy. Generally, with regard to removal decisions, Article 13 read in conjunction with Article 2 (Right to life) and Article 3 (Prohibition of torture) of the ECHR have been considered to require that the person must in practice have an effective remedy and that the remedy has suspensive effect where the person has made a substantiated claim that their rights under Article 2 and/or 3 would be violated as a result of removal. This has been considered to necessarily entail an independent and thorough examination of their claims that there are serious grounds for fearing treatment contrary to Articles 2 and/or 3 (*M.S.S. v. Belgium and Greece*, 30696/09, § 293; *M.K. and Others v. Poland*, 40503/17, 42902/17 and 43643/17, §§ 142-148 and 212-220). By contrast, in a situation where the person does not claim that there is a risk of a breach of Articles 2 and/or 3, the remedies need not have suspensory effect (*Khlaifia and Others v. Italy*, 16483/12, § 281). Even so, it has been required that the person has an effective opportunity to challenge the decision so that their appeal is examined in sufficient depth by an independent and impartial national court (*Khlaifia and Others v. Italy*, 16483/12, § 279; *Moustahi v. France*, 9347/14, §§ 156-164). Although a certain margin of discretion is left to the Member States, compliance with Article 13 has been considered to require that the substance of the complaint is properly examined by a competent body (M.S.S. v. Belgium and Greece, 30696/09, § 387).

In addition, in cases concerning the prohibition of collective expulsion, the ECtHR has required, as regards legal protection, that immigrants must have effective access to procedures for legal entry. The burden of proof to demonstrate this rests with the state involved. Matters to be taken into account have been considered to include the location of border crossing points; the

modalities for lodging asylum applications; the availability of interpreters or legal assistance to inform asylum seekers of their rights; and the fact that the applications were actually lodged at those border crossing points (*N.D. and N.T. v. Spain*, 8675/15 and 8697/15, §§ 212-217; *A.A. and Others v. North Macedonia*, 55798/16 and 4 others, §§ 116-122). The ECtHR has held that if an applicant, who had a well-founded complaint under Articles 2 or 3 regarding the risks they faced in the context of their removal, was effectively prevented from seeking asylum and had no possibility of an automatic suspensory remedy, the state had infringed Article 4 of Protocol No. 4 in conjunction with Article 13 of the ECHR (*M.K. and Others v Poland*, 40503/17, 42902/17 and 43643/17, §§ 219-220; *D.A. and Others v. Poland*, 51246/17, §§ 89-90; *Hirsi Jamaa and Others v. Italy*, 27765/09, §§ 201-207; *Sharifi and Others v Italy and Greece*, 16643/09, §§ 240-243). By contrast, if the person involved does not claim that there is a risk of a breach of Articles 2 and/or 3, it has been held that the remedies need not have suspensory effect (*Khlaifia and Others v. Italy*, 16483/12, § 281).

The ECtHR has also held that an excessively short appeal period, for example in the context of accelerated asylum procedures and/or appeals against removal decisions, may render the remedy ineffective in practice, contrary to the requirements of Article 13 and Articles 2 and 3 of the ECHR (*I.M. v. France*, 9152/09). However, legal remedies may prove effective if the applicant is heard and has sufficient guarantees to have his case resolved despite strict time limits (*E.H. v. France*, 39126/18, §§ 174-207).

2.9.5 Prohibition of abuse of rights

When the provisions of international human rights conventions relevant to the proposal and the rights guaranteed therein are assessed, the applicability of the prohibition of abuse of rights pursuant to Article 17 of the ECHR may also be evaluated in the context of instrumentalised migration. Article 17 of the ECHR states that nothing in the Convention may be interpreted as implying any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

However, the ECtHR has held that Article 17 only applies under exceptionally and under extreme circumstances (*Paksas v. Lithuania*, 34932/04, § 87) and that its application threshold is high (*Lilliendahl v. Iceland*, 29297/18, § 26). The overall purpose of Article 17 of the ECHR is to prevent totalitarian or extremist movements from abusing the principles expressed in the Convention for their own interests (*W.P. and others v. Poland*, 42264/98; *Paksas v. Lithuania*, § 87). According to the ECtHR, Article 17 should be invoked only if it is instantly clear that a person has attempted to invoke the Convention in order to engage in activities or carry out acts which are manifestly incompatible with the values of the Convention and with the intention of destroying the rights and freedoms enshrined in the convention (*Perinçek v. Switzerland*, 27510/08, §§ 114-115; *Roj TV A/S v. Denmark*, 24683/14, § 31 and *Šimunić v. Croatia*, 20373/17, § 38).

For the time being, the ECtHR has no case law concerning the prohibition of abuse of rights in matters related to entry. Instead, the case law has mostly concerned the freedom of expression (Article 10) and freedom of assembly and association (Article 11), i.e., questions of democracy of more general nature.

2.9.6 Right to liberty and security

According to Article 5 of the ECHR, everyone has the right to liberty and security of person. Any deprivation of liberty may only take place in accordance with a procedure prescribed by

law and should also be consistent with the purpose of the Article, which is to protect individuals against arbitrary detention (*S., V. and A. v. Denmark*, 35553/12, 36678/12 and 36711/12, § 73, and *McKay v. the United Kingdom*, 543/03, § 30).

Article 5(1)(f) of the ECHR explicitly provides for the possibility of depriving a person of his liberty by law in order to prevent his effecting an unauthorised entry into the country, or if action is being taken against such person with a view to deportation or extradition. The grounds of deprivation of liberty contained therein must be interpreted restrictively (*S., V. and A. v. Denmark*, § 73; *Buzadji v. Moldova*, 23755/07, § 84).

In such a case, the prohibition of arbitrary detention requires that the deprivation of liberty is carried out in good faith and that it is closely linked to the purpose of preventing unauthorised entry. Moreover, the prohibition requires that the duration and circumstances of detention are appropriate, taking into account that the measure does not apply to criminals but to aliens who have fled their country of origin, often in fear of their lives, and that the deprivation of liberty does not last longer than is reasonable having regard to the purpose of the detention (*Saadi v. the United Kingdom*, 13229/03, § 74). In such a situation, no right to detention exists if the deportation procedure is not carried out with due diligence (*A and others v. United Kingdom*, 3455/05, § 164).

2.9.7 Equality, non-discrimination and gender equality

Article 14 of the ECHR prohibits discrimination based on sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. Finland is also a party to the 12th Protocol to the European Convention on Human Rights (Finnish Treaty Series 8 and 9/2005), Article 1 of which prohibits all forms of discrimination.

The interpretation of human rights obligations on non-discrimination, equality and gender equality has been developed in the interpretative praxis and case law of human rights monitoring bodies, including in respect of grounds for discrimination not listed in said article. For example, in addition to the prohibited grounds for discrimination listed in Article 14 of the ECHR, the ECtHR has held that the prohibition of discrimination covers discrimination on grounds of age, gender identity, sexual orientation, health and disability, parenthood and marital status, employment, immigration status, etc.

According to the Committee on the Elimination of Racial Discrimination (CERD), which monitors the implementation of the International Convention on the Elimination of All Forms of Racial Discrimination (Finnish Treaty Series 37/1970), Finland must ensure that its existing legislation and other restrictions on the removal from its jurisdiction of nationals of non-Contracting States do not discriminate in purpose or effect against any person on grounds of race, colour, ethnic or national origin. In its conclusions, the CERD refers to its 2004 General Comment No 30 on the discrimination of non-citizens. In its General Comment, the CERD has stressed, inter alia, that States Parties have an obligation to guarantee equality between citizens and non-citizens.

2.10 EU legislation

2.10.1 Schengen Borders Code

Regulation (EU) 2016/399 of the European Parliament and of the Council establishing a Community Code on the rules governing the movement of persons across borders (the Schengen

Borders Code) sets out the provisions on the internal and external borders of the Schengen area, border crossing points, border control and border checks. The purpose of the Schengen Borders Code is to facilitate the free movement of persons within the European Union.

A Schengen external border means a border between a Schengen and a non-Schengen state, while the Schengen internal border is a border between Schengen states. According to Article 22 of the Schengen Borders Code, persons, irrespective of their nationality, may cross the internal borders of the Schengen area at any point without being subjected to border checks. According to Article 2(11) of the Schengen Borders Code, 'border checks' means the checks carried out at border crossing points, to ensure that persons, including their means of transport and the objects in their possession, may be authorised to enter the territory of the Member States or authorised to leave it. The Borders Code also contains more detailed provisions on how border checks are to be carried out

According to Article 14 of the Schengen Borders Code, the entry into the territory of the Member States must be refused of a third-country national, who does not satisfy all entry conditions laid down in the Borders Code. However, this does not restrict the application of special provisions concerning the right of asylum or international protection nor the granting of long-stay visas. According to the Article, entry may only be refused by a substantiated decision stating the precise reasons for the refusal. The decision is made by the competent authority under national law and it enters into force immediately. The persons whose access has been refused have the right to request a review of the decision. However, requesting a review does not postpone the enforcement of the decision to refuse entry.

Article 4 of the Schengen Borders Code requires Member States to apply the Regulation in full compliance with relevant EU law (including the EU Charter of Fundamental Rights), relevant international law (including the Geneva Convention Relating to the Status of Refugees), obligations relating to access to international protection, in particular the principle of non-refoulement, and fundamental rights. Article 7 of the Regulation requires border guards to fully respect human dignity in the performance of their duties, in particular in cases involving vulnerable persons. Any measures taken in the performance of their duties shall be proportionate to the objectives pursued by such measures.

2.10.2 International protection and the Common European Asylum System

The Charter of Fundamental Rights of the European Union guarantees the right to asylum and protection in cases of return, expulsion and extradition. Article 18 of the Charter of Fundamental Rights guarantees the right to asylum in accordance with the Geneva Convention and its Additional Protocol relating to the Status of Refugees as well as the Treaties of the European Union. Article 19 of the Charter prohibits collective expulsions and states that no one may be removed, expelled or extradited to a state where there is a serious risk that they would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.

Title V of the Treaty on the Functioning of the European Union (TFEU) covers the area of freedom, security and justice and includes provisions on border management, asylum and immigration. This is an area of shared competence (Article 4(2)(j) of TFEU), which means that national measures are restricted by EU measures. In the area of shared competences, Member States can exercise their competences where the EU has not exercised its own. To the extent that EU law provides for a particular matter, Member States are bound by that law. In the area of freedom, security and justice, Article 67(1) TFEU states that fundamental rights and the different legal systems and traditions of the Member States shall be respected.

Article 78 of this title provides for a Common European Asylum System. This article stipulates that the Union's asylum policy must comply with the Geneva Convention Relating to the Status of Refugees.

2.10.3 Requirements imposed by the Asylum Procedures Directive

As far as applying for asylum and processing asylum applications are concerned, the most relevant piece of EU legislation is the Asylum Procedures Directive. It defines an exhaustive set of rules under which Member States must examine all applications for international protection. The Directive applies to all applications for international protection lodged in the territory, at the borders, in the territorial waters or in the transit zones of the Member States. According to the Directive, an application is deemed to have been made when a person has expressed his or her wish to apply for international protection to an authority on the territory, at the borders, in the territorial waters or in a transit zone of a Member State. The person who made the application, the applicant, must then be given the opportunity to formally submit the application to the competent authority and the application must also be registered.

The Directive contains provisions on, inter alia, the procedures to be followed; the requirements for examining and deciding on an application; the competent authorities; the applicant's rights and legal protection during the procedure; the applicant's right to remain during the examination of the application; and the appeal procedure, and derogations from this. Under the Directive, the substance of an application may be left unexamined under certain circumstances. Even then, the applicant will be heard in a personal interview and a decision will be taken, which is subject to appeal under the provisions of the Directive. Inadmissibility under the Directive does not mean that an applicant can be removed without a decision on his/her application.

In the examination procedure for an application for international protection, the applicant must normally enjoy at least the following rights: the right to remain in the country until the determining authority has taken a decision; the right to use an interpreter to present his/her case, if heard by the authorities; the possibility to communicate with a representative of the United Nations High Commissioner for Refugees (UNHCR) and with organisations providing counselling to applicants for international protection; the right to be duly notified of the decision and to be informed of the facts and legal elements on which the decision is based; the possibility to seek advice from a legal adviser or other counsellor; the right to be informed of his/her legal position at decisive stages of the procedure in a language which he/she understands or may reasonably be supposed to understand; and, in the event of a negative decision, the right to an effective remedy before a court. Applicants will also have rights and obligations under the Directive laying down standards for the reception of applicants for international protection (hereinafter Reception Conditions Directive 2023/33/EU). Among other things, they must be provided with reception facilities provided for in the Directive as soon as the application is lodged.

The purpose of the Asylum Procedures Directive is to guarantee effective access to the procedure for granting international protection. According to recital 25 of the Directive, in the interests of a correct recognition of those persons in need of protection as refugees within the meaning of Article 1 of the Geneva Convention or as persons eligible for subsidiary protection, every applicant should have an effective access to procedures, the opportunity to cooperate and properly communicate with the competent authorities so as to present the relevant facts of his or her case and sufficient procedural guarantees to pursue his or her case throughout all stages of the procedure. Article 7 of the Asylum Procedures Directive requires Member States to ensure every third-country national or stateless person the right to lodge an application for international protection on his or her own behalf or through a third party. Article 6 of the

Procedures Directive requires Member States to ensure that a person who has made a request for international protection has an effective opportunity to lodge it as soon as possible. Under the same article, the authorities must also register the application. Making a request means the act of requesting protection from a Member State and lodging an application means the formal submission of the application to the correct authority. The right to make an application for international protection and access to the asylum procedure is a precondition, firstly, for respecting the right to an examination of the application and, secondly, for effectively guaranteeing the right to asylum under Article 18 of the Charter. Hence, EU law imposes a clear obligation on Member States to process an application for international protection made at its border, on its territory or in a transit area, without providing for flexibility or leaving any national discretion with regard to the fulfilment of this obligation.

2.10.4 Case law of the Court of Justice of the European Union

In several judgments, the Court of Justice has underlined the above-mentioned obligation imposed on Member States by EU law to examine an application for international protection lodged at its border, on its territory or in a transit zone. Most recently, the Court did so in its judgment concerning an instance of instrumentalised migration at the Lithuanian border with Belarus in 2021, C-72/22 PPU, M.A (ECLI:EU:C:2022:505, 30 June 2022).

The request for a preliminary ruling from the Supreme Administrative Court of Lithuania concerned, inter alia, the possibility for a Member State to restrict access to the asylum procedure on its territory in the event of the declaration of a state of war, a state of emergency or an emergency situation resulting from a massive inflow of migrants. To justify the restrictions in its national legislation concerning the right to make an application for international protection in the area, the Lithuanian Government invoked the threat to public order or internal security posed to the Republic of Lithuania at its borders, especially by the mass influx of migrants from Belarus.

In its judgment, the Court of Justice of the European Union clearly stated that Articles 6 and 7(1) of the Asylum Procedures Directive must be interpreted as precluding legislation of a Member State pursuant to which, in the event of a declaration of a state of war or a state of emergency or a declaration of an emergency due to a mass influx of migrants, illegally staying third-country nationals are de facto denied the opportunity of having access, in the territory of that Member State, to the procedure for examining an application for international protection (paragraph 56).

In the judgment, the Court of Justice stressed, among other things, the aim of the Asylum Procedures Directive to guarantee effective access to the procedure for granting international protection. At the same time, the right to make an application is a precondition, firstly, for respect for the right to have the application registered, lodged and examined within the time limits laid down in the Asylum Procedures Directive and, secondly, ultimately, for the effectiveness of the right to asylum as guaranteed by Article 18 of the Charter of Fundamental Rights of the European Union (paragraphs 60 and 61). According to the Court of Justice, even national legislation, which left a discretionary power to the authority to examine an application for international protection in the exceptional circumstances in question in light of the particular vulnerability of the applicant or other exceptional circumstances, did not fulfil the requirement of Article 6 of the Asylum Procedures Directive (paragraph 66).

In its judgment, the Court also referred to the border procedure as one of the means of responding to the situation described in the request for a preliminary ruling. According to the Court, the Asylum Procedures Directive, and in particular Article 43 on border procedures,

allows Member States to establish special procedures, to be applied at their borders, for assessing the admissibility of applications for international protection where the conduct of the applicant suggests that his or her application is manifestly unfounded or abusive. Such procedures enable the Member States to carry out, at the European Union's external borders, their responsibilities with regard to the maintenance of public order and the safeguarding of internal security, without it being necessary to rely on a derogation under Article 72 of the TFEU. According to this Article, the provisions of Title V of Part Three of the Treaty are without prejudice to the obligations of the Member States relating to the maintenance of law and order and the safeguarding of internal security (paragraph 74).

The Lithuanian legislation assessed in said judgment related specifically to a state of war, state of emergency or state of necessity resulting from the mass influx of migrants. The judgment does not refer to a situation where a foreign state uses migrants as a tool to exert influence on an EU Member State. As far as the influx of immigrants is concerned, the Court of Justice has, in several other judgments, reiterated the principle of the obligation of a Member State to examine an application for international protection lodged at its border, on its territory or in a transit zone. (C-808/18 (ECLI:EU:C:2020:1029, 17.12.2020), paragraphs 102–106; C-36/20 PPU (ECLI:EU:C:2020:495, 25.6.2020), paragraph63, C-821/19, (ECLI:EU:C:2021:930, 16.11.2021), paragraph 80.) In the criminal proceedings case C-808/18 (ECLI:EU:C:2020:1029, 17.12.2020) against Hungary, the Court further stressed that although the Schengen Borders Code requires Member States to ensure that the external borders of the Union are crossed lawfully, compliance with such an obligation cannot justify Member States' failure to respect a person's right to make an asylum application and have it registered and formally lodged in accordance with Article 6 of the Asylum Procedures Directive (paragraph 127). The Court has also held, as regards Hungary, that the obligation to disapply, where appropriate, national legislation, which is contrary to a provision of EU law having direct legal effect, applies not only to national courts but also to all state bodies, such as administrative authorities, which are required to apply EU law within the limits of their jurisdiction (C-924/19 PPU and C-925/19 PPU (EU:C:2020:367, 14 May 2020), paragraph 183). In its judgments on Hungary, the Court has specifically addressed the influx of large numbers of people.

In a recent judgment concerning Poland, C-392/22, (ECLI:EU:C:2024:195, 29.2.2024), the Court used the term 'pushback procedure' to refer to Poland's activities on the Belarusian border. The judgment concerns the Regulation of the European Parliament and of the Council of 26 June 2013 (Responsibility Determination Regulation) establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person; and whether the applicant can be transferred to the State responsible (Poland) if, according to the applicant, it has seriously and systematically infringed Union law in its treatment of third-country nationals by applying pushback procedures at its external borders against third-country nationals seeking to lodge an application for international protection and by detaining them at its border crossing points. The judgment also examines whether such violations are likely to call into question the principle of mutual trust between Member States to such an extent that they constitute an obstacle to a transfer, or whether they at least require the requesting Member State wishing to carry out the transfer to ensure that, if the transfer is carried out, the applicant for international protection concerned will not run the risk of being treated in a manner contrary to Article 4 of the Charter.

The Court reiterates the principle of Article 6 of the Asylum Procedures Directive on access to the asylum procedure and its link with Article 18 of the Charter of Fundamental Rights, as stated in several previous judgments. The Court regards as pushback procedures which, in practice, remove from the territory of the Union persons seeking to lodge an application for international

protection or remove from the territory of the Union persons who have lodged such an application on entering the territory of the Union before the application has been examined in the manner provided for by Union law. Such procedures are contrary to Article 6 of the Asylum Procedures Directive (paragraph 50). A practice of pushbacks is incompatible with that fundamental element of the Common European Asylum System, in that it prevents the right to make an application for international protection from being exercised, and, accordingly, prevents the progress, in accordance with the rules laid down by EU legislation, of the process of making and examining such an application (paragraph 52). A practice of pushbacks may also be incompatible with the principle of non-refoulement, if it consists in sending persons seeking to make, in the European Union, an application for international protection to a third country on whose territory they incur the risk of persecution referred to above (paragraph 53). The judgment took a position on whether an applicant can be transferred from another Member State to Poland, which is responsible for processing the application, under the Responsibility Determining Regulation, when, according to the applicant, it has seriously and systematically infringed upon Union law in its treatment of third-country nationals by applying pushback procedures at its external borders against third-country nationals. The judgment does not take a position on whether Poland did so and, if so, whether there was any accepted justification for derogating from EU law.

The EU Court of Justice has not been called upon to deal with a situation akin to the instrumentalised migration currently taking place at Finland's eastern border.

2.10.5 Possibilities to derogate from the requirements of the Asylum Procedures Directive

The Asylum Procedures Directive does not contain any provisions making it actually possible to derogate from the mandatory provisions of the Directive. The only exceptional circumstances where the Directive leaves some freedom of action to Member States is where large numbers of third-country nationals or stateless persons apply for international protection at the same time. Such freedom of action in said situations relates to the extension of the deadlines for registration and examination of applications and the authorities carrying out the examination.

According to the Asylum Procedures Directive, applicants must be allowed to remain in the Member State exclusively for the purpose of the procedure until the determining authority has taken its decision. An exception to this general rule can only be made in the case of a specific subsequent application and where the applicant is extradited to another Member State, for example as a result of the obligations arising from a European Arrest Warrant. An influx of large numbers of people, or other exceptional circumstances for that matter, do not constitute acceptable grounds for such derogation.

Article 78(3) of the Treaty on the Functioning of the European Union (TFEU) is part of the common policy on asylum matters and is also the explicit legal basis for responding to massive inflow emergencies and for potential temporary measures. Member States cannot act alone on the basis of this article, but the Commission has the right of initiative. The Council is called upon to approve the proposed measures on the motion of the Commission after consulting the European Parliament. The provisional measures referred to in said article are exceptional in nature. They may only be adopted if a sudden massive inflow of third-country nationals creates problems for the asylum system of one or more Member States which exceed a certain threshold in terms of urgency and seriousness.

In its case law (joined cases C-643/15 and 647/15 *Slovak Republic and Hungary v. Council*, EU:C:2017:631, 6.9.2017), the Court of Justice has held that provisional measures adopted under this paragraph may in principle also derogate from the provisions of legislative measures,

but such derogations must be limited both in their material and temporal scope so that they respond quickly and effectively by means of a provisional instrument only to a well-defined crisis situation. However, the Court went on to stress that the principle of proportionality requires that the objectives of the provision must be attainable through action by the EU institutions and that such action must not go beyond what is necessary to attain those objectives. Where there is a choice between several appropriate measures, the least restrictive one must be chosen and the harm caused must not be excessive in relation to the objectives pursued.

In response to the acute situation caused by the actions of Belarus, the Commission adopted on 1 December 2021 a proposal for a Council Decision on temporary emergency measures in favour of Latvia, Lithuania and Poland, based on Article 78(3) of the TFEU. The proposal sought to create an emergency procedure for asylum and migration management, which would apply to persons apprehended near the Latvian, Lithuanian or Polish border with Belarus after an unauthorised crossing of the external border and to persons who have presented themselves at a border crossing point. The proposed measures related to extending the deadlines for registering an asylum application to up to four weeks; extending the scope of the border procedure to all applicants under certain conditions; limiting material reception conditions to basic needs such as food, water, clothing, adequate health care and temporary accommodation from the date of application; and facilitating the return procedure following a decision on an application by allowing a derogation from EU rules.

Although the possibility for Latvia, Lithuania and Poland to restrict the reception of applications for international protection at their borders, on their territory or in transit was not proposed, recital 25 of the draft decision stated that "Any violent acts at the border must be avoided at all costs, not only to protect the territorial integrity and security of the Member State concerned but also to ensure the security and safety of the third-country nationals, including families and children that are awaiting their opportunity to apply for asylum in the Union peacefully. Where the Member States concerned are confronted at their 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 States 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 Decision." Hence, the Member States have the right as well as obligation to maintain security and public order at their borders and border crossing points. No decision was ever taken on the proposal in the Council, because Poland opposed it.

2.10.6 Instrumentalised migration in future EU legislation

On 23 September 2020, the European Commission adopted a comprehensive Communication (Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM(2020) 609, 23.9.2020, E 125/2020 vp) on the reform of migration and asylum policy (New Pact on Migration and Asylum). The Communication covered all key policy areas and relaunched the reform of the Common Asylum System. The Communication was accompanied by five legislative proposals, one of which was a Proposal for a Regulation addressing situations of crisis and force majeure in the field of migration and asylum, COM(2020) 613 final, hereafter the *Crisis Regulation* (U 61/2020 vp). During the Council negotiations, the proposal also included provisions on how to address situations of instrumentalisation in the field of migration, based on the Commission's proposal for a Regulation of December 2021 (COM(2021) 890 final, U 15/2022 vp). This proposal introduced, for the first time in EU asylum legislation, measures that could be used to deal with instrumentalisation situations. The proposal for the Crisis Regulation is also closely linked to the proposal for a Regulation on asylum and migration management (COM(2020) 610 final, hereinafter the *Management Regulation*, U 62/2020 vp)

and the amended proposal for a Regulation establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU (COM(2020) 611 final, hereinafter the *Procedural Regulation*, U 34/2016 vp). The Council and the European Parliament reached political agreement on the proposals in December 2023, with a view to adopting them still during this legislative term in spring 2024. They would be applied as of spring 2026, two years from now.

The original scope of the proposal included action in the event of a crisis situation and force majeure in the field of migration, and this remains the case. In addition, the scope of the Regulation has been extended to cover cases of instrumentalised migration, which would be considered one type of crisis situation. The definition of instrumentalisation would be the same as in the proposal for amending the Borders Code provisions governing the movement of persons across borders (COM(2021) 891 final, U 7/2022 vp). The instrumentalisation of migration would be defined as a situation where a third country or a hostile non-state actor directs illegal migration flows into the Union by actively encouraging or facilitating the movement of third-country nationals to the external borders or to a Member State, where such actions represent an objective of a third country to destabilise the Union or a Member State and are liable to endanger the essential functions of the State, the maintenance of law and order or the safeguarding of its national security.

In the situations covered by the Regulation, a Member State could ask the Commission for an assessment of its situation and the possibility of derogating from certain Union statutes and/or request joint measures to alleviate the situation. The final decision would be taken by the Council on the basis of a proposal from the Commission. The proposal is consistent with the Migration Management Regulation, i.e., solidarity is an obligation for Member States even in a situation of crisis and instrumentalisation, but Member States have the possibility to choose which measures they would be prepared to take. Such measures could include internal transfers of asylum seekers or beneficiaries of international protection under specific agreement, financial support, responsibility offsets (where a Member State takes responsibility for processing an application and does not transfer the applicant to the responsible State), other support measures needed by the beneficiary Member State (e.g. expert or material support), cooperation with third countries to respond to the situation, or any other measures necessary to respond to the situation.

A key element of the proposal is the possibility to derogate from certain provisions of the Procedural Regulation and the Management Regulation in situations of crisis, force majeure and instrumentalisation of migration. Member States could, for example, ask for the possibility to extend the registration period for applications, the duration of the border procedure and the return border procedure, and the scope of the border procedure. In a situation of instrumentalised migration, the registration period for applications could be extended up to four weeks from the standard five days. Both the border procedure and the return procedure could be extended by six weeks from the standard 12 weeks, and the applications of all instrumentalised applicants could be examined in the border procedure. Other derogations from the provisions on asylum procedures would not be possible in an instrumentalisation situation under the Crisis Regulation.

2.10.7 National security, public order and internal security in EU law

EU law recognises the special importance of national security. According to Article 4(2) of the Treaty on European Union (TEU), the Union shall respect the essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. National security, in particular, remains the sole responsibility

of each Member State. However, it does not warrant the general conclusion that all national security matters fall outside the scope of EU law.

The EU Treaties contain a number of explicit derogations to protect national security. Similar references are also found in EU law.

Article 72 of the Treaty on the Functioning of the European Union (TFEU) is included in Title V of the Treaty covering the area of freedom, security and justice. The Article is linked to Article 4(2) of the TEU. According to Article 72 of the TFEU, Title V shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security. In principle, this article has been considered to allow derogations from EU secondary legislation for the protection of public order and internal security. The derogation provided for in Article 72 TFEU must be interpreted strictly, as in general in respect of derogations. (e.g. judgment of 2 April 2020 on the joined cases of Commission v Poland C-715/17, Commission v Hungary C-718/17 and Commission v Czech Republic C-718/17, paragraph 144 and the case-law cited) The Member State should be able to demonstrate the grounds on which an exceptional migration situation would constitute a threat to public order or internal security within the meaning of Article 72 of the TFEU. The assessment should always be made on a case-by-case basis.

The key issue in assessing the possibility of derogation is the meaning to be given to the concepts of 'public order' and 'internal security' n the article. The Court of Justice has recognised that Member States have a wide margin of discretion when it comes to national security measures, but even then they are obliged to respect the EU Treaties. For example, when assessing Member States' measures to restrict free movement on the basis of national security, the Court has recognised that the national needs of Member States may vary from one Member State to another and from one period of time to another. However, the Court has also stressed that any restrictions imposed by Member States must be appropriate and necessary and proportionate to the objectives sought. According to the case-law of the Court, however, the concept of 'public order' has been considered to require that a situation represent a genuine, present and sufficiently serious threat affecting a fundamental interest of society. From the standpoint of public security, the relevant factors include whether there is a threat to the functioning of State institutions or its basic public services or to the survival of the population, a risk of serious disruption to foreign relations or the peaceful coexistence of peoples, or a threat to military interests. The fulfilment of these conditions should be assessed on a case-by-case basis (*Aladzhov*, C-434/10, 17.11.2011, paragraph 35 and *Tsakouridis*, C-145/09, 23.11.2010, paragraphs 43 and 44 and *Jipa*, C-33/07, 10.7.2008, paragraph 23 with case references). See also Advocate General Sharpston's Opinion in joined cases C-715/17, C-718/17 and C-719/17, paragraphs 197 and 198 with case references.

In recent years, the Court of Justice has taken a position on the application of Article 72 of the TEUF to massive inflows of migrants. In the above-mentioned cases concerning Lithuania (C-72/22 PPU, M.A) and Hungary (C-808/18), the states invoked this Article before the Court to justify derogations from Union law. Lithuania invoked the threat to public order or internal security posed to the Republic of Lithuania at its borders, especially by the mass influx of migrants from Belarus. In Hungary's view, Article 72 allowed a derogation from the Union rules adopted under Article 78 of the TFEU if compliance with these rules would prevent Member States from properly managing an emergency situation caused by a massive inflow of applicants for international protection.

In both cases, the Court reiterated its previous rulings that derogations must always be interpreted restrictively. From this follows that Article 72 of the TFEU cannot be interpreted as

giving Member States the power to derogate from the rules and provisions of EU law solely by reference to their obligations to maintain public order and safeguard internal security. (C72/22 PPU, M.A, paragraph 71; and C-808/18, paragraph 215) The Court went on to say that, although it is for the Member States to take appropriate measures to ensure public order and their internal and external security on their territory, it does not follow that such measures are entirely outside the scope of EU law. The Treaty on the Functioning of the European Union (TFEU) only provides for derogations in situations where law and order or public security may be threatened in clearly defined cases. It may not be inferred from this that the Treaty would contain an inherent general exception excluding all measures taken for reasons of law and order or public security from the scope of EU law. Any recognition of such a exception, irrespective of the specific conditions of the Treaty provisions in question, could jeopardise the binding nature and uniform application of EU law. (C72/22 PPU, *M.A*, paragraph 70; and C-808/18, paragraph 214)

As regards Lithuania, the Court found that Lithuania had also failed to specify the effect of the derogation from EU law on the maintenance of public order and the safeguarding of internal security in the context of the emergency caused by the mass influx of migrants. The Court considered that the procedures provided for in the Procedures Directive, such as the border procedure, are procedures that allow Member States to establish special procedures for maintaining law and order and safeguarding internal security at the European Union's external borders, and carry out their responsibilities without it being necessary to rely on a derogation under Article 72 of the TFEU in situations where the conduct of the applicant suggests that his or her application is manifestly unfounded or abusive (paragraphs 73 and 74).

Considering the recent case law of the Court of Justice, it would be difficult to justify the presence of a serious threat solely on the basis of an increase in the number of asylum seekers, i.e., a mere mass influx. As previously mentioned, the cases heard by the EU Court of Justice have been related to the influx of large numbers of people and the cases have therefore been different from the current situation in Finland. The Court has not been called upon to deal with a situation akin to the instrumentalised migration currently taking place at Finland's eastern border. As it is, the Court has not taken any position on whether, in such a situation, a derogation from EU secondary legislation under Article 72 of the TFEU for the safeguarding of public order and internal security would be possible. Hence, a potential derogation should be examined from the perspective of whether the restrictions are appropriate, necessary and proportionate to the objective pursued and whether there is a real, present and sufficiently serious threat to a fundamental interest of society. Moreover, the situation should be assessed in terms of whether there is a threat to the functioning of state institutions or its basic public services or to the survival of the population, a risk of serious disruption to foreign relations or the peaceful coexistence of peoples, or a threat to military interests.

3 Objectives

The objective of the proposal is to effectively combat any attempts to exert pressure on Finland through instrumentalised migration and to bolster border security. A further goal is to prepare for more aggravated situations of instrumentalised migration and ensure the authorities' capacity for action even in such situations.

4 Proposals and their effects

4.1 Key proposals

The Government proposes that an act on temporary measures to combat instrumentalised migration be enacted. The act would lay down provisions on the conditions under which a

government plenary session could decide to restrict the reception of applications for international protection in a limited area on Finland's national border and in its immediate vicinity in order to safeguard the sovereignty or national security of Finland. The existence of a need for a decision on such a restriction would be established in cooperation with the President of the Republic. The decision could be made for a maximum period of one month at a time.

Had the Government made a decision referred to above, a migrant exploited in efforts to exert influence and present in the area referred to in the decision would be prevented from entering the country. A migrant who has entered the country would be removed from the country and guided to move to a place where applications for international protection are received. However, a migrant's application for international protection would be received in certain exceptional cases. The proposed regulation would not restrict the reception of applications for international protection beyond the area referred to in the government decision.

4.2 Main effects

4.2.1 Effects on the activities of authorities

Restricting the reception of applications for international protection, especially when the situation at the border is deteriorating quickly, would significantly improve the Border Guard's ability to manage the situation. It would also pose challenges to the party exerting pressure on Finland. It can therefore be estimated that one of the benefits of the decision to impose restrictions is its preventive nature. This course of action would also bring significant added value to managing the situation in areas between official crossing points and to exceptional situations in which migrants use violence or take advantage of their large number.

The aim of the regulation is also to ensure, for its part, the sufficiency of authorities in exceptional situations. The proposed regulation would make it possible in the beginning to reduce the amount of resources of authorities that are not engaged in managing the situation on the national border and in its immediate vicinity. These resources would include resources reserved for the operation of registration centres, the reception system and the return system as well as resources reserved for maintaining public order and national security in inland areas. Instrumentalised migration may also have an effect on healthcare and social welfare services. In addition to national authorities, agencies and authorities providing international support would also be affected. The rapid removal of instrumentalised migrants from the country would also reduce the number of decisions by courts and competent authorities on detention, coercive measures and precautionary measures and the resources required for their implementation.

The introduction of new powers would require internal guidance and training of the authorities involved in these activities on appropriate practices and, in particular, on the identification of persons in a vulnerable position.

4.2.2 Effects on security

Influence exerted by Russia on Finland has led to restrictions on traffic on the eastern border, the closure of border crossing points and the concentration of asylum applications away from the eastern border, in order to safeguard Finland's national security. Russia's activities have resulted in very high costs for Finland, for example, due to the construction of a fence on the eastern border, the need for increased border control and the necessity of long-term preparedness of the authorities, which includes equipping and practising for mass influx of migrants in different forms.

Finland has an obligation to protect its external border against illegal border crossings and to ensure security in the border area and within the state. A sovereign state has the right to control access to its territory. Responding to instrumentalised migration has resulted in the suspension of normal cross-border traffic, and in this respect, the rights and freedoms of individuals are currently realised to a very limited extent on the eastern border. As has been highlighted above, Russia has the ability, if it so chooses, to create long-term disruption at Finland's eastern border by instrumentalising migrants.

Activities, in which a foreign state interferes in the affairs of another sovereign state by inappropriately exerting pressure and by directing applicants for international protection to its border in order to influence its internal affairs, constitute a violation of the sovereignty of that state. The activities of the foreign state are also conducive to weakening national security as described in chapter 2 of the proposal and in the provision-specific rationale below. The proposed new act would provide an essential solution to this.

The proposed act would improve Finland's ability to safeguard its national security and sovereignty in a situation in which the other available means are not functional. Preventing instrumentalised migrants from entering the country and removing them from the country as proposed would combat efforts to exert influence, prevent threats to national and public security and limit the possibilities to question Finland's sovereignty. Preventing entry would be the main rule for ensuring security both at border crossing points and in areas between official crossing points. In addition to preventing entry, removal from the country, including its rules of procedures, would supplement the system concerning those who have already arrived in the country but who are not part of the people whose entry can be permitted in connection with the application of the Act. The primary objective of the Act would be general and special prevention. The purpose of the procedure would be to remove a gap in legislation that a foreign state can exploit to exert influence on Finland through instrumentalised immigrants. Eliminating this gap would result in general prevention. Special prevention would be achieved especially when individual migrants found their course of action to be unproductive and understanding of this spread among those seeking to enter Finland despite the risks involved.

There is a valid readmission agreement between the EU and Russia (Council Decision 2007/341/EC), an implementing protocol between Finland and Russia supplementing it (Act 946/2012 and Government Decree 20/2013) and a procedure for refusing entry in accordance with the Schengen Borders Code that have been implemented before the closing of border crossing points. In accordance with the said treaties, notwithstanding these, on the basis of longstanding practice, and information provided by the Russian authorities, removal from the country can be considered feasible also under the conditions of the legislation under preparation. In particular, return of persons who have illegally crossed the border in areas between the official crossing points has, until recently, been separately requested. In similar types of instrumentalisation on the borders of Latvia, Lithuania and Poland, the returns continue to take place.

4.2.3 Economic effects

The application of the proposed legislation would probably be preceded by a prolonged situation that would already have required significant measures by the authorities. The Border Guard would have enhanced its intelligence collection, border control and crime prevention efforts. Border controls on land, at sea and in the air would have been increased, border checks would have been carried out in even more detail at border crossing points, and monitoring of aliens would have been increased. Patrols would have been equipped to prepare for different situations and the amount of technical surveillance equipment would have been increased. The Border

Guard would have been prepared to maintain public order and security at border crossing points and to use crowd control resources and it would have built temporary barriers at the eastern border. Registration of asylum seekers would have been enhanced by adding more personnel. The European Border and Coast Guard Agency would probably be supporting Finland in managing the situation on the eastern border. In order to manage the situation, the personnel of the Border Guard would have had to do significantly more overtime work as well as work in the evening, nights and weekends. The Border Guard would have maintained operational capability by increasing the number of personnel on call and would have recruited new public officials for fixed-term appointments. The costs of official journeys, interpretation, transport and facilities would also have increased.

The additional costs described above could be estimated to continue and increase in the situations referred to in the act, but their amount cannot be estimated accurately in advance. It would depend on the number of persons attempting to enter Finland illegally and their course of action, such as the potential to use force. The duration of the situation would affect the costs. In any case, the implementation of the measures referred to in the legislation would require a significant amount of human resources. Primarily, entry into the country should be prevented in situations involving instrumentalisation, which would require considerable human and material resources, especially in the unfenced parts of the border between official crossing points. Similarly, the control of groups of people arriving in the country, proper procedure in situations involving removal from the country and the prevention of re-entry require a considerable amount of human resources and material preparedness.

For example, the measures and procurements made at the turn of 2023–2024 to concentrate the applications for international protection and to close border crossing points caused the Border Guard additional costs of approximately EUR 1.2 million per week after the intensified operations began. Of these costs, additional human resources costs were approximately EUR 450,000 per week and travel costs of around EUR 50,000 per week. The amount of supplementary procurements needed to manage the situation, such as temporary barriers or additional surveillance technology, has an essential effect on the amount of additional costs. Seasons also affect the need for temporary structures and, indirectly, other costs such as for heating, electricity and cleaning. A project code is used to monitor the additional costs, and the hours of use of heavy vehicles are monitored separately. The additional costs arising from the situation will be applied for in the supplementary budget based on the actual costs incurred. The external funding mechanisms that may be used for the additional costs (such as emergency funding of the EU's Border Management and Visa Instrument) will be fully utilised, with the aim of minimising the additional costs for the State of Finland.

The cross-governmental activities required by the situation described above would also result in additional costs for the police, Defence Forces, Finnish Immigration Service and Finnish Customs, among others.

4.2.4 Effects on fundamental and human rights

Under the proposed section 3 subsection 1, a government plenary session could, under the conditions provided by the act, decide to restrict the reception of applications for international protection in a limited area on Finland's national border and in its immediate vicinity for a fixed period of time. Under section 5 of the proposed act, an application for international protection would be received if, according to a case-by-case assessment made by a border guard, this would be essential for safeguarding the rights of a child, a person with disabilities or another person in a particularly vulnerable position. An application would also be received if a person has presented or there are circumstances on the basis of which it is evident, according to an

assessment made by a border guard, that the person faces a real risk of being subjected to the death penalty, torture or other treatment violating human dignity primarily in the state from which the person has arrived in Finland.

The proposed regulation is significant from the perspective of the absolute non-refoulement principle contained in the Constitution, several human rights treaties and EU law. Compliance with the non-refoulement principle is usually ensured in practice by receiving the asylum application and assessing the asylum seeker's individual situation. The proposal would mean that the right to apply for asylum in the area referred to in the government decision would only be realised for children, some persons with disabilities and certain persons in a particularly vulnerable position, and for persons for whom it is evident, according to an assessment made by a border guard, that they are in real risk of being subjected to the death penalty, torture or other inhuman or degrading treatment or punishment primarily in the state from which they have arrived in Finland.

In addition to the principle of non-refoulement, the proposal is significant for several other fundamental and human rights. In this respect, the most important are the right to life, prohibition of torture, right to liberty and security of person, right to an effective remedy, prohibition of discrimination and prohibition of collective expulsion. Because instrumentalising the application for asylum as a means to exert influence at the state level can as such be considered a violation of international law, combating instrumentalisation has, at least indirectly, positive indirect effects on the realisation of fundamental and human rights and compliance with international law.

Non-refoulement

The proposed regulation would mean a derogation from the absolute principle of non-refoulement (Article 33 of the United Nations Convention relating to the Status of Refugees, Article 3 of the ECHR, Articles 2, 6 and 7 of the ICCPR and Article 3 of the UN Convention against Torture), if it were deemed that the cases of migrants were not assessed in a reasonable, objective and individual manner. National legislative measures cannot be used to derogate from the absolute principle of non-refoulement.

The Constitution also lays down provisions on non-refoulement. Under section 9, subsection 4 of the Constitution, "a foreigner shall not be deported, extradited or returned to another country, if in consequence he or she is in danger of a death sentence, torture or other treatment violating human dignity." In other words, the purpose of the principle of non-refoulement is to ensure that no person is sentenced to death and that no alien is subjected to torture or other treatment violating human dignity.

Preventing the lodging of asylum applications is related to ensuring the principle of non-refoulement and it would be problematic from the perspective of the Constitution and human rights obligations. According to the draft proposal for the principle of non-refoulement laid down in the Constitution, under the human rights treaties, aliens must be guaranteed procedural protection while their right to enter Finland or to continue their stay here is being decided on. The following is stated, among other things, on non-refoulement: "Although the provision does not mention the concepts of refugee or asylum, it has a substantive link to the Convention relating to the Status of Refugees." Were the asylum application not properly examined, it could in practice be impossible for the authorities to obtain information on the person's potential risk of being persecuted or tortured, for example. The proposed regulation would not safeguard every migrant the right to apply for asylum and procedural protection in that time and space. Instead, the rights would be realised selectively in this respect.

Under the human rights treaties aliens must be guaranteed procedural protection while their right to enter Finland or to continue their stay here is being decided on. In its case law, the European Court of Human Rights has emphasised the binding nature of the procedural rights of asylum seekers and that the rights must be safeguarded in exceptional circumstances too. The court has attached particular importance to the genuine possibility of a person to effectively lodge an application for international protection. However, a state has the right to restrict the entry of aliens to legal border crossing points and to prevent illegal border crossings.

Under the proposed regulation, a government decision would not restrict the reception of applications for international protection beyond the area referred to in the decision. As a result, Finland would be able to direct migrants to certain border crossing points not covered by the decision.

Prohibition of collective expulsion

The proposed regulation is significant as concerns the prohibition of collective expulsion under Article 4 of Protocol No. 4 of the ECHR. The ECHR has held that removing persons from the country under Article 4 of Protocol No. 4 means that persons are removed from the territory of a State to the territory of another State against their will. It must be assessed separately whether removal from the country is collective expulsion by nature, that is, whether the persons are offered a genuine and effective opportunity to present claims concerning the expulsion in an interview, for example. No minimum number of people nor membership in a certain group is required for an expulsion to be considered a collective expulsion. Instead, the assessment is based on whether the matter has been examined in a reasonable, objective and individual manner. The assessment of the proposed regulation as concerns the prohibition of collective expulsion is related to whether the migrants have had a genuine and effective possibility to contact the authorities and apply for asylum.

Reasons, such as very large groups of people that have been directed to the border at the same time to apply for international protection, or information that persons would seriously endanger Finland's sovereignty or national security, could be assessed as reprehensible conduct on the part of the applicant. Even then, however, the state would be required to provide genuine and effective access to means of legal entry, in particular to border procedures, so that all persecuted persons can lodge an application for protection.

The reprehensible conduct of the applicant may, however, be accepted if the applicant had a weighty reason attributable to the contracting state for failure to use means of legal entry. Such weighty reason attributable to the contracting state can, for example, be excessively regulated reception of asylum applications, as in the case of *Shahzad v. Hungary* (12625/17).

From the standpoint of the prohibition of collective expulsion, the conclusive grounds for characterising the removal from the country as collective is that the case of each individual alien of the group has not been examined in a reasonable, objective and individual manner. The situations referred to in the proposed legislation emphasise the nature of the interaction between each migrant and the border authority and whether this interaction can be considered reasonable, objective and individual.

Effective legal remedies concerning entry to the country

The proposed regulation, in which an application for international protection would not be received from all migrants, would be somewhat problematic from the perspective of section 21

of the Constitution. According to section 21 of the Constitution concerning the protection under the law, everyone has the right to have his or her case dealt with appropriately and without undue delay by a legally competent court of law or other authority, as well as to have a decision pertaining to his or her rights or obligations reviewed by a court of law or other independent judicial body for the administration of justice.

The only condition for an application for international protection to be effectively lodged is the declaration of the applicant that he or she wishes to apply for asylum. There are no other conditions. Each application lodged in Finland must be examined individually to ensure that no person is returned to an area where he or she could be subjected to the death penalty, torture, persecution or other treatment violating human dignity or from where he or she could be sent to such an area. In the proposed regulation, an application for international protection would in certain circumstances only be received from children, persons with disabilities and certain persons in a particularly vulnerable position, and from persons for whom it is evident, according to an assessment made by a border guard, that the person faces a real risk of being subjected to the death penalty, torture or other treatment violating human dignity primarily in the state from which the person has arrived in Finland.

The proposal would also be problematic, because there would be no decision on refusal of entry and removal from the country and therefore no right to request a review. The right to request a review is one of the guarantees of a fair trial and good governance. With regard to protection under the law, a person's right to appeal against a decision is considered as a minimum requirement. An applicant must also have the right to petition the court to prohibit the enforcement of their return and to allow them to wait the outcome of the decision in Finland before they are returned, if the court prohibits the enforcement. Minor derogations to the right to request a review may be provided in an act, as long as the derogations do not change the status of the right as the main rule or, in individual cases, do not endanger the right of an individual to a fair trial (government proposal HE 309/1993 vp, p. 74). From the perspective of the Constitution, the aspects related to protection under the law and generally to the appropriateness of processing are essential, especially when taking into account that asylum seekers are often in a particularly vulnerable position (statements of the Parliamentary Law Committee PeVL 34/2016 vp, pp. 3–4, PeVL 8/2018 vp, p. 3, PeVL 2/2021 vp, paragraph 18). In its statement on the Union communication concerning the border procedure proposal, the Constitutional Law Committee has emphasised the importance of this and expressed reservations about the Commission’s proposal to limit appeals only to the courts of first instance in the border procedure (PeVL 15/2021 vp). The Constitutional Law Committee has also issued statements on assessing the acceptability of prohibiting further requests for a judicial review (see e.g. PeVL 23/2013 vp, p. 5/I).

Right to life and personal liberty, integrity and security

The proposal would have effects from the perspective of section 7 of the Constitution and corresponding human rights obligations. The section contains a provision on the right to life, personal liberty, integrity and security, the prohibition of the death penalty, torture and other treatment violating human dignity, and further provisions on interference with personal integrity and deprivation of liberty. The provision emphasises the positive obligations of the public authorities to protect members of society from crime and other unlawful acts against them, regardless of whether these are committed by those exercising public authority or by private bodies (government proposal HE 309/1993 vp, p. 47).

The explicit mention of the prohibition of torture in section 7, subsection 2 of the Constitution emphasises that this treatment, which causes very serious mental or physical suffering, must not be allowed under any circumstances. The prohibition of treatment that violates human dignity applies to both physical and mental treatment. It covers all forms of cruel, inhuman and degrading punishment or other treatment (government proposal HE 309/1993 vp, p. 47). If compliance with the principle of non-refoulement was not considered sufficient in the proposed legislation, it would also involve the risk that full compliance with the prohibition of torture could not always be ensured.

The prohibition of the death penalty is also unambiguous and absolute. Sentencing to the death penalty is prohibited, not just the enforcement of the sentence (Constitutional Law Committee PeVL 5/2007 vp, p. 8-9, PeVL 6/1997 vp). The proposed regulation would also involve a risk that full compliance with the prohibition of the death penalty could not be ensured if compliance with the principle of non-refoulement was not considered sufficient.

On the other hand, national security is ultimately also related to the rights guaranteed in section 7 of the Constitution. The proposed regulation can be estimated to have positive effects in so far as it protects Finland's national security.

Persons in a vulnerable position

The proposal seeks to ensure the interests of the child and the protection of family life (sections 10 and 22 of the Constitution). The best interests of the child must be a primary consideration in all actions concerning children that are undertaken by administrative authorities (Article 3.1 of the Convention on the Rights of the Child, SopS 60/1991). Under the derogation laid down in section 5 of the proposal, an application for international protection concerning a child would, as a rule, be received. The provision-specific rationale of the provision states that in a situation where a child's application would be received, the need to receive the application of the child's family members in addition to the child's application would be assessed on a case-by-case basis. This assessment takes into account the realisation of the best interests of the child.

The derogation provision referred to in section 5 of the proposed act would also safeguard, at least to some extent, the right of persons with disabilities to apply for international protection and it would also ensure that the principle of non-refoulement is not violated. The derogation provision would also safeguard the rights of some other persons in a particularly vulnerable position that relate to, for example, lodging an application for international protection and compliance with the principle of non-refoulement. However, there is some discretion in the application of the provision.

In addition, a person's application for international protection would be received if it was evident, according to an assessment made by a border guard, that the person faces a real risk of being subjected to the death penalty, torture or other treatment violating human dignity primarily in the state from which the person has arrived in Finland.

In practice, however, applying the derogation provision could be somewhat challenging, considering that identifying the persons covered by the provision could be difficult. The proposed regulation applies to situations where applications for international protection would not, as a rule, be received, but the right to this would be exceptional and realised through an assessment by the authorities. It may be challenging to determine whether young people aged 16 to 17 are under age on the basis of their appearance, for example, and the same applies to persons with disabilities or illnesses where the disability or illness cannot be easily detected on

the basis of appearance. A particularly vulnerable position due to some other reason may additionally be difficult to recognise without a closer investigation.

Due to the problems related to identifying such persons, it is important that the border guard interact with the migrant. In practice, the proposed regulation would mean that the border guard would have to make an individual assessment at the border of whether the person applying for protection is in a particularly vulnerable position. The migrant himself or herself would also be responsible for presenting any relevant factors in the assessment. The border guards should be carefully instructed and trained so that they can identify vulnerable persons before the removal from the country.

Equality, non-discrimination and gender equality

The Constitution of Finland (731/1999), the Non-Discrimination Act (1325/2014) and the Act on Equality between Women and Men (609/1986) prohibit discrimination and impose obligations to promote equality and non-discrimination. In addition, Finland is committed to promoting equality between women and men in numerous international human rights treaties of the UN and the Council of Europe. For example, according to section 8 subsection 1 of the Non-Discrimination Act, no one may be discriminated against based on their age, origin, nationality, language, religion, belief, opinion, political activity, trade union activity, family relations, health, disability, sexual orientation, or any other reason related to the person. Discrimination is prohibited regardless of whether it is based on factual or assumed information relating to the individual themselves or to another individual.

The proposed regulation on restricting the reception of applications for international protection is somewhat problematic from the perspective of the prohibition of discrimination. Persons in a particularly vulnerable position may be categorised differently depending on how easily the vulnerable position can be identified. In addition, the proposal leads to a somewhat problematic situation from the perspective of the provision on equality (section 6 of the Constitution), because the proposal would place asylum seekers in different positions depending on where they attempt to cross the Finnish border.

The central human rights treaties of the UN and the Council of Europe are based on equality and non-discrimination. No person should be discriminated against in the removal from Finland's jurisdiction based on, for example, race, disability, skin colour or ethnic or national origin, and aliens should be guaranteed equal and effective legal remedies against demands for return.

Freedom of movement, right to work and the freedom to engage in commercial activity

The proposed regulation would mean that it would be possible to restrict the reception of asylum applications for a fixed period even if the border crossing point was open for other traffic. This would make it possible to safeguard other fundamental rights in situations where, in practice, the alternative would be a government decision, under section 16 of the Border Guard Act, to close a border crossing point or to restrict cross-border traffic for a fixed period or until further notice. In this way, it would be possible to safeguard the freedom of movement of others crossing the border and promote, for example, the protection of family life and the realisation of the best interests of the child in situations where a family member or relative of a person living in Finland lives abroad. Enabling other cross-border traffic would also promote the rights of aliens studying in Finland and the rights of owners of real estate or other property requiring maintenance in Finland. In this respect, the proposal can be estimated to have positive effects.

The smooth running of cross-border traffic is also important for the economy and prosperity of Finland. Enabling cross-border traffic for other than asylum seekers may have significant positive economic impacts on business, such as carriers, tourism companies and other operators associated with them. In this respect, the proposed regulation could also have positive effects on the freedom to engage in commercial activity and the right to work.

4.2.5 Monitoring the implementation of human rights obligations

The implementation of Finland's international human rights obligations is continuously monitored. The implementation of human rights treaties is primarily monitored through periodic reports. In addition to the government of a Party to the treaties, the following are also consulted in monitoring the implementation: independent overseers of legality and ombudsmen, the national human rights institution and civil society organisations and, where applicable, UN specialised agencies, programmes and funds. The periodic reports are reviewed and various actors are consulted by independent and impartial treaty monitoring bodies. Based on the review, the Parties receive conclusions and recommendations to promote the implementation of treaty obligations. Finland, like other Western countries, receives many recommendations on matters related to application for international protection.

The implementation of human rights obligations is also monitored through appeal procedures. The European Convention on Human Rights has established an international monitoring system within which the European Court of Human Rights (ECtHR) may, in a legally binding manner, declare that a respondent State has violated the rights or freedoms recognised in the European Convention on Human Rights and/or its Protocols. According to the European Convention on Human Rights and the established case law of the ECtHR, the Contracting Parties have the primary responsibility to secure the rights and freedoms guaranteed by the Convention and its Protocols. In accordance with the principle of subsidiarity, alleged violations of the rights and freedoms guaranteed by the Convention must primarily be dealt with by national courts and, if necessary, only secondarily by the ECtHR. At the same time, it is confirmed that the Parties enjoy a margin of discretion in the national application of the Convention and its Protocols, the exercise of which is supervised by the ECtHR.

ECtHR case law does not yet include rulings on such appeals related to entry into a country that have involved instrumentalised migration. The Court has not thus been called upon to deal with a situation akin to the situation currently taking place at Finland's eastern border. The ECtHR is currently considering several appeals against Lithuania, Latvia and Poland concerning asylum seekers who sought to enter these countries from Belarus in autumn 2021. The method of interpretation of the ECtHR has often been considered dynamic or evolutionary, and it is possible that future case law in new situations would allow more far-reaching decisions than in previous cases.

In an appeal matter, the ECtHR may indicate an interim measure to a respondent State in accordance with Rule 39 of the Rules of Court, if it deems this necessary to prevent serious and irreparable damage. The ECtHR shall indicate interim measures only in exceptional cases and based on a thorough assessment of the circumstances. In appeals concerning applications for international protection, interim measures usually request that the respondent State refrain from removing the appellant to a country where they would allegedly be threatened with death or risk being subjected to torture or inhuman or degrading treatment. Interim measures have also requested that the respondent State receive and examine applications for asylum submitted by persons upon arrival at the border (*M.K. and Others v. Poland*, section 235). In its case law, the ECtHR has also dealt with situations in which the respondent State has failed to comply with an interim measure indicated by the ECtHR, in which case the ECtHR has concluded that the

State has failed to discharge its obligations under Article 34 of the Convention (*D.A. and Others v. Poland*, section 101).

All international human rights treaties adopted within the framework of the UN involve an appeal procedure established either by the Convention or by a separate Optional Protocol. Similarly, the UN treaty bodies may indicate interim measures with respect to appeals. In the case of appeals concerning the asylum procedure, the treaty bodies do not, in practice, investigate appeals as long as the national procedure is pending, but they may impose an enforcement ban for the duration of the national proceedings, during which time the appellants may not be removed from the country.

As a rule, the investigation of an individual complaint by the ECtHR or the UN committees and the indication of an interim measure requires an appeal by a private individual, civil society organisation or, for example, a legal person.

4.2.6 Effects on Finland's international relations

The European Union and the North Atlantic Treaty Organization (NATO) form the core of Finland's cooperative foreign policy. NATO membership places Finland even more firmly in the European and transatlantic security community. Finland aims to be a reliable and predictable foreign and security policy actor and a strong supporter of the common values, including democracy and the rule of law, of both Western security communities to which it belongs. One of Finland's core messages is that NATO membership will not change the long-standing objectives of Finland's foreign policy: Finland's foreign and security policy is based on the rule of law, human rights, equality and democracy. Finland emphasises the importance of the international rules-based system and compliance with international law. Within the EU and NATO, the Nordic countries form Finland's closest reference group.

NATO's Strategic Concept for 2022 identifies the Russian Federation as the most significant and direct threat to the Allies' security and to peace and stability in the Euro-Atlantic area. The EU has responded to Russia's war of aggression in Ukraine with extensive sanctions. Russia's hybrid activities at Finland's eastern border have further increased international understanding (both in the EU and in NATO) of the risk factors and threats associated with the long border between Finland and Russia. Finland's allies and partners have shown strong support for Finland's actions in solutions concerning the eastern border. In the context of Russia's full-scale war of aggression and in the light of the challenges faced by many other EU and NATO countries with regard to migrants, decisions made based on Finland's national security amid hybrid influence efforts by a foreign state are unlikely to have a significant impact on Finland's status or country image in the EU and NATO.

The bilateral relationship between Finland and Russia underwent a fundamental, long-lasting change after Russia launched its full-scale war of aggression against Ukraine in February 2022. The bilateral relationship deteriorated significantly in 2023 as Russia implemented concrete measures, including hybrid influence activities related to the eastern border, following Finland's accession to NATO. Russia denies its responsibility and role in channelling third-country nationals to the eastern border. Finland has responded decisively to these measures and has stated that its solutions are the result of Russia's actions. Russian state media has painted an increasingly negative picture of Finland, which is why Finland's actions would probably continue to be presented in a negative light. Russia would build a false narrative about Finland as a country that disregards human rights and international treaties and seeks to undermine the rights of Russians. It should be noted, however, that Russia will likely continue to paint a

negative picture of Finland as part of its propaganda efforts and weaken the bilateral relationship regardless of Finland's decisions.

4.2.7 Effects related to EU law

Finland's efforts to respond to instrumentalised migration at the eastern border have been met with broad support and understanding not only from the EU institutions but also from other EU Member States. In a letter on migration sent to the European Heads of State or Government on 13 December 2023 ahead of the December European Council, President of the European Commission Ursula Von der Leyen noted that the situation at the eastern border constitutes a hybrid attack and affirmed the EU's support for Finland. European Commissioner for Home Affairs Ylva Johansson has also made statements expressing support for Finland. In addition, in its 21 November 2023 debate about the situation at Finland's eastern border, the European Parliament was exceptionally unanimous in its views, expressing approval of Finland's actions and emphasising the unity of the EU. In connection with this debate, Commissioner Johansson stressed that this was a question of instrumentalisation perpetrated by Russia in response to, among other things, Finland's NATO membership and support for Ukraine. Furthermore, in its December conclusions (14–15 December 2023, paragraph 30), the European Council strongly condemned all hybrid attacks and stated that the European Union was determined to counter the ongoing hybrid attacks at its external borders launched by the Russian Federation and by Belarus.

Finland has communicated actively and openly to the EU institutions and other Member States about the situation and the measures taken to address it. Finland's eastern border is also an external border of the EU: crossing it enables access to an area free of internal border control and, consequently, allows for secondary movement to other EU Member States. Thus, Finland's actions have secured not only Finland's internal security but also that of the Union. Finland has also highlighted and utilised the expert assistance provided by the European Border and Coast Guard Agency Frontex and the law enforcement agency Europol in managing the situation.

As previously pointed out in the proposal, EU-level regulation does not currently provide tools for combating instrumentalised migration at the eastern border and countering efforts to exert pressure on Finland. Finland's strong objective (see E 58/2023 vp) is for the instrumentalisation of third-country nationals to be recognised at the EU level as part of harmful hybrid activities and for the Union to find European solutions for responding to such situations.

Possible infringement procedure

The Commission may bring an action against Finland before the EU Court of Justice if it considers that Finnish national legislation or the actions of Finnish authorities are in breach of EU law. The Commission has discretionary power to open infringement procedures under Article 258 TFEU (see, inter alia, 247/87, *Star Fruit v. Commission*). The Commission has stated that it will intervene especially in situations that have a major impact on the realisation of the rights of citizens and businesses. The Commission is also sensitive to situations where the redress procedures of national authorities or the national legal system do not provide effective redress in the event of a breach of EU law (COM(2022) 518 final). The relationship between the legislative proposal and EU legislation, in particular the provisions of the Asylum Procedures Directive, is described above.

The Commission aims to hold informal discussions with the Member States on detected infringements before opening the actual infringement procedure. The Commission aims to

detect possible breaches of EU law as early as possible. In fact, the majority of infringement cases are settled before being referred to the Court of Justice. The timetables for the infringement procedure are ultimately at the discretion of the Commission.

The infringement procedure consists of three stages. In the first stage, the Commission would send a letter of formal notice on the matter, to which Finland would respond. If the Commission were not satisfied with Finland's response, it would move on to the second stage of the procedure, in which the Commission would issue a reasoned opinion. The reasoned opinion would require Finland to take action within a certain time limit (usually 2 months). If Finland's actions were considered insufficient, the Commission could bring an action against Finland before the Court of Justice for a breach of membership obligations. In the third stage, the matter would proceed to the Court of Justice for consideration.

If the Court of Justice found that Finland had failed to fulfil its obligations and had failed to comply with the judgment, the Commission could bring an infringement procedure against Finland for this failure. In this case, the Court of Justice could impose a financial penalty in the form of a lump sum and/or a daily payment on Finland in the infringement procedure in question. The assessment of the amount of the penalty payment and lump sum would take into account, in particular, the duration and seriousness of the infringement and the ability of the Member State in question to pay (in practice, the Member State's GDP), the need to ensure a deterrent effect and the consequences of the failure to fulfil the obligations for the private and public interests concerned. The amount of the financial penalties could be very high.

It should also be noted that under EU law, a Member State may incur an obligation to compensate for damages caused to individuals by a breach of EU law. For the State to incur liability, the case law has generally required that the infringed law was intended to confer rights on individuals, that the infringement was sufficiently serious, and that there was a causal link between breach and damage (C-46/93 and C-48/93, *Brasserie du Pêcheur SA*). As regards the implementation of the Directive, the requirement that the infringement is sufficiently serious has been considered fulfilled in itself if the Directive had not been transposed within the prescribed period (joined cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94, *Dillenkofer v. Germany*). The Court's assessment in infringement procedures is not affected by a Member State's argument that another Member State has also violated EU law in the same way. The assessment is not affected by whether the Commission has initiated infringement procedures against another Member State (inter alia C-146/89 *Commission v. United Kingdom*, C-266/03 *Commission v. Luxembourg*).

The case could also proceed for consideration by the Court of Justice through a request from a Finnish court for a preliminary ruling, as in case C-72/22 PPU, *M.A.* concerning Lithuania.

5 Other alternatives for implementation

5.1 Alternatives and their effects

5.1.1 Foreword

It follows from the constitutional principles of necessity and proportionality that of the effective regulatory or other measures available, the option that least interferes with fundamental and human rights must be selected. In particular, a derogation from the Constitution must be limited to the strictly necessary in a situation in which no other sufficiently effective measures compatible with the Constitution are available.

For the reason described above, an effort has been made to identify and assess all alternative measures both before the setting up of the project and during it. Before setting up the project to prepare this proposal, the public authorities explored in cooperation alternative measures to combat efforts to put pressure on Finland by instrumentalising migration and to manage the resulting situations better than at present. The measures explored so far are presented below. Some measures of this kind are already being developed in other legislative projects. It is partly a question of how to apply existing legislation more effectively, such as making more efficient use of detention. Some of the measures, as described below, were assessed to be such that their further preparation was not considered appropriate, for example because they would not help combat instrumentalised migration to Finland and its most serious forms. Instead, some of the identified measures could be applied in less serious situations in lieu of the proposed regulation or in conjunction with the proposed regulation. The proposed regulation would be applicable in situations where none of the measures available under the current legislation, when used either alone or in conjunction with other measures, would be sufficient to combat serious instrumentalised migration to Finland.

The matter was discussed by the Ministerial Committee on Foreign and Security Policy, which concluded that the measures described below would be helpful in managing the situation, but that they alone are not enough to combat efforts to put pressure on Finland. The project was therefore tasked with preparing a solution, in accordance with the legislation proposed here, that is absolutely necessary and the only measure assessed to be effective in combating the serious pressure exerted on Finland by a foreign state and the serious threat to Finland's sovereignty and national security caused by it.

With regard to the proposed legislation, alternative means, such as the threshold and scope of application of the regulation, the method of implementation, legal remedies, the necessary limitations, the level of decision-making and the possible participation of Parliament in decision-making have been assessed. In the proposed regulation, a derogation from fundamental rights is limited to the strictly necessary in a situation in which no other sufficiently effective measures that interfere less with fundamental rights are available. The assessments and conclusions concerning these are described in more detail in the provision-specific rationale.

5.1.2 Application of the Border Guard Act and more efficient asylum investigation

As an alternative to the proposed regulation, the possibility of continuing to respond to instrumentalised migration with measures under section 16 of the Border Guard Act has been assessed. As described in the section on the current situation, the Government has made several decisions to close border crossing points on the eastern border, and all border crossing points on the eastern border have been closed for a long time. The only open border crossing point is Vainikkala, which is open for goods transport. The total closure of border crossing points on the eastern border has been an effective measure, but it also prevents normal cross-border traffic and thus has an impact several fundamental and human rights. For this reason, a total closure cannot be regarded as the final solution to the situation.

If one or more border crossing points were open, normal cross-border traffic across the eastern border would be possible. Compared with the total closure of the border crossing points, this would enable the realisation of fundamental rights concerning freedom of movement, the protection of property, the protection of family life, the right to work and the freedom to engage in commercial activity.

If border crossing points were open, the processing of asylum applications could be made more efficient by means of existing legislation. By increasing and better targeting the resources of the

Finnish Immigration Service, it would be possible to improve the prioritisation of applications submitted by asylum seekers arriving via the eastern border as a result of instrumentalised migration so that unfounded applications could be identified, processed and decided on more quickly. The Finnish Immigration Service has already done this to some extent, but in order for it to work, the procedure should be considerably faster and more efficient than at present, which would probably require additional resources both for the Finnish Immigration Service to process applications and for legal aid and interpretation. The appeal process in administrative courts should also be made more efficient, and their resources should be allocated for dealing with prioritised appeals. A quick resolution of appeals would also make it easier to remove persons who have received a negative and final decision from the country more quickly.

Introducing the border procedure would provide a new tool for processing applications more efficiently and for managing the situation. In its set of proposals presented in response to Belarus' activities, the European Commission proposed the border procedure as one means of responding to the instrumentalisation of migrants and managing migrants who have already entered the country. As described in the section on the current situation, the border procedure will make it easier for the authorities to manage the situation when persons arriving in Finland have applied for international protection in Finland. The benefit of the border procedure compared to other asylum procedures is that under the border procedure, the applicant must stay at or in the vicinity of the border or transit zone while the application is being investigated. This restriction of freedom of movement is not a question of detention but a restriction related to the border procedure. Detention is also possible based on individual consideration and a decision confirmed by a district court. The border procedure will help to improve the efficiency of investigations and shorten the processing times for applications that are likely to be unfounded. For the procedure to be effective, returns must also be successful.

However, the there are limits on the application of the border procedure under the Asylum Procedures Directive. Only a small proportion of the applicants for international protection who arrived in Finland in autumn 2023 and early 2024 would meet the conditions for its application. As noted in the section on the current situation, Finland could discuss with the Commission the possibility of introducing provisional measures under Article 78(3) of the Treaty on the Functioning of the European Union (TFEU) for the benefit of Finland. This Article is part of the Union's common asylum policy and forms the legal basis for dealing with emergency situations caused by mass influxes of migrants and for possible provisional measures. The Commission has the right of initiative, and the measures referred to in the Article are adopted by the Council on a proposal from the Commission and after consulting the Parliament. The Member States therefore cannot act on their own initiative based on this Article.

The measures the Commission might propose would likely be the same as those proposed in 2021 for the benefit of Latvia, Lithuania and Poland in response to the emergency situation caused by the actions of Belarus. The Council never made a decision on the proposal as Poland objected. The proposed measures were related to extending the deadlines for the registration of asylum applications to a maximum of four weeks, extending the scope of the border procedure to all applicants under certain conditions, limiting material reception conditions to basic needs (food, water, clothing, adequate healthcare and temporary accommodation from the date of application) and facilitating the return procedure after the decision on the application by allowing for a derogation from EU regulations. These measures could facilitate the management of the situation and enable the authorities to direct their resources to more efficient operations. In its case law, the Court of Justice of the European Union has placed restrictions on the possible exceptions. The Court has emphasised that when it is possible to choose between several appropriate measures, the least onerous must be chosen, and that the harm caused by the measures must not be disproportionate to the objectives pursued.

The use of detention could also be increased within the framework of the current legislation, and thereby promote the management of situations and national security in less serious situations. Of the precautionary measures listed in the Aliens Act, detention in particular may to some extent mitigate the threats to internal security that may arise from instrumentalised migration and prevent persons from moving from Finland to other parts of Europe. As the Aliens Act contains comprehensive provisions on the detention of aliens, more effective use of detention would not require legislative amendments. Asylum seekers arriving via the eastern border could be detained on individual grounds, for example on the grounds referred to in section 121, subsection 1, paragraphs 1, 2 or 6 of the Aliens Act.

However, when considering detention, it should be noted that detention constitutes deprivation of liberty under section 7, paragraph 3 of the Constitution and is thus a measure that places severe restrictions on the freedom of movement and residence of an alien. A decision on detention is made based on an individual assessment and is intended to be used only as a last resort in situations referred to in section 121 of the Aliens Act. When resorting to detention, care must be taken to ensure that the conditions of detention are appropriate. According to the draft proposal for the Aliens Act (government proposal HE 172/2014 vp), international human rights monitoring bodies have issued recommendations urging Finland to use alternatives to detention whenever possible. Less restrictive measures should primarily be used especially for children and other particularly vulnerable persons. In addition, Finland has received a number of recommendations from human rights monitoring bodies on detention conditions and the rights of detainees with respect to children's rights and access to a doctor, for example.

The existing detention capacity in Finland is limited, but the current utilisation rate of detention units would allow for broader application of the provisions on detention. There are two detention units in Finland, one located in Metsälä in Helsinki and the other in Konnunsuo in connection with the Joutseno Reception Centre. The existing capacity is continuously also used for persons other than those arriving at the eastern border if the requirements of section 121 of the Aliens Act are met. The existing detention capacity would be filled eventually, and increasing it would take time. If necessary, detention units may be established in accordance with section 2 of the Detention Act, but the operations of a detention unit require significantly more personnel than that required for a reception centre, and they also require security guard services. The costs of detention are significant.

The limited existing detention capacity and the resource commitment resulting from the establishment of new units mean that the precautionary measure must be used prudently. Because a decision on detention is made based on individual consideration of a person, it also requires in practice that the asylum seeker be addressed by the police or the border authority. The resourcing of district courts should also be taken into account. In order for the authorities to be able to identify those migrants who pose a potential security threat or are at risk of absconding, it should be possible to manage the number of migrants in a way that corresponds to the resources of the authorities. The use of other precautionary measures also requires the identification of those persons at whom the measures should be targeted.

From the perspective of the instrumentalised migrants, keeping one or more border crossing points open and processing asylum applications and appeals more effectively would be a fundamental rights compatible way to respond to instrumentalised migration. In particular, it would promote the realisation of the legal protection guaranteed under section 21 of the Constitution. The competent authorities would be able to assess the actual need for protection of each person and ensure respect for the principle of non-refoulement.

However, if border crossing points were open, it is likely that instrumentalised migration would continue as before and it might expand. The phenomenon has resumed and at times become more difficult to manage when Finland has tried to open border crossing points for other traffic. Instrumentalised migration is directed to whichever border crossing point is open at a given time. Even keeping just one border crossing point open would probably have the effect of a foreign state directing a large number of people to the areas close to the border crossing point and exerting pressure on them to try to enter Finland. Crossing the border at locations other than official crossing points could become an attractive option for migrants to enter the country, if the open border crossing point were to become congested or if its opening hours and other restrictions would not otherwise allow for smooth crossing. Keeping one or more border crossing points open can therefore be considered appropriate in less severe situations, but as a sole means it cannot be considered an effective response to the serious situations of instrumentalised migration. In the situations of instrumentalised migration, keeping border crossing points open would probably have a negative effect on the rights of others crossing the border if the measure proposed now was not available too. Instrumentalised migration may, for example, congest cross-border traffic in a way described in section 2.2 that prevents other cross-border traffic.

5.1.3 Designating Russia as a safe third country

One alternative that the Government has examined as a way to improve the efficiency of the asylum procedure is whether Russia could be considered a safe third country. If this was the case, persons who have been refused asylum could, at least in principle, be returned to Russia. Provisions on the application of the criteria for a safe third country are laid down in the Asylum Procedures Directive. The key is that the substance of an application for international protection would not have to be assessed in Finland, if the applicant is considered to have arrived from a safe country, where they could have been received international or otherwise sufficient protection; to which they have sufficient ties and where they may be returned. The substance of the application may not be ruled inadmissible on these grounds for nationals of the third country concerned.

According to the Directive, there are two ways to designate a third country as safe. They are a case-by-case consideration of the safety of the country for a particular applicant and national designation of countries considered to be generally safe. Finland has chosen to apply the first method on which provisions are laid down in section 99a of the Aliens Act. Based on country information from different sources, the Finnish Immigration Service has so far not considered Russia a safe third country for individual applicants. By amending its legislation, Finland could lay down a government decision, for example, and decide that Russia would generally be considered a safe country or a safe country for a certain group or groups of people. Greece, among others, has legislation that considers Turkey a safe country for certain nationalities. However, the criteria set out in the Directive for a safe third country are strict, since a safe third country is required to have a well-functioning asylum system and to comply with the principle of non-refoulement. Based on official sources and country information, it does not seem possible to generally designate Russia as a safe country.

Even if Russia were generally considered a safe country, it would in any case be examined individually for each asylum seeker whether Russia could be considered safe for them and whether they would have sufficient ties to it. If the person appealed against the decision, the decision on removal from the country could not be enforced before the administrative court has decided the matter. In order to benefit from this option, the processing times in courts should be significantly shortened. The benefits would be very limited even if Russia did not take the persons back. If, in future, Russia could be generally considered a safe country or a safe country

for a certain group or groups of people, such as the groups of people being instrumentalised, the use of this procedure could be expanded. However, it would not, as such, be an effective or sufficient means of combating threats related to the most serious situations of instrumentalised migration, but it would still be possible for a foreign state to use instrumentalised migration against Finland in the manner it wishes.

5.1.4 Regulated processing of applications at the border

Regulating the reception and processing of applications could be one way of operating within the framework of the current legislation and managing the situation at the border. Under the current legislation, if there is a sharp increase in the number of applications, the application must be registered without delay or within 10 days at the latest. If the resources of the Border Guard are tied to maintaining border security, only a very limited amount of resources can be reserved for the registration of asylum applications. This would limit the number of applicants allowed to enter Finland. Under the current legislation, also the opening hours of border crossing points could be restricted in order to manage the situation.

In its case-law, the European Court of Human Rights has, under certain conditions, accepted the denial of admittance or stay of asylum seekers arriving from places other than open border crossing points, and the requirement that they use an open border crossing point for applying for international protection.

The above-mentioned measures in the asylum procedure, such as the border procedure, could be used even during the regulated and thus also slower procedure. In this model, too, it would be beneficial, if the interim measures referred to above in Article 78(3) TFEU were proposed for the benefit of Finland. This model would, in particular, benefit from extending the deadlines for the stages of the examination. This would be a more positive measure for the fundamental rights of instrumentalised migrants. On the other hand, its practical application would mean that the rights of other people crossing the border would probably not be realised, as the measure would cause congestion at the border crossing point. In practice, the model would not prevent instrumentalised migration or efforts to exert influence on Finland. It is possible to resort to this model especially during mass influx of migrants in order to manage the situation, and the model may also be useful for managing the early stages and less serious situations of instrumentalised migration, but as an independent means it is not an effective way of combating the serious situations of instrumentalised migration and the threats associated with them.

5.1.5 Fast track procedure at the border

One alternative that the Government has examined is whether the right to asylum of persons seeking asylum at a border crossing point during an entry check could be assessed immediately at the border crossing point in connection with the border check. The Border Guard would receive the asylum application and screen its grounds to find out whether there are any indications of grounds for international protection. If the screening revealed indications of a real need for international protection, the person would be referred from the border crossing point to the normal asylum procedure and reception centre. If there were no such indications, the asylum application would be examined in full at the border crossing point. It would be examined by the Finnish Immigration Service. If the application was rejected and the prerequisites for the applicant’s entry were not met, the applicant would receive a decision on refusal of entry under the Schengen Borders Code and be removed from the country. The procedure would not comply with the provisions on the right of appeal in the Asylum Procedures Directive, and thus the person could not petition a court to prohibit the enforcement of the refusal of entry or removal from the country.

It would be questionable whether, within the time limit set for the fast track procedure, it would be possible to hear the applicant, assess appropriately their need for international protection and make a decision on the matter. As most immigrants are expected to end up in the normal asylum procedure, the fast track procedure would lack effectiveness. This procedure would involve a major risk that persons who had received a negative decision could not necessarily be returned, if Russia did not accept them.

5.1.6 Reception of asylum applications outside Finland's borders

In the course of the drafting process, the Government examined whether asylum applications submitted by persons residing in Russia could be received for example in Russia so that the asylum seeker would not be in Finland during the examination of the application. The Government concludes that it is not possible in the current circumstances to apply a model that would be as effective and well-functioning as desired.

Since the amendment to the Aliens Act in 2004, it has not been possible to seek asylum at or through Finland's diplomatic missions abroad.

According to the Asylum Procedures Directive, asylum applications are processed in the territory of a Member State, including at the border, in the territorial waters and in the transit zones. While the opportunity of seeking asylum at a foreign mission has not been excluded, the Directive does not apply to asylum applications received by a foreign mission of a Member State. However, the option under assessment would involve an external service provider acting on behalf of a Finnish mission. As using an external service provider in applying for international protection would be a new procedure, the legal basis for this option would require a more detailed examination. Exact provisions on the division of responsibilities between the public authorities and the service provider would need to be laid down in an act.

Finland uses a service provider in Russia to receive visa and residence permit applications. The option of receiving asylum applications at the same centres would need to be negotiated and agreed with the service provider. The service provider's activities are dependent on the host country's consent. It is uncertain whether Russia would allow this type of processing of asylum applications.

In accordance with the Asylum Procedures Directive, an asylum seeker has the right to remain in the Member State pending the examination of the application. The option under assessment would be in conflict with the Directive, especially if it were the only available means for persons staying in Russia to apply for asylum in Finland. In assessing the option of an external service provider, it has been assumed that border crossing points at Finland's eastern border were temporarily closed and therefore either it would be impossible to receive applications at the eastern border or it would be possible only to a very limited extent.

However, problems would arise as to how a person's asylum application, and usually their subsequent legal stay in the country, could work if the person applies for asylum while they are outside Finland. The asylum seeker's visa or residence permit in Russia may have expired by the time they apply for asylum. Moreover, the grounds for the asylum application may be related to the treatment or danger the person has encountered in Russia. In addition, if the opportunity for submitting an asylum application in Moscow was not limited to third-country nationals, citizens of the mission's host country could also apply for diplomatic protection. In this respect, the foreign policy impacts of this option and its basis in international law would require a more detailed examination.

The option of using an external service provider could lead to an increased in asylum applications, which could lead to overburdening of the asylum procedure. Other aspects to take into account include the physical safety of the service provider and its employees, and the necessary security resources.

Of the Schengen States, since 2020 Hungary has been applying the “embassy procedure”, not receiving asylum applications at the border but requesting applicants to travel to embassies in Belgrade or Kyiv to indicate their intent to seek asylum in Hungary. In its preliminary ruling of 22 June 2023 in European Commission v Hungary (C-823/21), the Court of Justice of the European Union found the procedure to be in violation of the Asylum Procedures Directive.

Based on the case-law of the European Court of Human Rights, it is unclear whether such a procedure would provide a genuine, efficient and effective opportunity to apply for asylum, given that the customer service centre would be located far from the border, and whether in such a procedure asylum seekers could be interpreted as falling within the jurisdiction of Finland.

The extraterritorial reception and processing of asylum applications has become a topic of discussion in several EU Member States. Italy, for example, has concluded a protocol with Albania on the establishment of an asylum centre, and Germany, Austria, the Netherlands and Denmark are considering receiving and processing asylum applications outside their borders. Earlier on, Denmark opted out from the EU asylum system.

5.1.7 Conclusions

During the project of drawing up this proposal, and even before it, efforts have been made to comprehensively identify all conceivable means by which serious situations involving instrumentalisation of migration could be effectively addressed, and the threats that instrumentalisation may pose to Finland's sovereignty and national security prevented. Such means have been carefully assessed to see whether they could bring added value to the efforts preventing instrumentalised migration or whether they could be sufficient, either as independent means or applied in parallel, to combat a serious threat. Despite an extensive assessment, it has not been possible to identify a means that could be effective in combating the serious threats underlying the situation.

In each security situation, the option that is chosen must always be one that is effective with minimum impact on fundamental and human rights. In each particular situation, this option would constitute the threshold for deploying the proposed regulation, as it would be the necessary means to combat pressure exerted by a foreign state and to defend Finland's right to decide on its internal affairs. It is necessary for a state to be able to ensure its sovereignty and national security in all situations. To this end, the means presented here is the only option that can effectively enable preparedness for and combating of the most serious situations of instrumentalised migration, which is why it is necessary, despite having significant impacts on fundamental rights.

The implementation options for the model presented here have been thoroughly considered and efforts have been made to choose those that would allow maximum compatibility with fundamental and human rights while ensuring that the model remains effective in achieving its objectives.

5.2 Legislation in different countries and other means used abroad

General

The Ministry of the Interior report "Preparedness for Use of Migration as a Form of Hybrid Influence Activities: Report on Needs for Legislative Amendments" was published in February 2022 (Ministry of the Interior publications 2022:20). For the purpose of the study, information was collected on the preparedness of other European countries for hybrid action that exploits migration. The report shows that the national legislation of the 15 countries that responded to the survey at the time of the study does not allow a complete refusal to receive an asylum application or restrict the number of applications. The report also concludes that, as a rule, the countries have followed a set asylum application procedure even in difficult situations. According to a UNHCR report, in 1990–2010, it was mainly countries with a significantly deteriorated reception capacity that resorted to the closing of their border in the event of massive influx of refugees (e.g. Tanzania, which closed its border with Burundi in 1995 after having earlier received 500,000 Rwandan refugees). In other words, the proposed regulation would be exceptional in international terms. The recent legislation in the Baltic States is described in more detail below.

Latvia

Due to instrumentalised migration at its border with Belarus, Latvia has amended its State Border Guard Law *(Valsts robežsardzes likumā)* and Law on the State Border *(Valsts robežas likumā)*. Under the State Border Guard Law, the Latvian Border Guard may prevent border crossing if a person seeks to enter the country at a place other than a designated border crossing point or at a time other than the permitted hours without objectively justified grounds for allowing immediate entry to the country. The basic needs of persons are taken care of as necessary.

According to the Law on the State Border, when establishing a disproportionate number of cases of illegal crossing of the State border or attempt thereof, an enhanced mode of operation of the border guarding system may be declared. This refers to approximately 15–20 persons per day or at least 70 persons per week if the number of persons seeking to enter the country remains at the aforementioned level for 10 days or if there is a clearly identified risk of large-scale illegal border crossings. The aim of an enhanced mode of operation of the border guarding system is to ensure the inviolability of the State border and to prevent threats to the State. Enhanced border control will be introduced for a fixed period of up to six months, but, when necessary, it can be extended until the threat has passed. The responsible authority is the Latvian Border Guard.

In its decision on an enhanced mode of operation of the border guarding system, the Government has the right to introduce different measures, insofar as necessary and proportionate for the prevention or overcoming of the relevant threat. For example, the Government may suspend or restrict cross-border traffic, impose restrictions on movement, introduce special traffic arrangements, and specify the right of public officials to stop and inspect vehicles, investigate the lawfulness of the stay in the country of the foreign nationals they encounter, and arrest a person suspected of illegal border crossing or facilitation of such activities.

Public officials may also be authorised to move more widely than usual in different areas in order to find persons or goods illegally moved across the border and to enter to residential premises in order to apprehend a person who has crossed the border illegally or to prevent a

threat to life. The Border Guard must, without delay, inform the Prosecutor's Office of each case where the abovementioned rights have been exercised. In its decision, the Government may also introduce other measures that may relate to, for example, restricting the availability of goods or services or derogating from the regulation on public procurement. A person has the right to refer their matter to a court of law for decision when the matter relates to the measures mentioned in the government decision, but this does not prevent the implementation of the measures.

Lithuania

Lithuania has also amended its legislation on border management due to instrumentalised migration at its border with Belarus. The aim is to respond in particular to instrumentalised migration taking place between border crossing points at the land border. Based on the amendments, it is possible to declare a state comparable to a state of emergency as a result of a mass influx of migrants. In such a case, the Committee on National Security and Defence may propose measures to the Lithuanian Government, which will then decide on them. On the basis of a government decision, an alien may be prevented from entering the country if the person intends to cross or has crossed the national border at a place that is not designated for this purpose or at a place that is designated for this purpose, but the person has otherwise violated the procedure laid down on entry into the country. Such an alien is not considered to have entered Lithuania.

However, the entry of an alien is not prevented if it is shown that the alien is fleeing an armed conflict as defined in the government decision or persecution as defined in the Geneva Convention relating to the Status of Refugees or attempts to enter the country for humanitarian reasons.

In addition, under the Law on the State Border and Protection of Thereof *(valstybės sienos ir jos apsaugos įstatymas),* the Lithuanian Government may close border crossing points during an emergency and restrict cross-border traffic in order to protect national security, public safety or public health.

Estonia

Section 9^{10} of the Estonian State Borders Act *(riigipiiri seadus)* lays down provisions on the return of an alien from the border in an emergency caused by mass immigration. Under section 910, in an emergency caused by mass immigration, in the event of a threat to public order or national security, the Police and Border Guard Board may return an alien who has illegally crossed the external border to the foreign state from where they arrived in Estonia without the issue of a precept to leave or without making a decision on prohibition on entry if it was possible for the alien to enter Estonia through a border crossing point open for crossing of the external border. Where an alien cannot be returned immediately, the Police and Border Guard Board will organise compliance with the alien's obligation to leave in accordance with the rules provided in the Obligation to Leave and Prohibition on Entry Act (*väljasõidukohustuse ja sissesõidukeelu seadus*). An alien may contest their return in accordance with the rules provided in the Code of Administrative Court Procedure. Contesting the return of an alien does not suspend the return of the alien nor does it provide grounds for admitting the alien to Estonia. The Police and Border Guard Board may admit an alien to Estonia for humanitarian reasons.

Under Section 9^{10} of the State Borders Act, in an emergency caused by mass immigration the Police and Border Guard Board may refuse the receipt of an application for international protection if the application was not filed at the location determined for that purpose. Provisions

on international protection are laid down in the Estonian Act on Granting International Protection to Aliens *(välismaalasele rahvusvahelise kaitse andmise seadus)*.

According to the abovementioned section, upon the return of an alien the Police and Border Guard Board is to consider section 17^1 of the Obligation to Leave and Prohibition on Entry Act which contains provisions on prohibition on expulsion. According to the provision, an alien may not be expelled to a state to which expulsion may result in consequences specified in Article 3 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, or the application of death penalty. In addition, the expulsion of an alien shall comply with Articles 32 and 33 of the United Nations Convention relating to the Status of Refugees.

Estonia is currently drawing up national authority instructions on the measures enabled by the abovementioned legislation.

6 Comments received through consultation process

Comments generally stressed the need for regulation that can be applied effectively to address the instrumentalisation of migration. The security authorities (Finnish Security and Intelligence Service, National Bureau of Investigation, National Police Board, Defence Command, and Ministry of Defence) considered the proposed regulation essential for countering efforts to exert pressure on Finland. The legislation would also send a clear signal to a foreign state and could contribute to preventive action. The Parliamentary Ombudsman found that a state governed by the rule of law also must have the right to take measures that are necessary to avert a serious danger to its sovereignty or national security. This would remain true even when the measures appeared to be in conflict with international norms if, at the time when the norms were drawn up and parties committed to them, it had not been possible to take into account the activities that later gave rise to such serious danger.

In the opinion of the Supreme Administrative Court, the ability to maintain the fundamental principles of the rule of law must be preserved even in cases where serious consideration needs to be given to safeguarding national sovereignty and territorial integrity. In the opinion of the Chancellor of Justice, there are particularly good grounds to base major decisions on a government proposal and present them to Parliament for decision-making when the matter is important for national security and concerns the reconciliation of national security and fundamental and human rights.

Several opinions drew attention to the tensions and, in part, conflicts between the proposed legislation and the Constitution and fundamental rights, Union law, and Finland's international human rights obligations. In this respect, some commenters examined whether the proposal could be considered a limited derogation from the Constitution, which is referred to in section 73 of the Constitution. According to the opinions, a legislative proposal should, as a rule, be compatible with international human rights obligations. The Parliamentary Ombudsman found that the draft proposal concerned a new situation, which had been assessed using application solutions drawing on past events and situations. The Parliamentary Ombudsman pointed out that the interpretations of international treaties and fundamental and human rights norms change over time and the interpretations can also be influenced. The Supreme Administrative Court noted that international treaties or the Union directives on international protection do not recognise the phenomenon of instrumentalised migration. Moreover, there are no examples in case-law of a situation that is equivalent to the instrumentalisation of migration referred to in the draft act.

Interest groups were critical of the proposal and expressed their concern both about ensuring non-refoulement and about the impacts of the proposed powers on the group they represented (asylum seekers in general and children, persons with disabilities, women and families in particular). According to the opinions, identification of persons in a vulnerable position or subjected to persecution, and therefore the investigation of their need for international protection, should be more comprehensive than proposed.

Several commenters paid attention to protection under the law and adequate legal remedies in the application of the proposed legislation. In this respect, commenters highlighted challenges related to the summary processing, for example interpretation arrangements. Among others, the Administrative Courts considered that the nature of the proposed case-by-case assessment in relation to a decision issued in the administrative procedure should be examined in more detail. It was pointed out in the opinions that an oral decision may also constitute an administrative decision that is eligible for appeal.

The employee associations of the Border Guard, and the Chancellor of Justice, the Parliamentary Ombudsman and some other commenters drew attention to the protection of public officials under the law during the implementation of the proposed legislation. These opinions emphasised that regulation should be clear and well-defined so that the implementation of the act would not lead to unreasonable situations for individual border guards. The Chancellor of Justice thought it necessary to include in further drafting an assessment of whether the discretionary powers of border guards would become excessive in view of the prohibition of arbitrariness contained in section 2, subsection 3 and in the equality provision of section 6 of the Constitution. In some opinions, it was proposed that a public official of a certain level should be responsible for making a decision on the grounds for the derogation in the case of migrants. Some commenters held that applying the legislation would put public officials at risk of criminal prosecution, as the proposed regulation would be in manifest conflict with EU legislation and Finland's international human rights obligations.

The opinions also considered the effectiveness of the proposed legislation in cases where a foreign state did not readmit migrants, and possible situations involving the use of force at the border if a migrant behaved violently when objecting to the measures. Some opinions drew attention to the threshold for deploying the measures, the impacts of excluding the application of the Aliens Act, and the need for training and instruction for the authorities. Some commenters found the assessment of alternatives to the proposed legislation to have been relatively narrow in scope.

Based on the opinions, the relationship between the proposal and EU law and Finland's international obligations was made more specific. A more detailed assessment was included in the rationale concerning, for example, the room for manoeuvre in EU and international law and the interpretation of these in this situation. As a result of the amendments made to the proposal, some aspects of this area were reassessed. The threshold for deploying the measures was specified as knowledge of, or reasonable grounds to suspect, a foreign state exerting influence on Finland. It was also emphasised that the measures should be considered necessary specifically in order to avert a serious danger to Finland's sovereignty or national security, and not only to put an end to pressure. Guarantees for protection under the law were added by a more detailed description in the rationale of the procedures for identifying persons in a vulnerable position and for ensuring non-refoulement. Further drafting clarified, both in the provisions and in the rationale, the ambiguity related to the application of the Aliens Act and the Schengen Borders Code, but it was still considered that the implementation of the proposed act would not constitute an administrative decision made in the administrative procedure. The powers of public officials during implementation were made more specific in the rationale.

Finally, supplementary information was added to the assessment of alternative means, and the effectiveness of the proposed legislation in preventing instrumentalised migration was described in more detail.

7 Provision-specific rationale

Section 1. *Objective of the Act.* The Government proposes that a new act on temporary measures to combat instrumentalised migration be enacted. The objective of the act is to combat efforts by a foreign state to exert influence on Finland by exploiting migrants. Efforts to exert influence and the exploitation of migrants are discussed in more detail in connection with section 3.

Section 2. *Scope of application of the Act.* The act would apply to an alien's entry into the country and removal from the country as well as to the reception of applications for international protection in a situation where a foreign state is seeking to exert influence on Finland by exploiting migrants.

The act would not apply to an alien's entry into the country and removal from the country as well as to the reception of applications for international protection in other situations.

Section 3. *Restriction on the reception of applications for international protection.* The section would lay down provisions on powers to restrict the reception of applications for international protection in situations where efforts are made to exert influence on Finland by exploiting migrants. The decision on the restriction would be made by a government plenary session. Under section 8, subsection 1 of the Administrative Judicial Procedure Act, appeals against the decision of a government plenary session are made to the Supreme Administrative Court. In such cases, the right of to request review is determined in accordance with section 7, subsection 1 of the Act (see e.g. Supreme Administrative Court decision KHO:2024:27).

This would be a question of interpretation of clearly defined powers. A precondition for such decision-making would be a detailed evaluation of the conditions for the application of the section based on information available to the security authorities. The consideration would significantly focus on legal issues but since the decision-making also involves significant dimensions in terms of Finland's foreign and security policy position, it would be justified to assign the decision-making to a government plenary session instead of to a public authority or the Ministry of the Interior, taking into account that under section 67 of the Constitution matters that are far-reaching or important as matters of principle must be decided at government plenary sessions. As it can be considered that this would be a question of application of legislation, not exercise of new legislative powers, and therefore this would be a duty within the scope of governmental powers, it can be considered that the decision-making concerning the matter is best left to the Government for the reasons arising from section 3, subsection 2 of the Constitution.

As described below, restricting the reception of applications for international protection would also be possible in order to avert a serious danger to Finland's sovereignty, which is a foreign policy issue. Under section 93, subsection 1 of the Constitution, the foreign policy of Finland is directed by the President of the Republic in cooperation with the Government. It is therefore proposed that the President of the Republic and the Government would in cooperation identify the need for making the decision on the restriction referred to in this section. The need should be specified separately in connection with each government decision on the restriction. In practice, this would mean, for example, considering the matter at a joint meeting of the Ministerial Committee on Foreign and Security Policy and the President of the Republic referred to in section 24 of the Government Act (175/2003).

This would not involve the delegation of legislative powers to the Government in a similar manner as, for example, in section 23 of the Constitution. Therefore, the Government does not propose that Parliament carry out an ex post review of the decision. In addition, considering that the decision-making requires information all of which cannot be openly discussed in the plenary session of Parliament, Parliament's position as a decision-maker would be challenging to some extent, taking into account the previous view of the Constitutional Law Committee that Parliament always expresses its position specifically in the plenary session (PeVM 9/2010 vp, p. 5/II). Parliamentary committees would have the right to obtain information in accordance with sections 47 and 97 of the Constitution.

Under *subsection 1* of the section, a government plenary session could decide to restrict the reception of applications for international protection in a limited area on Finland's national border and in its immediate vicinity. The restriction would mean that the reception of applications for international protection in Finland could not be suspended altogether. The restriction could mean, for example, derogations based on citizenship. It would thus be possible for the Government to decide that the restriction does not apply to certain nationalities at all, such as the citizens of a foreign state that is exerting pressure on Finland. For the purpose of the land border, Finland's national border refers to a location agreed between states and marked in the terrain as well as to the airspace above it and the subsoil below it. The national border is precisely defined and clearly marked in the terrain. In this context, the national border would refer not only to the land border but also to the boundary of territorial waters as well as to airports and ports serving as border crossing points. Together, they form Finland's national border through which people can enter the territory of Finland. For the purpose of the land border, the immediate vicinity of the border would mean the border zone or, at most, the statutory maximum width of the border zone, which is an area three kilometres wide when measured from Finland's national border. At locations other than between official crossing points, the immediate vicinity of the border would in practice mean the immediate vicinity of Finland's national border or a border crossing point.

The government decision could only apply to a limited part of Finland's national border and its immediate vicinity. Therefore, it would not be possible to restrict the reception of applications for international protection in all parts of Finland's national border (land border, airports and ports). As described above, the case-law of the ECtHR requires that states ensure availability of genuine and effective access to means of legal entry. However, the judgments do not take a clear stand on how many and at what distance from one another the state must have border crossing points where to apply for international protection.

The decision could be made for a maximum period of one month at a time. A fixed-term decision would emphasise the exceptional nature of the measure. If necessary, it would be possible to make several separate decisions while the act was in force, but the fulfilment of the conditions laid down in this section would need to be assessed for each decision.

A decision on the restriction could be made if 1) it is known, or reasonable grounds exist to suspect, that a foreign state is seeking to exert influence on Finland by exploiting migrants; 2) the efforts to exert influence seriously endanger the sovereignty or national security of Finland; 3) the restriction is essential for safeguarding the sovereignty or national security of Finland; and 4) other means are not sufficient in safeguarding the sovereignty or national security of Finland.

Information on the efforts by a foreign state to exert influence on Finland could be based either on practical observations made by the public authorities or on information received from, for example, people crossing the border. In practice, the reasonable grounds to suspect such efforts

would be based on observations made in the border area and on information obtained or received by the authorities, such as the Border Guard, the Finnish Security Intelligence Service, the Finnish Defence Forces and the National Bureau of Investigation, and on the reasoned assessments and conclusions based on them. On this basis, it should be evident that instrumentalised migration has already begun or that there are clear indications that it will begin soon. When drawing conclusions on the threat of instrumentalisation and its probability, overall consideration should be given to the general security situation, previous events, and the above-mentioned information, observations and assessments. It should also be possible to make a decision on the restriction based on a reasonable suspicion, as it may be difficult to prove the role of a foreign state in the matter, especially in the early stages of exerting influence. In its influence activities, a foreign state may also knowingly use or otherwise exploit proxy actors, such as criminal organisations or other facilitators of illegal entry, in order to disguise its own role. However, the information and assessments on which the decision is based should be sufficiently verified. Exerting influence by exploiting migrants and instrumentalisation of migration would mean that this would not be a question of voluntary and spontaneous movement of migrants, but they would have been lured, guided, assisted or forced to move to Finland's national border and seek to enter Finland and/or the Schengen area.

Sovereignty is a primary norm of public international law, a breach of which constitutes an internationally wrongful act and triggers state responsibility. The principle of state sovereignty confers on the state an exclusive right to exercise state powers in its own territory. In addition, sovereignty protects the territorial integrity and political independence of a state from interference by other states. The endangerment of sovereignty can be examined from the perspective of whether instrumentalisation of migrants poses a serious danger to the functioning of institutions or essential public services, or whether it is a question of a risk of a serious disturbance to foreign relations or to peaceful coexistence of nations, or a risk to military interests. Activities in which a foreign state interferes in the affairs of another sovereign state by inappropriately exerting pressure in order to influence its internal affairs constitute a violation of the sovereignty of that state. The aim of such activities is to restrict Finland's right to independently make decisions concerning its territory and to create disorder, instability and high costs in Finland.

The question whether instrumentalised migration seriously endangers Finland's sovereignty should be assessed on a case-by-case basis. It would be essential to assess whether efforts by a foreign state to exert influence on Finland endanger sovereignty. The assessment of seriousness should take into account the potential or actual impacts on Finnish society described above. Any danger posed by instrumentalised persons to Finland's sovereignty would not be a criterion of serious endangerment.

States have a wide margin of discretion in determining what kinds of activities they consider a danger to their national security (HE 198/2017 vp). Activities that pose a serious threat to national security refer to activities that threaten the law and order of democratic society, basic functions of society, life or health of a large number of people, or international peace and security. Serious unrest in the territory of a state central to Finland's security or serious endangerment of border security may also pose a serious threat to national security. The expression ‘national security’ means that such activities would not primarily target anyone as an individual but, more generally, society and its people (HE 198/2017 vp).

In Finland, endangerment of national security has been interpreted as, for example, activities that pose a threat to people's lives or health or functions vital to society, foreign intelligence activities, or activities of a foreign state that could damage Finland's international relations, economic interests or other vital interests (HE 98/2020 vp).

National security also covers the protection of international relations, safeguarding public order and security, civil defence, state security and national defence interests (HE 76/2011 vp). National security also entails the sovereignty of the state, management of government affairs, international activities, defence capability, internal security, functioning of the economy and infrastructure, and the income security and functional capacity of the population. Threats to the above interests can be considered to endanger national security (See the working group report on the guidelines for developing Finnish legislation on conducting intelligence 2015). Security of supply must also be taken into account as an element of national security and internal security.

The Security Strategy for Society 2017 defines internal security as one of the functions vital to society. Maintenance of internal security covers maintaining public order and security and ensuring border security. Maintenance of border security helps to prevent breaches of provisions on crossing the national border and threats to public order and security posed by cross-border passenger traffic, to combat cross-border crime and to ensure the safety and smooth flow of cross-border traffic. It also helps to monitor and safeguard Finland’s territorial integrity.

Hybrid influence activities typically involve a wide range of tools, including political, economic, information and cyber influence activities. Migrants can also be used in hybrid influence activities. Hybrid influence activities that exploit migration are not considered to require a large number of migrants (HE 63/2022 vp).

However, it should be assessed on a case-by-case basis in each situation whether such activities seriously endanger national security in the manner referred to in the section. The assessment of seriousness should take into account the potential or actual impacts on Finnish society described above. It would be essential to assess whether efforts by a foreign state to exert influence on Finland endanger national security. Any danger posed by instrumentalised persons to Finland's national security would not be a criterion of serious endangerment.

From the point of view of national security, it is also important that the highest government bodies and other public bodies, as well as those responsible for the basic functions of society, can perform their duties without external interference. As stated above, a state has the right to decide on aliens’ entry into the country. Thus, external activities that aim to disturb or paralyse a democratic society and its institutions, or make it possible to disturb or paralyse their activities, may pose a serious threat to national security. As described above, such activities also endanger Finland's sovereignty.

As pointed out in section 2.1 of the proposal, a foreign state may seek to destabilise Finnish society by burdening public authorities, increasing polarisation of society, causing distrust in society, and possibly infiltrating people linked to extremist thinking, persons with a military background and criminals into the country. The effects may be immediate or have a creeping long-term impact on society. Influence activities can be based on an attempt to instrumentalise hundreds of people to the country in large groups over a short period of time, or the goal can be pursued with smaller numbers, which, however, exceed the public authorities' planned management capacity. As described in section 2.2 of the proposal, instrumentalised migration entails backlogs in the asylum system and delays in registration, attempts to weaken social cohesion, infiltration into the Finnish territory of persons who can be used on behalf of a foreign state, or other objectives. The goal is to complicate the work of Finnish authorities and throw society into disarray. The activities tie up a great deal of the authorities’ resources.

In the assessment, it would be particularly significant if an exceptional number of people had arrived or attempt to arrive in Finland in a certain area or during a certain period of time. These numbers would not be predetermined, and the assessment should not be made from the

perspective of the capacity of the Finnish asylum system. Moreover, making a decision on the restriction would not require that persons had already arrived in Finland. It would be sufficient that it is known, or reasonable grounds exist to suspect, that there are people behind Finland's national border and they are intended to be used as instruments for exerting pressure on Finland. It would be essential to demonstrate that the situation seriously endangers Finland's sovereignty or national security.

When assessing whether it is essential to restrict the reception of applications for international protection in order to safeguard Finland's sovereignty or national security, it would be important to demonstrate that the restriction is likely to be an effective means of resolving the situation at hand. In addition, from the perspective of proportionality, it should be demonstrated or a reasoned assessment should be provided that no other means are sufficient to resolve the situation. However, this would not mean that the suitability of other means would first have been tested in practice, but a reasoned assessment of their insufficiency would also be sufficient. Before making a decision, the impacts of the decision on the realisation of fundamental and human rights should also be carefully assessed.

If the Government had made a decision to restrict the reception of applications for international protection, there would not necessarily be a need to make a separate decision in the same area to centralise the lodging of applications for international protection under section 16 of the Border Guard Act. In practice, the proposed regulation would in other respects correspond to the above mentioned decision referred to in the Border Guard Act, but it would also enable, as described below, the prevention of the entry of persons applying for international protection and their removal from the country. However, the proposed regulation would not prevent a decision to centralise the submission of applications for international protection referred to in section 16 of the Border Guard Act from being taken in the same area, if necessary. Such a decision could also be necessary elsewhere at Finland's national border than within the territorial scope of the government decision under the proposed act.

At the same time as the government decision under the proposed regulation, other powers referred to in section 16 of the Border Guard Act, i.e. the temporary closure of one or more border crossing points and/or the restriction of cross-border traffic, could also be used if the requirements are met. However, the purpose of the proposed regulation would be to make it possible to keep border crossing points open to other traffic if necessary. This would promote the realisation of other fundamental and human rights, such as freedom of movement, the right to family life, the rights of minorities, the right to work, the protection of property and the freedom to engage in commercial activity.

As stated above, restricting the reception of applications for international protection on the grounds referred to in the section would not require that instrumentalised migrants had already arrived in Finland. A decision could also be made proactively if this were essential for safeguarding the sovereignty or national security of Finland. A similar possibility to act proactively also applies to decisions under section 16 of the Border Guard Act to close border crossing points, restrict cross-border traffic and centralise the submission of applications for international protection (HE 94/2022 vp).

Subsection 2 of the section would contain an informative provision according to which a decision made by a government plenary session in accordance with subsection 1 would not restrict the reception of applications for international protection beyond the area referred to in the decision. The provision would emphasise the premise expressed in subsection 1 that the reception of applications for international protection could be restricted only in a limited area on Finland's national border or in its vicinity. Furthermore, restricting the reception of

applications for international protection would not affect the provisions of section 95 of the Aliens Act on the authorities with which an application for international protection may be lodged outside Finland's national border.

Under *subsection 3* of the section, the reception of applications for international protection should not be restricted to a larger extent or for a longer period than is essential for combating the serious endangerment of the sovereignty or national security of Finland.

As described above, the European Court of Human Rights has stated in its case-law that the obligations of the European Convention on Human Rights require that states ensure availability of genuine and effective access to means of legal entry for migrants. A state has the right to restrict the entry of aliens to legal border crossing points and to prevent illegal border crossings, provided that genuine and effective access to means of legal entry is ensured. As explained above, it is also apparent from the EU Asylum Procedures Directive that in order to ensure genuine and effective access to the asylum procedure, it should be ensured that a sufficient number of application registration points, including border crossing points, are designated and kept open for that purpose and that applicants are informed of the closest service points with which they can lodge their applications. The geographic location of one or more border crossing points open for the submission of applications for international protection should be taken into account when assessing the scope of the decision.

In its report on fundamental rights issues at land borders, the European Union Agency for Fundamental Rights (FRA) has drawn attention to the fact that border crossing points must be at a reasonable distance from each other in order for border arrangements to comply with the EU Charter of Fundamental Rights, the Geneva Refugee Convention and other obligations under international law relating to international protection (Migration: Fundamental rights issues at land borders (2020)). However, with regard to the land border between Finland and Russia, it must be taken into account that provisions on the border crossing points are laid down in the Agreement on crossing points at the Finnish-Russian state frontier between the Government of the Republic of Finland and the Government of the Russian Federation (Finnish Treaty Series 66/1994).

The proposed regulation would allow short-term restrictions on the reception of applications for international protection in a certain area, for example at the border between Finland and Russia. The regulation would not mean that Finland would completely suspend the reception of applications for international protection. When making a decision, it should be assessed what kind of a decision would be essential and proportionate in any given situation. The government plenary session would be obliged to regularly review the content and scope of the decision as the situation develops, in cooperation with public authorities. The decision should be repealed or amended if it is no longer essential for the purpose laid down in subsection 1.

The Ministry of the Interior should provide information on the decision made by the government plenary session to a sufficient extent. The aim would be to provide information on the content of the decision both to the party exerting pressure on Finland and to instrumentalised migrants, which would prevent them from coming to the vicinity of the Finnish border.

Section 4. *Removal from the country and preventing entry into the country*. The section would lay down provisions on the measures taken by competent authorities in a situation where the Government has made a decision referred to in section 3, subsection 1. As a rule, the Border Guard would be responsible for implementing decisions on the restriction, supported by other authorities.

As a general rule, the entry of instrumentalised migrants in the area referred to in the government decision would be prevented. Provisions on this would be laid down in *subsection 1* of the section.

Preventing entry into the country would mean measures taken to prevent people from entering the territory and jurisdictional area of Finland. This could entail people trying to enter Finland by crossing the border at locations between official border crossing points or through open or closed border crossing points. Under section 6 of the Border Guard Act, the duties of the Border Guard must be performed appropriately and impartially, while promoting equal treatment and conciliation. Border security must primarily be maintained by means of advice, requests and commands. Thus, border guards should, whenever possible, inform migrants observed behind the national border that it is not permitted to enter Finland from the location in question and advice, request or command them to use legal routes. The primary means of preventing entry into the country would include building physical barriers, such as fences and heavier obstacles, and issuing requests, prohibitions and commands orally and by means of signs and signboards. Vehicles could also be prevented from entering, for example by using vehicles to form a roadblock. People could also be stopped from entering by means of a physical barrier formed by border guards at the national border. In the cases where entry is prevented and the people are unable enter the territory and jurisdictional area of Finland as described above, the matter would not constitute a refusal of entry referred to in Article 14 of the Schengen Borders Code.

If, despite preventive measures, instrumentalised migrants had already entered Finnish territory, they would be removed from the country without delay under *subsection 2* and directed to a location where applications for international protection are received. Removal from the country would also be enforced primarily by means of advice, requests and commands, but it could be reinforced by using force, if necessary. In practice, removal from the country would take place in a suitable location at the national border where it could be carried out by appropriate means. The proposal does not include amendments to the regulation on the use of force or preparedness for the use of force by border guards or to the regulation on self-defence.

Under section 32 of the Border Guard Act, border guards have the right, for the purpose of maintaining public order and security at border crossing points, to prohibit or restrict movement, order a crowd to disperse or move, disperse a crowd with force and apprehend or remove a person from a place, for example. Under section 35 of the Border Guard Act, when performing official duties, border guards have the right to use force to overcome resistance, remove persons from places, apprehend persons, prevent the escape of those who have been deprived of their liberty, remove obstacles or prevent an imminent threat of an offence or another dangerous act or event. The use of force under section 35 of the Border Guard Act can be applied to all official duties of border guards both at border crossing points and outside them, for example, in the border zone. The use of force must be necessary and justifiable. When assessing the justifiability of the use of force by border guards, the importance and urgency of the official duty, the danger of resistance, the resources available and other circumstances affecting the overall assessment of the situation must be taken into account. Where it is necessary to use force, it must be used only to the extent and for the time necessary to perform a statutory official duty (principle of minimum intervention).

In accordance with the principle of proportionality laid down in section 7 of the Border Guard Act, actions taken must be justifiable in proportion to the importance, danger and urgency of the duty, the objective sought, the behaviour, age, health and other specifics of the person at whom the action is directed, and in view of other factors affecting the overall assessment of the situation. According to the principle of minimum intervention (section 7a), no individual's rights may be infringed upon and no one may be caused more harm or inconvenience than is

necessary for the duty to be carried out. Under section 11, border guards must respect fundamental and human rights and, in exercising their powers, choose from all reasonable options the course of action that best serves to uphold these rights.

Under *subsection 3*, a person to be removed from the country should be provided with written information on the grounds for the measure and on the place where the person may lodge an application for international protection. In that regard, this would be a question of an actual administrative action not involving a separate administrative decision. Therefore, there would also be no right to request review. This would not constitute, for example, removal from the country under Article 8 of the Return Directive. The subsection would contain an express provision stating that removal from the country would not be subject to appeal. However, the person would have the opportunity to file a complaint about the action in accordance with the Administrative Procedure Act, submitting the matter and, in particular, the lawfulness and appropriateness of the authority's conduct for further consideration by the supervisory authority after the event. In order for the actions taken under the proposed act to be sufficiently documented, border guards should, as a rule, record the events in the Border Guard's information system, complying with the legislation on the processing of personal data in force at the time. Recording the events would facilitate the examination of the situation after the event, and improve the protection under the law of both the migrant and the border guard who carried out the action. In each situation, it would be possible to determine more specifically the level of detail for the recorded entries in order to ensure, on the one hand, the above aspects of protection under the law and, on the other hand, the effectiveness of the action.

The proposed act would not apply to the processing if a person has entered the country without notifying the authorities of an intention to apply for international protection in Finland. The entry of such persons is processed in accordance with the ordinary procedure under the Schengen Borders Code and the Aliens Act. Persons who do not fulfil the required entry conditions when entering the territory of Finland are refused entry by a decision taken under Article 14 of the Schengen Borders Code, and their entry into Finland is not permitted. The conditions for entry are examined immediately after the border crossing in a suitable place.

Section 5. *Derogations.* The section would contain provisions on derogations to the general rule laid down in section 4 according to which instrumentalised migrants are prevented from entering the country and those who have entered the country are removed. The purpose of these derogations would be to allow, in limited cases, the lodging of applications for international protection in situations where it would be necessary to fulfil the fundamental and human rights obligations binding on Finland. The derogations would apply to situations where a person has expressed their intention to apply for international protection in Finland. The processing in the case of those who have entered the country for other purposes is described in more detail in connection with section 4.

Under *subsection 1*, firstly an application for international protection would be received if, according to an assessment made by a border guard in an individual case, it were essential for safeguarding the rights of a child, a person with disabilities or another person in a particularly vulnerable position. When making the assessment for a child, particular importance would be attached, in accordance with Article 3 of the Convention on the Rights of the Child, to the best interest of the child and circumstances related to the child’s development and health. With regard to persons with disabilities and other persons in a particularly vulnerable position, the assessment would take into account whether removal from the country would pose an immediate danger to the person's life or health. When considering the issue of centralising the submission of applications for international protection under section 16 of the Border Guard Act, the Constitutional Law Committee emphasised that, in government decision-making, particular

attention should be paid to the effects of centralisation on groups in a particularly vulnerable position, such as children and people with disabilities as asylum seekers (PeVL 37/2022, paragraph 27).

When an application submitted by a child, person with disabilities or person in a particularly vulnerable position would be received, it would be assessed on a case-by-case basis whether the applications for international protection submitted by their accompanying family members and by the possible assistant to the person with disabilities could also be received. When considering whether to receive applications from family members, the best interests of the child would be taken into account. In practice, an assessment in the best interests of the child could concern, for example, the reception of applications by the child's parents on a case-by-case basis. The purpose would not be to assess family ties more extensively than what was necessary for the best interests of the child. This would aim to ensure the protection of family life and the rights of children and people with disabilities.

The border guards should aim to identify children, people with disabilities and people in a particularly vulnerable position. In the situation referred to in the proposed act, identification would primarily take place by means of assessing physical characteristics, but also by examining any identity documents or other reliable documentary evidence and by interviewing the persons during the encounters. When identifying people in a particularly vulnerable position, it would be important to take account of their age or physical or psychological state. As explained above, the key issue in the assessment would be whether removal from the country would pose an immediate danger to the person's life or health. In this respect, consideration should also be given to the possibility for the Finnish authorities to eliminate the danger, for example with medical treatment or by other means, before removing the person from the country.

Secondly, a person’s application for international protection would be received if the person has presented, or there have arisen, circumstances which, according to an assessment made by a border guard, make it evident that the person faces a real risk of being subjected to the death penalty, torture or other treatment violating human dignity primarily in the state from which the person has arrived in Finland. In particular, the assessment would take into account documents and electronic data that the person presents, such as information available on a mobile phone or another device the person is carrying. The assessment would also include an examination of any external facts that could be observed about the person, and an examination of up-to-date information obtained from various sources on the safety of the state under assessment for the person to be removed from the country. The timeliness of country information would always be checked during the drawing up of the government decision.

In practice, the assessment would be carried out by a border guard who has received sufficient training and instructions for the task. The summary assessment would be based on sufficient interaction to allow the migrant have a genuine opportunity to present matters relevant to the assessment. A case-by-case assessment would always be carried out without delay. The migrant would be able to present facts related to their personal situation, such as credible documentary evidence or other evidence. Other credible evidence suggesting the existence of the treatment referred to in the provision could also come to light during the situation. For example, violence or degrading treatment or evidence based on other sources could be immediately observed during the situation.

The assessment would primarily examine the situation in relation to the country from where the person is seeking to enter Finland. The assessment would focus on whether the person would be, in the country in question, in real risk of being subjected to the specified treatment. Particular

account would be taken of a legal entry permit, such as a residence permit or visa, that is issued to the person to the country in question. In addition, the above-mentioned violence or degrading treatment that can be immediately observed at the border and factors from other sources would be of relevance. When interacting with the authorities, the migrant would have an opportunity to present the authorities with circumstances as to why the country in question is not safe for them.

On the basis of the presented information, the border guard would need to form a reasoned assessment of whether the migrant would face a real danger of being subjected to the death penalty, torture or other similar degrading treatment as a result of removal from the country. The situation of those who had entered the country would always be assessed without delay, but on an individual basis. The assessment would be carried out in a manner that would be necessary for safeguarding the rights of the person or for ensuring border security or national security or due to other circumstances. These could mean, for example, situations where relocating a person would be appropriate for the organisation of the Border Guard operations. The border guard would need to ensure that the person is adequately understood. If the border guard and the person who had entered the country do not share a common language, the border guard should ensure communication by other means, such as telephone interpretation or translation. This would safeguard the right of those who had already entered the country to be heard, and promote the realisation of equality.

Even if the situation referred to in the act involved making a very summary assessment, it would aim to guarantee compliance with the principle of non-refoulement for people who would face a real risk of being subjected to the death penalty, torture or other degrading treatment as a result of removal from the country. It would also safeguard the rights of children, people with disabilities and other people in a particularly vulnerable position. The case-by-case assessment described above can be considered to be reasonable, objective and individual in the situation of instrumentalised migration referred to in the proposal, and therefore to meet the requirements for an appropriate assessment in respect of persons who have entered the country.

Should the grounds laid down in this section for receiving an application for international protection not appear, the person would be removed from the country without delay in accordance with the provisions of section 4. Should the person's application for international protection be received, the person would be directed or, if necessary, transported to the appropriate location for registering asylum applications. The examination of the asylum application would continue under the provisions of the Aliens Act on asylum examinations, and the applicant would be provided with the reception services that they are entitled to as an asylum seeker under the Act on the Reception of Persons Applying for International Protection and on the Identification of and Assistance to Victims of Trafficking in Human Beings.

Section 6. *Exceptional situations.* The section would lay down provisions on the powers in situations where attempts were made to enter Finland forcibly by using violence or taking advantage of a large number of people. The provisions would help prepare for the possibility that the situation deteriorated in the manner described in more detail in section 2.3 of the proposal. A state has the right and also obligation to maintain security and public order at its borders and border crossing points. Violence at the border must be avoided by all means both when safeguarding the territorial integrity and security of the state and when seeking to ensure the security of people crossing the border legally. However, if acts of violence occur at the borders, the authorities may take the necessary measures to maintain security and public order. Under this section, forcible entry into the country could be prevented immediately at the national border without carrying out a case-by-case assessment referred to in section 5, if this was

essential to safeguard the lives and health of people and if the procedure could be deemed justifiable when assessed as a whole.

Violence would mean acts of violence against both people and property. It could therefore include acts such as damaging a barrier when attempting to enter the country. The application of the regulation would not require a certain number of people attempting to enter the country. Instead, what would be essential is that the people took advantage of their large number in order to complicate the work of Finnish authorities. Forcible entry into the country could be prevented immediately at the national border, where this was necessary to safeguard the life or health of either people staying in Finland or the migrants themselves. The authorities would have the opportunity to use all means available to them under the current legislation to prevent forcible entry into the country. The powers and options available to the Border Guard to use force are explained in more detail in the rationale for the proposed section 4. When assessed as a whole, the action should be justifiable in view of the situation. As explained in the rationale for section 4, an authority must respect the principles of proportionality and minimum intervention and choose from the available options the course of action that best serves to uphold the fundamental and human rights.

Forcible entry into the country could be prevented without carrying out the case-by-case assessment referred to in the proposed section 5. Therefore, in a situation involving an attempt to enter the country by using violence or by taking advantage of a large number of people, it would not be necessary to assume that every person participating in such action was seeking international protection in Finland. This would not be assumed even if the circumstances of the situation, events preceding it or intelligence gathering suggested otherwise. What would be essential in such a situation is that Finland's territorial integrity, national security and public order were safeguarded, people's lives and health were secured, and the entry of aliens into Finland took place in a controlled manner. As explained above, it would be essential that the measures taken by the authorities were justifiable when assessed as a whole.

Section 7. Entry into force. The section would lay down provisions on the entry into force and period of validity of the act. The act would be temporary, and it would be valid for one year after its entry into force.

8 Entry into force

This act is proposed to enter into force as soon as possible and remain in force for one year from the entry into force.

9 Relationship to the Constitution and procedure for enactment

9.1 Basis for assessment

9.1.1 General premises

The government proposal would introduce a provision assigning the Government the power to decide to restrict the reception of applications for international protection. Under section 3, subsection 1, of the bill, the Government could decide to restrict the reception of applications for international protection in situations listed the section. In such situations, applications for international protection would not be received unless grounds specified in section 5 exist.

A key question for the constitutional review of the proposal is, in the first place, whether the bill may be adopted under the enactment procedure for ordinary acts referred to in section 72 of

the Constitution, and if that is not possible, whether the bill may be adopted as an exceptive act under the procedure referred to in section 73 of the Constitution. Another key aspect of the review is how to assess the relationship of exceptive acts, referred to in section 73, subsection 1, of the Constitution, to the human rights obligations binding on Finland and to the European Union law.

The objective of this proposal is to combat efforts by a foreign state to exert influence on Finland by exploiting migrants. The Constitutional Law Committee has stated that border control, determination of border crossing points and regulation of border traffic fall, as a rule, within state sovereignty (PeVL 37/2022 vp). The government proposal for amending the section of the Constitution on freedom of movement refers to a general rule of public international law which states that foreign nationals do not have a general right to settle in another country (HE 309/1993 vp, p. 52). In its past statements, the Constitutional Law Committee has referred to the case-law of the European Court of Human Rights, according to which there is a well-established principle of public international law stating that states have the right to control the entry and residence of aliens (e.g. judgment of 5 March 2020, *M.N. and others v Belgium*, no. 3599/18, paragraph 124 and the case-law cited).

The Constitutional Law Committee has previously discussed questions of instrumentalised migration on a few occasions in connection with proposals for EU law. Then, the Committee considered it important that any measures to tackle instrumentalised migration take into account that, on one hand, states have the right to decide on the security of their external borders and that, on the other hand, states have the right to control entry to their territory (PeVL 16/2022 vp, paragraph 7; PeVL 15/2022 vp). The Constitutional Law Committee has deemed that regulation to tackle instrumentalised migration has acceptable and weighty objectives (PeVL 16/2022 vp, paragraph 5). However, the Constitutional Law Committee has also stressed that any measures regulating entry to Finland’s territory should observe Finland’s international obligations, respect the fundamental and human rights and uphold human dignity (PeVL 15/2022 vp, paragraph 8). According to the Committee, these requirements can also be based on sections 1 and 22 of the Constitution. (PeVL 37/2022 vp, paragraphs 4–6).

The proposed regulation specifically aims to prevent hybrid influence activities that instrumentalise applications for asylum and asylum seekers and that seriously endanger Finland's sovereignty or national security. The proposed regulation would mean that it would be possible to restrict the reception of asylum applications for a fixed period in a limited area on Finland's national border, even if all border crossing points were open. This would safeguard the rights of those who are not asylum seekers in situations where, in practice, the alternative would be a government decision, under section 16 of the Border Guard Act, to close a border crossing point or to restrict cross-border traffic for a fixed period or until further notice. In such situations, the proposed regulation would safeguard the right of movement of those who are not asylum seekers. It could also promote the protection of family life and the best interests of the child, for example in situations where a person who is resident in Finland has a family member or relative living abroad. In this respect, the proposal may have positive impacts.

The smooth running of cross-border traffic is of key importance for the economy and prosperity of Finland. Enabling cross-border traffic for other than asylum seekers may have significant economic impacts on business, such as carriers, tourism companies and other operators associated with them. Enabling cross-border traffic would also promote the freedom to conduct business.

This is, at least to a certain extent, a new kind of situation with no existing applicable case-law or treaty monitoring practice in international or EU law. For this reason, new legal

interpretations must also be found. The interpretations of international treaties and EU law change over time, and the interpretations can also be influenced and justified by strong real arguments in new situations and contexts. The proposed legislation seeks to influence a situation that is fundamentally distinct from the objectives of international treaties and the relevant EU law. The purpose of the existing treaties or the resulting case-law has not been to promote opportunities for instrumentalising migration and exerting pressure on states. In this new situation, the applicability of previous interpretations and case-law can also be approached through a reasoned distinction, i.e. by noting the differences between the current interpretation and the case-law and the new situation, and by presenting grounds for new interpretations with real arguments related to the new situations.

The need for the possible international protection of migrants is not the only fact to be considered when the state controls its borders and the entry of aliens at its borders. The perspective of the rule of law and protection under the law is not exclusively related to the status of an individual brought to the Finnish border. Other interests, such as national security, territorial integrity and public order, must also be considered in border control and legal assessment. It is not necessary to assume that every person who attempts to enter into a country by using violence or taking advantage of mass power, or that a person who, based on the circumstances or prior intelligence, has hostile intentions, should be treated as an asylum seeker. These would be exceptional, individual situations affecting only some migrants, and the prevention of these situations cannot be considered problematic from the perspective of international law.

However, a constitutional review must be linked to the current law and existing case-law, taking into account the room for interpretation and manoeuvre in international law. The constitutional review must therefore also assess how the proposed powers would affect the human rights of persons being instrumentalised. In this respect, it must especially assess how the proposed regulation would affect Finland’s fundamental and human rights obligations in relation to access to asylum procedures and the principle of non-refoulement. Because the regulation seeks to prevent instrumentalisation of people by state actors, it can also be considered to have, at least indirectly, positive impacts on the realisation of fundamental and human rights. The proposal has relevance for at least sections 1, 6 and 7, section 9, subsection 4, and sections 21, 22 and 73 of the Constitution. The review pays attention to the requirements laid down in both subsection 1 and subsection 2 of section 73 of the Constitution. The relationship between the proposal and the provisions of section 106 of the Constitution must also be assessed. Under section 106 of the Constitution, a court of law must give primacy to the provision in the Constitution if the application of an act would be in evident conflict with the Constitution in a matter being considered by the court. If the Constitutional Law Committee has confirmed that an act is constitutional, any opposing view cannot be seen as clear and undisputed in the manner referred to, insofar as the Committee's review of a case before the court involves an interpretation similar to the issue being considered (Constitutional Law Committee statement PeVM 10/1998 vp). The review will also consider Articles 2, 3, 5, 13 and 15 of the European Convention on Human Rights; Article 33(1) of the Geneva Convention relating to the Status of Refugees; Articles 4, 6 and 7 of the ICCPR; and Article 3 of the UN Convention against Torture. The relationship of the proposal to human rights obligations and to the Constitution is discussed in sections 9.2 and 9.3, respectively. Section 9.1.2 describes premises for assessing the matter from the perspective of EU law in general with regard to Finland’s legislative powers.

9.1.2 Significance of the EU law

EU law takes precedence over national law (well-established and recurring case-law of the Court of Justice of the European Union, see e.g. C-6/64, EU:C:1964:66, pp. 1159 and 1160; C-

573/17, EU:C:2019:530, paragraph 53 and the case-law cited). Pursuant to the principle of sincere cooperation, the Member States must take any appropriate measure to ensure fulfilment of the obligations arising out of the Treaties or resulting from acts of the institutions of the Union and to refrain from any measure which could jeopardise the attainment of the Union's objectives (Article 4(3) TEU). The Constitutional Law Committee, too, has drawn attention to these matters and stated that it is clear that EU law takes precedence over national law in accordance with the conditions defined by the case-law of the Court of Justice of the EU (see PeVL 20/2017 vp, p. 6, and PeVL 51/2014 vp, p. 2/II) and that the principle of primacy of the EU law is a key principle of the Union's legal order and it has been brought in force in Finland at the level of the Constitution. In this context, the Constitutional Law Committee has drawn attention to section 1 of the Constitution that states that Finland is a Member State of the European Union and to the condition of the EU's principle of sincere cooperation that requires Member States to refrain from any measure which could jeopardise the attainment of the Union's objectives (PeVL 79/2018 vp). Being a Member State of the European Union naturally means compliance with the EU law, which is why a deviation from the provisions of the Treaty on the Functioning of the European Union, the Charter of Fundamental Rights of the European Union and the general principles of the EU law (including the principle of primacy of EU law) could be considered an exceptional and problematic solution. With regard to the primacy of EU law, it is particularly important to examine whether the proposal has sufficient grounds in Union law for the Government, the authorities and the courts to apply the proposed act notwithstanding the primacy of EU law.

EU law covers asylum and migration matters very comprehensively. Title V of the Treaty on the Functioning of the European Union (TFEU) on the area of freedom, security and justice includes provision on matters such as border control, asylum and migration. Article 78 under Title V provides for a common European asylum system and for common asylum procedures. Secondary legislation, in particular the Asylum Procedures Directive, has comprehensive provisions on these matters. It lays down exhaustive provisions on rules requiring Member States to examine all applications for international protection. The Charter of Fundamental Rights of the European Union, which is part of the EU's primary legislation, and its provisions guaranteeing the right to asylum and protection in the event of removal, expulsion or extradition should also be taken into account. Article 18 of the Charter of Fundamental Rights guarantees the right to asylum in accordance with the Geneva Convention and its Additional Protocol relating to the Status of Refugees as well as the Treaties of the European Union. Article 19 of the Charter prohibits collective expulsions and states that no one may be removed, expelled or extradited to a state where there is a serious risk that they would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment. The Charter of Fundamental Rights of the European Union is a legally binding instrument that has the same legal value as the Treaties (Article 6(1) of the Treaty on European Union (TEU)). The provisions of the Charter of Fundamental Rights of the European Union are binding on the Member States when they apply EU law, such as EU asylum regulation. Moreover, Article 6 of the Treaty on European Union (TEU) states that fundamental rights, as guaranteed by the European Convention on Human Rights, constitute general principles of the EU law.

The premise of the proposal is that the proposed summary assessment and the legal remedies attached to it would seek to ensure compliance with non-refoulement and therefore also the realisation of Article 19 of the Charter of Fundamental Rights. However, as compliance with non-refoulement would not be ensured by receiving an asylum application and examining the matter in the asylum procedure, there is tension between the proposal and Article 18 of the Charter of Fundamental Rights on the right to asylum and the regulation on the EU asylum procedure implementing the Article. With regard to the right to asylum, efforts are made to ease the tensions by limiting the derogation to the minimum possible by only applying it to a limited

area and by keeping its duration as short as possible. In addition, persons in need of protection would be entitled to apply for international protection at border crossing points not covered by the government decision. As regards secondary legislation, it becomes necessary to assess whether derogations are possible under Article 4(2) TEU or Article 72 TFEU.

Section 2.10.7 of the proposal describes the possibilities for derogating from EU secondary regulation for reasons of national security. EU law recognises the special importance of national security. Under Article 4(2) TEU, the Union must respect the essential state functions, including ensuring the territorial integrity of the state, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State. The case-law of the Court of Justice of the European Union recognises the importance of safeguarding national security. The Court has found that the concept of 'public security' covers both the internal security of a Member State and its external security and, consequently, a threat to the functioning of institutions and essential public services and the survival of the population, as well as the risk of a serious disturbance to foreign relations or to peaceful coexistence of nations, or a risk to military interests, may affect public security (C-72/22 PPU, paragraph 88). It has also found that the importance of the objective of safeguarding national security, read in the light of Article 4(2) TEU, exceeds that of other objectives in some of the EU's secondary legislation and is therefore capable of justifying measures entailing more serious interferences with fundamental rights than those which might be justified by those other objectives (C-162/22, paragraph 36; the case concerned objectives such as the prevention, investigation and detection of criminal offences).

The safeguarding of internal security is discussed in Article 72 TFEU under Title V on the area of freedom, security and justice. According to Article 72 TFEU, Title V does not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security. The derogation provided for in Article 72 TFEU must be interpreted strictly, as in general in respect of derogations (e.g. judgment of 2 April 2020 on the joined cases of *Commission v Poland* C-715/17, *Commission v Hungary* C-718/17 and *Commission v Czech Republic* C-718/17, paragraph 144 and the case-law cited). A Member State must be able to prove that an exceptional influx of aliens on their territory poses a threat to national security or law and order as referred to in Article 72 TFEU. In its judgment of case C-808/18, the Court of Justice of the EU found that a Member State merely invoking, in a general manner, a risk of threats to public order and national security is not a demonstration to the requisite legal standard of the necessity to derogate from a particular directive. The assessment must always be based on the situation prevailing in the Member State.

Section 2.10.4 of the proposal describes, for example, a judgment of the Court of Justice of the EU concerning a situation at the border between Lithuania and Belarus in 2021 (C-72/22 PPU, *M.A.* (ECLI:EU:C:2022:505, 30 June 2022)). The judgment does not refer to a situation where a foreign state instrumentalises migrants to exert influence over a Member State of the European Union; instead, it concerns case of a mass influx of aliens. The Lithuanian national legislation in question was also based on a state of emergency or an emergency only due to a mass influx of aliens without any attempts by another state to exert influence. The Court found that Article 6 and Article 7(1) of the Asylum Procedures Directive are to be interpreted as precluding legislation of a Member State under which, in the event of a declaration of martial law or a state of emergency or in the event of a declaration of an emergency due to a mass influx of aliens, illegally staying third-country nationals are effectively deprived of the opportunity of access, in the territory of that Member State, to the procedure in which applications for international protection are examined (paragraph 56). According to the judgment, even national legislation that allows the public authorities to exercise discretion in a state of emergency and to agree to examine an application for international protection in light of the particular vulnerability of the

applicant or other exceptional circumstances does not meet the requirements of Article 6 of the Asylum Procedures Directive (paragraph 66). In this case, the Court did not assess the compatibility of legislation on instrumentalised migration with EU legislation, but rather legislation on a mass influx of aliens. Therefore, the situation was different from the ongoing situation involving instrumentalisation of migration at Finland's eastern border.

The Court of Justice of the EU has recognised that while Member States have a wide margin of discretion in terms of national security, they are still obliged to respect the Treaties. For example, when assessing Member States' measures to restrict free movement on the basis of national security, the Court has recognised that the national needs of Member States may vary from one Member State to another and from one period of time to another. However, the Court has also stressed that any restrictions imposed by Member States must be appropriate and necessary and proportionate to the objectives sought. According to the case-law of the Court, however, the concept of 'public order' has been considered to require that a situation represent a genuine, present and sufficiently serious threat affecting a fundamental interest of society. The concept of 'public security' covers both the internal security of a Member State and its external security and, consequently, a threat to the functioning of institutions and essential public services and the survival of the population, as well as the risk of a serious disturbance to foreign relations or to peaceful coexistence of nations, or a risk to military interests, may affect public security (see e.g. C-72/22 PPU, paragraph 88 and the case-law cited). The case mentioned above concerned a sudden influx of third-country nationals.

The case-law of the Court of Justice of the EU has also drawn attention to the right to security of person under Article 6 of the Charter of Fundamental Rights of the European Union. According to the Court, the safeguarding of national security and the maintenance of law and order affect also the protection of the fundamental rights and freedoms of other persons (e.g. joined cases of C-511/18, C-512/18 and C-520/18, *La Quadrature du Net* et.al., paragraphs 99 and 136, and C-623/17, *Privacy International*, paragraph 44).

An assessment of the restrictions enabled by the bill should consider, first, whether the restrictions are appropriate and necessary and proportionate to the objectives sought and, secondly, whether the situation represents a genuine, present and sufficiently serious threat affecting a fundamental interest of society. The assessment should also consider whether the situation represents a threat to the functioning of institutions or to essential public services or to the survival of the population, or a risk of a serious disturbance to foreign relations or to peaceful coexistence of nations, or a risk to military interests. Other fundamental rights such as the right to personal security under Article 6 of the EU Charter of Fundamental Rights should also be taken into account.

The purpose of the proposed legislation is to address the constantly changing security situation and to safeguard Finland's sovereignty and national security. In the phenomenon of instrumentalised migration, the involvement of a foreign state is evident and their role as a whole is significant. The aim of a foreign state is to exert pressure on Finland. What is happening at the eastern border is an exceptional, alarming and serious phenomenon when examined in the context of the changes in the security environment of Finland and Europe. Finland, too, is a target of implicit and explicit aggressive attempts by a foreign state to interfere with matters falling within state sovereignty.

Such influence activities may cause serious disruptions of public order and security, and they can be used to create tensions between migrants and groups opposing them. In the most serious situations, the target country must weigh the measures it needs to take to safeguard social stability, legal order, national security, territorial integrity, public order and security or public

health while simultaneously complying with the obligation to duly process applications for international protection. A larger group entering a country by force or violence could pose a serious threat. Such a group could include individuals who could be deemed to be a threat to national security or public order based on different aspects of their background. In situations where people forcibly enter the country using violence or taking advantage of a large number of people, the life and health of the persons involved must also be considered.

For the time being, there are no legal instruments that a state could apply to effectively combat such efforts to exert influence on its sovereignty and national security. The European Union has recognised the justified need of the Member States to be able to respond to such situations, but so far, the Member States have only had access to means by which they can keep a mass influx of migrants under control if it is either spontaneous or manoeuvred by a foreign state.

Although there are tensions between the proposed legislation and EU law on the asylum procedure, a situation leading to the application of the proposed legislation can be regarded as a situation where a derogation from the EU law could be possible under Article 72 TFEU or Article 4(2) TEU for the purpose of upholding public order or of safeguarding internal or national security. The present situation differs substantially from the above-mentioned cases where the Court of Justice of the European Union found that no derogation was possible. The proposed legislation does not include powers to prepare for situations for the management of which there are tools in the EU law. The purpose of the proposal is to create powers for situations that pose a danger to Finland's sovereignty and national security due to pressure from a foreign state. A particular challenge in this situation is that the foreign state exerting pressure is one that is waging a war of aggression and acting in unpredictable and aggressive ways. Instrumentalised migration may also constitute an unconventional approach in the military thinking of the state exerting the pressure, and the application that approach to exert influence. Given the nature of the phenomenon and its impact on Finland's sovereignty and national security, the proposed measures can be considered to relate, in particular, to the essential state functions referred to in Article 4(2) TEU including ensuring territorial integrity, maintaining law and order and safeguarding national security, and to the maintenance of law and order and the safeguarding of internal security referred to in Article 72 TFEU, and therefore the proposal can be deemed to have sufficient grounds in Union law for the Government, the competent authorities and the courts to apply the act. Since the Constitutional Law Committee has not previously commented on a similar question, there is reason for the Committee to review the matter. A statement of the Constitutional Law Committee is also relevant for the application of section 106 of the Constitution, should a need arise to assess the application of the provision of the act for the purpose of a case brought before a court. As regards EU law, the assessment would then focus on section 1 of the Constitution in particular.

9.2 Assessment of general conditions for restricting fundamental rights

9.2.1 Sovereignty and national security as grounds for restrictions

Section 3 of the bill proposes to lay down provisions on the powers of the Government to temporarily restrict the reception of applications for international protection in separately specified areas of Finland’s national border. However, applications for international protection should be received in the situations described in section 5, excluding the exceptional situations referred to in section 6.

Section 3, subsection 1, of the bill would define the situations in which a decision on restrictions may be taken. These situations would be such where influence activities seriously endanger Finland’s sovereignty or national security. The proposal would strive to guarantee Finland’s

possibilities to safeguard its sovereignty and national security even in the situations defined in the proposal. There are constitutional grounds for the objective of the proposal with respect to safeguarding the sovereignty and national security of Finland. However, an interest that can be justified in constitutional terms alone does not settle the question of whether there are grounds to restrict other fundamental rights based on such an interest.

In a few other contexts, the Constitutional Law Committee has assessed the question of the extent to which the safeguarding of national security can be considered an acceptable reason to restrict fundamental rights (e.g. statements PeVL 2/2023 vp, PeVL 37/2022 vp and PeVL 16/2022 vp). For example, in its statement 37/2022 vp concerning the amendment of the Border Guard Act, the Constitutional Law Committee considered the objectives of the proposal to be legitimate and important and stated that the State must seek to safeguard national security and public order in all circumstances. In the Committee's opinion, the proposed measures were based on legitimate interests which, in extreme cases, may even revert to the fundamental right to security of person (Constitutional Law Committee statement PeVL 16/2022 vp, paragraph 5; see also statement PeVL 5/1999 vp, p. 2/II; see also e.g. statements PeVL 36/2020 vp, p. 3, PeVL 73/2018 vp, p. 3, PeVL 15/2018 vp, p. 8). The Committee stated that under section 22 of the Constitution, the public authorities shall guarantee the observance of fundamental rights and human rights, including the right to security of person. The Committee also considered the question of national security in its report on an amendment to the Constitution (PeVM 4/2018 vp, pp. 6–9). The other interest to be protected by the restriction under section 3 of the bill is Finland’s sovereignty. This would be linked to Finland being a sovereign republic under section 1, subsection 1, of the Constitution and to Finland’s sovereign rights guaranteed by international public law. It can be stated as a premise that the grounds on which this proposal would restrict fundamental and human rights can be considered an acceptable reason with regard to the system of fundamental rights.

In practice, the application of section 3, subsection 1, of the bill would restrict the fundamental rights of persons being instrumentalised. For this reason, the proposal should especially be reviewed from the perspective of section 9, subsection 4, and section 21 of the Constitution in light of general conditions for restricting fundamental rights.

The Constitutional Law Committee has found that in order to be proportionate, a restriction on fundamental rights must be effective. The Constitutional Law Committee has stated that a restriction on fundamental rights cannot be fit for purpose and therefore necessary if it cannot, even in principle, achieve the legitimate objective on which it is based (see e.g. statements PeVM 11/2020 vp, p. 5 and PeVL 40/2017 vp, p. 4). The effectiveness of the proposed regulation is assessed in more detail in section 4.2.2.

9.2.2 Rights of the child and protection of family life

The right to family life is a legally binding fundamental and human right guaranteed by international human rights treaties and the Constitution of Finland. The protection of family life falls within the scope of the protection of private life under section 10 of the Constitution (HE 309/1993, pp. 52–53). The best interests of the child must be a primary consideration in all actions concerning children that are undertaken by administrative authorities (Article 3.1 of the Convention on the Rights of the Child). According to Finland’s international obligations, the best interests of the child is both a subjective right and a guiding principle of interpretation and action and its content is determined on a case-by-case basis. Under the Convention on the Rights of the Child, all persons under 18 years of age are children.

The proposed regulation strives to safeguard the rights of the child and the protection of family life. As a rule, minors would have the right to apply for asylum even in situations where the proposed regulation is being applied. Identification of minors should be ensured in situations where the act is being applied. In practice, there is a risk that the rights of minors who are close to 18 years of age would not be guaranteed if they do not have any identity documents indicating their age and they cannot be identified as minors in any other way. It will not be possible for the public authorities to make any in-depth inquiries to determine a person's age during a short interaction with that person. The provision-specific rationale for the proposed section 5, subsection 1, show that when a minor's application for international protection is received, it will also be assessed on a case-by-case basis whether the applications submitted by that minor's family members can also be received. When considering whether to receive applications from family members, the best interests of the child are taken into account. As the proposed regulation aims to safeguard the rights of the child and the protection of family life, there would probably not be any direct impediment to apply to the proposed regulation the enactment procedure for ordinary acts.

9.2.3 Right to apply for asylum

According to section 5 of the bill, the Finnish authorities should only receive applications for international protection under the criteria specified in the section when a decision under section 3 is in force. In the exceptional situations, referred to in section 6 of the bill, that involve violence and comparable action taking advantage of a large number of people, applications for international protection would not be received at all. Consequently, the right to apply for asylum at the Finnish border would be restricted in certain situations, and not everyone arriving at the Finnish border would have the right to apply for asylum in that location.

According to the government proposal to amend the fundamental rights provisions of the Constitution (HE 309/1993 vp, p. 52), the human rights treaties obligate Finland to guarantee aliens procedural protection while decisions are being made on their right to enter Finland or to continue their stay in Finland. The right to apply for asylum has evolved through the interpretation of the human rights treaties and it has especially arisen from the principle of non-refoulement. According to the case law of the European Court of Human Rights, the effective implementation of the rights enshrined in the European Convention on Human Rights requires that states facilitate legal means of entry for those arriving at the national border. These means include an effective possibility of lodging an application for international protection. The Court has found that a state may refuse entry to its territory to aliens who have failed without cogent reasons to comply with legal means of entry by seeking to cross the border at a different location than an official border crossing point by taking advantage of their large numbers and using force (e.g. *N.D. and N.T. v. Spain*, 8675/15 and 8697/15). The right to lodge an application for asylum is also linked to section 21 of the Constitution on protection under the law, which is discussed in more detail below.

The right to asylum is also provided for in Article 18 of the Charter of Fundamental Rights of the European Union. The Charter has the same legal value as the EU Treaties, which means that it is part of the EU's primary legislation. Section 4.2.4 above discusses the right to apply for asylum in more detail.

The European Court of Human Rights has emphasised in its case-law that the European Convention on Human Rights does not, as such, protect the right to asylum. The protection it affords is confined to the rights enshrined in the Convention, including particularly the rights under Article 3. That provision prohibits the return of any alien who is within the jurisdiction of a state to another state in which they face a real risk of being subjected to inhuman or

degrading treatment or even torture (*N.D. and N.T. v. Spain*, paragraph 188). This aspect is discussed in section 9.2.5.

There are tensions between the proposed regulation according to which, as a rule, the possibilities of lodging an application for asylum would be restricted in situations where the act is being applied, and the human rights obligations binding on Finland, and it limits the core of the fundamental right to protection under the law laid down in section 21 of the Constitution, which is discussed in more detail below. In practice, the fact that asylum applications would only be received if the criteria laid down in section 5 were met, or asylum applications would not be received at all in certain exceptional situations laid down in section 6, would mean that applications for international protection would not be received from all persons in the area where the act was being applied. The significance of this for compliance with the principle of non-refoulement is assessed in section 9.2.5.

9.2.4 Protection under the law

The derogation provision of section 5 of the proposed act would be based on the premise that the reception of applications for international protection in a situation referred to in section 3 of the proposed act would be subject to an assessment made by a border guard on whether the criteria laid down in the section are satisfied. In practice, the proposed regulation would mean that a border guard would make a summary assessment of the situations in which a person is referred to the normal asylum procedure. Such an assessment could be characterised as actual administrative action. It would not be a normal administrative procedure, which is why the regulation should be examined from the perspective of the fundamental right to protection under the law.

Under section 21, subsection 1 of the Constitution of Finland, everyone has the right to have their case dealt with appropriately and without undue delay by a legally competent court of law or other authority, as well as to have a decision pertaining to their rights or obligations reviewed by a court of law or other independent organ for the administration of justice.

Subsection 1 of the said section contains a basic provision on everyone's right to have their case dealt with and decided by a court of law or other authority. Subsection 2 concerns other aspects of a fair trial and good governance. It is linked to subsection 1, which also safeguards the right to a fair trial and good governance. The section requires that a fair trial and good administration be realised as a whole. In addition, it provides institutional protection for the most important elements of that whole (government proposal HE 309/1993 vp, p. 72).

Section 21, subsection 2 of the Constitution requires that the guarantees of good governance be laid down by law. The concept of good governance draws on section 21 of the Constitution. It refers not only to the requirements for prompt and appropriate action by the authorities referred to in subsection 1, but also to the list of the elements of good governance provided in subsection 2. The provision lists the main elements of good governance: publicity of the proceedings, right to be heard (statements of the Constitutional Law Committee PeVL 25/2013 vp, p. 3, PeVL 16/2010 vp, p. 7, PeVL 23/2007 vp, p. 2–3, PeVL 46/2006 vp, p. 3, PeVL 70/2002 vp, p. 6, PeVL 12/2002 vp, p. 6, PeVL 1/2002 vp, p. 2), right to receive a reasoned decision (PeVL 27/2012 vp, p. 2, PeVL 10/2012 vp, p. 5–6, PeVL 10/2011 vp, p. 2, PeVL 48/2006 vp, p. 5, PeVL 10/2006 vp, p. 3, PeVL 4/2004 vp, p. 8–9, PeVL 46/2002 vp, p. 8, PeVL 12/2002 vp, p. 6) and right to request a review (PeVL 27/2013 vp, p. 4/II). The list of elements is not intended to be exhaustive. The requirement of impartiality in official actions, as well as the service principle laid down in the Administrative Procedure Act (434/2003), may be linked to the

requirement of appropriate processing provided in subsection 1. For example, the right to legal assistance is included in the guarantees of good governance referred to in the Constitution.

In its past statements, the Constitutional Law Committee has concluded that based on section 21 of the Constitution, the submission of international protection decisions to a court for consideration must be made possible (statement of the Constitutional Law Committee PeVL 16/2000 vp, p. 4). The Constitutional Law Committee has also considered other questions of protection under the law and the appropriateness of processing in the context of asylum applications. For example, the Constitutional Law Committee refers in its statement (PeVL 24/2016 vp, p. 4) to the definition of an adequate time limit for requesting a review and states that, from the perspective of the Constitution, the aspects related to protection under the law and generally to the appropriateness of processing are essential, especially when it is taken into account that the people in question are in a particularly vulnerable position, emphasising the requirements for protection under the law.

Section 21, subsection 1 of the Constitution is intended to safeguard the right to a hearing by a tribunal required in Article 6(1) of the European Convention on Human Rights (ECHR) and Article 14 of the International Covenant on Civil and Political Rights (ICCPR) in every situation referred to in the provisions. Everyone is entitled to a fair hearing by a tribunal referred to in Article 6(1) of the ECHR in the determination of the person's rights or obligations or of a criminal charge against the person. By the determination of rights and obligations, the ECHR refers not only to civil matters but also to many matters that are characterised as being governed by public law.

Section 21, subsection 1 of the Constitution covers decisions in administrative matters concerning, for example, the rights and obligations of individuals. Decisions taken by an administrative authority in such matters must therefore be subject to consideration by a court or other independent judicial organ. Although the provisions of this subsection are clearly linked to Article 6(1) of the ECHR in particular, the Constitutional Law Committee has concluded that the national Constitution in this respect relates to factors defined as rights or obligations under Finnish law.

The right to request a review is one of the guarantees of a fair trial and good governance. One of the requirements with regard to protection under the law is that a person must have the right to appeal against a decision affecting them. An asylum seeker must also have the right to petition the court to prohibit the enforcement of their return and to allow them to wait the outcome of the decision in Finland before they are returned, if the court prohibits the enforcement (e.g. Articles 3 and 13 of the ECHR). Generally, with regard to removal decisions, Article 13 read in conjunction with Article 2 (Right to life) and Article 3 (Prohibition of torture) of the ECHR have been considered to require that the person must in practice have an effective remedy and that the remedy has suspensive effect where the person has made a substantiated claim that their rights under Article 2 and/or 3 would be violated as a result of removal. Minor derogations from the right to request a review may be provided in an act, as long as the derogations do not change the status of the right as the main rule or, in individual cases, do not endanger the right of an individual to a fair trial (government proposal HE 309/1993 vp, p. 74). From the perspective of the Constitution, the aspects related to protection under the law and generally to the appropriateness of processing are essential, especially when taking into account that asylum seekers are often in a particularly vulnerable position (statements of the Parliamentary Law Committee PeVL 34/2016 vp, pp. 3–4, PeVL 8/2018 vp, p. 3, PeVL 2/2021 vp, paragraph 18). In its statement on the Union communication concerning the border procedure proposal, the Constitutional Law Committee emphasised the importance of this and expressed reservations about the Commission's proposal to limit appeals only to the courts of first instance in the border

procedure (PeVL 15/2021 vp). The Constitutional Law Committee has also issued statements on assessing the acceptability of prohibiting further requests for a judicial review (see e.g. PeVL 23/2013 vp, p. 5/I).

In practice, section 5 of the proposed act would mean that migrants would have the right to submit to a border guard, in situations referred to in the section, evidence of why they think that they should be able to lodge an application for international protection. This would not include an actual processing of the matter in an administrative procedure, but it would be a summary assessment. In certain exceptional situations referred to in section 6 of the proposed act, no case-by-case assessment would be carried out at all. Such practice would therefore restrict the right to refer the matter to an administrative procedure as well as the right to refer the matter to a court for consideration. For this reason, this would limit the possibilities of persons who are in Finland's jurisdiction to refer their matter to the actual administrative procedure for consideration in accordance with section 21 of the Constitution in the area where the act would be applied. This can be considered problematic in respect of section 21 of the Constitution and cannot be regarded as a restriction that could be considered acceptable in the light of the general conditions for restricting fundamental rights.

In the proposed act, implementing the protection of individuals under the law would, as a rule, be based on the following premises: 1) the authorities would be obliged to ensure that each migrant has a genuine and effective possibility to present the circumstances based on which they consider that they belong to one of the exceptional groups specified in the act; 2) a border guard would have to ensure that each migrant is adequately understood, for example through interpretation; 3) appropriate instructions would be issued on how to apply the act; and 4) a border guard would be responsible for the application of the provisions under liability for acts in office. These aspects would include guarantees that the protection of individuals under the law would, as a rule, be taken into account in the application of the act. In certain exceptional situations referred to in section 6 of the proposed act where the authorities would primarily have to safeguard the lives and health of the parties involved in the situation and act accordingly, the protection of individuals under the law could not necessarily be taken into account in the same way.

However, the proposed regulation, which in principle prevents the lodging of asylum applications by instrumentalised migrants in the area referred to in the government decision, the processing of such applications and any requests for reviewing them, would significantly restrict the right to legal remedies. The proposed act can be considered to interfere with a core aspect of the fundamental right to protection under the law, and in this respect there are also tensions between the proposed act and human rights obligations. For these reasons, the ordinary legislative procedure cannot be applied to the proposed regulation.

9.2.5 Non-refoulement

While the decision referred to in section 3, subsection 1 of the proposed act is in force, the application of sections 4–6 of the proposed act could in practice mean that Finland might not accept applications for international protection from all persons arriving at the Finnish border. Therefore, there is reason to assess the relationship between the proposed act and the principle of non-refoulement.

Under section 9, subsection 4 of the Constitution, an alien may not be deported, extradited or returned if in consequence they are in danger of a death sentence, torture or other treatment violating human dignity. The non-refoulement obligation can also be derived from human rights obligations binding on Finland. Certain human rights cannot be derogated from under any

circumstances (non-derogable rights), including the right to life, on which the non-refoulement obligation is based (Article 2 of the ECHR, Article 6 of the ICCPR) and the prohibition of torture and other inhuman or degrading treatment or punishment (Article 3 of the ECHR, Article 7 of the ICCPR). On this basis, the premise of the national interpretation of section 7, subsection 2 of the Constitution is that it is not possible to derogate from the prohibition of torture and the related provisions even in emergency conditions.

The government proposal for the reform of fundamental rights states that under the human rights treaties foreign nationals must be guaranteed procedural protection while decisions are being made on their right to enter Finland or to continue their stay here. The following is stated, among other things, on non-refoulement: "Although the provision does not mention the concepts of refugee or asylum, it has a substantive link to the Convention relating to the Status of Refugees (Finnish Treaty Series 77/68). For example, the Convention prohibits the Contracting States from returning persons at risk of persecution. A similar principle of non-refoulement may be derived from the prohibitions of torture and other inhuman treatment contained in general human rights treaties (Article 7 of the ICCPR and Article 3 of the ECHR), and it is also enshrined in the Aliens Act (378/91, section 38, subsection 2 and section 41, subsection 2). – – The principle of non-refoulement is intended to cover all actual situations in which an alien is transferred to another state by the Finnish authorities. The provision must also be considered to prohibit the transfer of persons from Finland to states from which they could be extradited to third states and therefore become victims of a death penalty or torture, for example." (government proposal HE 309/1993 vp, p. 52)

In its report on the reform of fundamental rights (report PeVM 25/1994 vp, pp. 4–5), the Constitutional Law Committee notes that some of the provisions have been worded as precise and absolute prohibitions. In this context, the Committee mentions the restriction on the extradition of foreign nationals. According to the report, since such prohibitions also apply to the legislator, an ordinary act cannot be used to derogate from them. The application of the procedure for constitutional enactment does not justify derogations from the provisions of human rights treaties (government proposal HE 309/1993 vp, p. 27). Moreover, it follows from section 23 of the Constitution that, even in emergency conditions, it is not possible to lay down provisions on temporary derogations that are contrary to Finland's international human rights obligations. In its case law, the European Court of Human Rights (ECtHR) has emphasised Article 27 of the Vienna Convention on the Law of the Treaties (Finnish Treaty Series 32 and 33/1980), according to which a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty (see *N.D. and N.T. v. Spain*, 8675/15 and 8697/15, paragraphs 109 and 190).

The Constitutional Law Committee has stated its opinion consistently on the absolute nature of non-refoulement, including in its recent statements (PeVL 37/2022 vp, paragraph 19, see also PeVL 20/2017 vp, pp. 7–8). With regard to non-refoulement, the Committee has stated that the absolute legal precondition laid down in the provision of the Constitution must also be taken into account in decision-making related to deportation (see statements PeVL 18/2018 vp and PeVL 20/2017 vp) (PeVL 44/2022 vp, p. 6). In its statement (PeVL 20/2017 vp) on the EU's proposal for a Qualification Regulation, the Constitutional Law Committee notes that Finland should also strive to ensure on the basis of section 1, subsection 3 and section 22 of the Constitution that the absolute nature of non-refoulement is not made relative by provisions that are open to interpretation and that may in practice enable derogation from the absolute nature of non-refoulement in Member States whose constitutional regulation, or the legal practices safeguarding it, are unable to guarantee the appropriate application of the principle of non-refoulement. It is apparent from this wording that the Committee has not considered in its

statements the possibility of a situation arising in Finland where the appropriate application of non-refoulement would not be guaranteed.

In considering the government communication to Parliament on the Commission's Proposal for a Regulation of the European Parliament and of the Council addressing situations of instrumentalisation in the field of migration and asylum, the Constitutional Law Committee has stated the following (statement PeVL 16/2022 vp, paragraph 17): “It is the opinion of the Constitutional Law Committee that, in a regulatory context sensitive to fundamental and human rights, the sole objective of law drafting should not be to simply speed up and streamline the processing (PeVL 2/2021 vp, paragraph 18). From the perspective of the Constitution, the aspects related to protection under the law and generally to the appropriateness of processing are essential, especially when taking into account that asylum seekers are often in a particularly vulnerable position (statements of the Parliamentary Law Committee PeVL 34/2016 vp, pp. 3–4, PeVL 8/2018 vp, p. 3).”

The Constitutional Law Committee has particularly emphasised that the obligations concerning return also require an individual assessment of the applicant's situation, consideration of the best interests of the child and the realisation of the protection of family life (see PeVL 16/2022 vp, PeVL 34/2016 vp, p. 4, PeVL 8/2018 vp, p. 3). In other words, compliance with the principle of non-refoulement in practice requires a sufficiently individualised examination of the matter, and no procedure may endanger it. In its judgment on prohibiting collective expulsion of aliens (*N.D. and N.T. v. Spain*, 8675/15 and 8697/15), the European Court of Human Rights (ECtHR) states that with regard to Contracting States whose borders coincide with external borders of the Schengen Area, the effectiveness of the rights specified in the European Convention on Human Rights requires that these States make available access to means of legal entry for those who have arrived at the border. According to the Court, that includes genuine means of lodging an application for international protection.

The Constitutional Law Committee has also stressed that any measures regulating entry should comply with Finland’s international obligations, respect the fundamental and human rights and uphold human dignity (statement PeVL 15/2022 vp, paragraph 8). According to the Committee, these requirements can also be based on sections 1 and 22 of the Constitution (PeVL 37/2022 vp, paragraph 4–6).

According to Article 78(1) of the Treaty on the Functioning of the EU, the Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention relating to the status of refugees. The principle of non-refoulement is based on Article 33 of the Geneva Convention. Article 19 of the Charter of Fundamental Rights of the European Union concerns protection in the event of removal, expulsion or extradition. Although Article 18 of the Charter is entitled “Right to asylum”, it does not mean a subjective or absolute right to asylum.

It should also be taken into account that from the perspective of EU or international law, a national exceptive act may not be invoked as an acceptable justification for derogating from such law; even then, domestic law must be in line with EU and international law and be justified within the scope of the derogations allowed by such law.

With regard to non-refoulement, it is not possible to separate the compliance with the principle of non-refoulement laid down in the Constitution from the compliance with human rights obligations; instead, the principle of non-refoulement laid down in the Constitution must be

interpreted in a manner that is consistent with the corresponding provisions of human rights treaties. ECtHR case law has emphasised the importance of the absolute nature of non-refoulement, derived from Articles 2 and 3 of the ECHR, and applying it to asylum seekers whose entry into the country has been prevented (*N.D. and N.T. v. Spain*, § 178). Preventing the entry of an asylum seeker does not release the State from its obligation to comply with the principle of non-refoulement (*N.D. and N.T. v. Spain*, § 180). The Court has concluded that the respondent State had violated Article 3 in situations at the border where persons who had sought asylum or expressed fear for their security were removed to the immediate country of transit without substantive consideration of their asylum applications (*M.K. and others v. Poland*, 40503/17, § 184–186).

The European Court of Human Rights (ECtHR) does not examine the applicants' asylum applications, but it has considered in its case law whether the respondent State has effectively protected applicants against arbitrary return. If the respondent State decides to refuse the applicant entry, it must assess whether the person has access to an adequate asylum procedure in a country of transit, which provides effective protection against non-refoulement (*Ilias and Ahmed v. Hungary*, § 137). The assessment must be carried out on the initiative of the State, taking into account current information on the country in question and its asylum procedure (*Ilias and Ahmed v. Hungary*, § 148). Furthermore, the appellant must have the opportunity to demonstrate that the country concerned is not safe for them (*Ilias and Ahmed v Hungary*, § 148). The Court has emphasised the particular importance of this assessment in situations where the transit country is not a state party to the ECHR (*M.A. and others v. Lithuania*, 59793/17, § 104). In the absence of sufficient guarantees, the respondent State must also allow the asylum seeker to stay in its territory until the application has been properly examined (M.K. and others v. Poland, § 185; *D.A. and others v. Poland*, 51246/17, § 59). Nor can the State deny access to its territory to persons alleging that they may be subjected to ill-treatment in the country of transit, unless adequate measures are taken to eliminate such risk (*M.K and others v. Poland*, § 178–179). If the State suspects that an asylum application is unfounded, the State still has an obligation under Article 3 either to conduct a substantive asylum examination or to assess thoroughly whether the person would have access in the receiving country to a proper asylum procedure providing protection against non-refoulement (*Ilias and Ahmed v. Hungary*, 47287/15, § 138). In a recent case, the Court emphasised that, from the perspective of Article 3, a State cannot deny an asylum seeker access to its territory or remove them without a proper evaluation of the risks that such a denial or removal might have for their rights protected under Article 3, even on the assumption that that person might be able to return through some other means of entry (*S.S. and others v Hungary*, 56417/19, 44245/20, § 68). ECtHR case law does not yet include rulings on such appeals related to entry into a country that have involved instrumentalised migration. The Court has not thus been called upon to deal with a situation akin to the situation currently taking place at Finland's eastern border.

Furthermore, in accordance with section 22 of the Constitution, the public authorities must ensure the realisation of fundamental rights and human rights. In other words, failure to comply with international human rights obligations would also be problematic from the perspective of the Constitution of Finland.

As described above, statements of the Constitutional Law Committee indicate that the Committee has emphasised the absolute nature of non-refoulement. The effective purpose of the case-by-case assessment referred to in section 5 of the proposed act is to ensure that the principle of non-refoulement would not be violated. However, the content of the proposed act is such that compliance with the principle of non-refoulement would be ensured in a summary assessment instead of the normal asylum procedure.

The assessment would primarily examine the situation in relation to the country from where the person is seeking to enter Finland, and the assessment would focus on whether the person would be, in the country in question, in real risk of being subjected to treatment mentioned in section 5. It would be essential to individually assess whether the country in question could be considered sufficiently safe for the person seeking to enter Finland. Even if safety were not, in a given situation, assessed in the light of the general criteria established in the case law of the European Court of Human Rights and EU law, the assessment would nevertheless always be based on the person's individual situation and, when interacting with the authorities, the person would have an opportunity to present circumstances as to why the country in question would not be safe for them. In particular, the existence of a legal entry permit, such as a residence permit or visa, issued to the person by the country in question would have a substantial role in the assessment. In the case of instrumentalised migration, the premise would be that it could not categorically be stated that a country using such a phenomenon to exert pressure on another country would pose a systematic and concrete danger to persons to whom it has issued legal entry permits. In addition, violence or treatment violating human dignity that could be observed immediately at the border and circumstances based on other sources would be of relevance in the individual assessment.

In certain exceptional situations referred to in section 6 of the proposed act in which violence or a large number of persons comparable to violence are used to forcibly enter the country, a summary case-by-case assessment could not necessarily be carried out. In this respect, the relationship between the proposed act and human rights obligations binding on Finland is, at the very least, strained.

The review should assess whether the proposed regulation will result in the absolute nature of non-refoulement being made relative by such means, referred to above by Constitutional Law Committee, that are open to interpretation and that may in practice enable derogation from the absolute nature of non-refoulement. Given that non-refoulement is a prohibition that must not be derogated from under any circumstances, the ordinary legislative procedure cannot be applied to the proposed regulation. Section 9.3 below concerns a review of whether the regulation could be reconciled with the principle of non-refoulement.

9.2.6 Right to life, personal liberty and integrity, and the link between the right and non-refoulement

In addition to the question of non-refoulement, the proposed regulation can also be considered to involve some tensions from the perspective of section 7 of the Constitution and the corresponding human rights obligations. The section contains a provision on the right to life, personal liberty, integrity and security, the prohibition of the death penalty, torture and other treatment violating human dignity, and further provisions on interference with personal integrity and deprivation of liberty.

The explicit mention of the prohibition of torture in section 7, subsection 2 of the Constitution emphasises that this treatment, which causes very serious mental or physical suffering, must not be allowed under any circumstances. The prohibition of treatment that violates human dignity applies to both physical and mental treatment. It covers all forms of cruel, inhuman and degrading punishment or other treatment (government proposal HE 309/1993 vp, p. 47). If the proposed procedure were not considered to ensure compliance with the principle of non-refoulement, the proposed legislation would also lead to a situation where compliance with the prohibition of torture would not be ensured.

The prohibition of the death penalty is also unambiguous and absolute. Sentencing to the death penalty is prohibited, not just the enforcement of the sentence (Constitutional Law Committee statement PeVL 5/2007 vp, p. 8–9, PeVL 6/1997 vp). Not complying with non-refoulement also endangers compliance with the absolute prohibition of the death penalty.

If the proposed regulation is not considered to ensure compliance with the absolute principle of non-refoulement in all situations, it entails a risk that the aforementioned rights cannot be ensured either. This is another reason for why the ordinary legislative procedure cannot be applied to the proposed regulation.

On the other hand, the proposal must, with regard to section 7 of the Constitution, also be assessed from the perspective of the fundamental right to security of person. In its statement 37/2022 vp concerning the amendment of the Border Guard Act, the Constitutional Law Committee considered the objectives of the proposal to be acceptable and important and stated that the State must seek to safeguard national security and public order in all circumstances. In the Committee's opinion, the proposed measures were based on legitimate interests which, in extreme cases, could even pertain to the fundamental right to security of person (Constitutional Law Committee statement PeVL 16/2022 vp, paragraph 5; see also statement PeVL 5/1999 vp, p. 2/II; see also e.g. statements PeVL 36/2020 vp, p. 3, PeVL 73/2018 vp, p. 3, PeVL 15/2018 vp, p. 8). The Committee stated that under section 22 of the Constitution, the public authorities shall guarantee the observance of fundamental rights and human rights, including the right to security of person. In the exceptional situations referred to in the proposed section 6, the authorities must take the essential measures to safeguard the lives and health of those involved in the situation. In other words, these situations are about the fundamental right to security of person and the authorities' obligation to safeguard it under section 22 of the Constitution. Ultimately, the right to life of those involved in the situation may also be at stake.

9.2.7 Prohibition of collective expulsion

The proposed regulation could also lead to a violation of the prohibition of collective expulsion of aliens enshrined in Article 4 of Protocol No. 4 of the ECHR, if it were considered that the case of applicants for international protection would not be examined in a reasonable, objective and individual manner. According to the ECtHR case law, collective expulsion means any measure compelling a group of aliens to leave the country without the opportunity to present their individual views against expulsion (*Khlaifia and others v. Italy*, 16483/12, § 237). In its assessment of the prohibition of collective expulsion, the ECtHR stated in judgement *N.D. and N.T. v. Spain* (8675/15 and 8697/15) that with regard to Contracting States whose borders coincide with external borders of the Schengen Area, the effectiveness of the rights specified in the ECHR requires that these States make available access to means of legal entry for those who have arrived at the border. In its assessment, the ECtHR paid attention to whether the State had provided genuine and effective access to means of legal entry and whether the person seeking entry had a cogent reason attributable to the State for failure to use such means of legal entry.

When assessing effective access to means of legal entry, it is first necessary to consider whether the State has made available genuine and effective access to means of legal entry, in particular border procedures, in order to allow all persons who face persecution to submit an application for protection, based in particular on Article 3, under conditions which ensure that the application is processed in manner consistent with the international norms.

With regard to the proposed regulation, from the perspective of collective expulsion it is essential to assess whether the persons whose entry into the country is prevented and who are removed from the country in a situation referred to in section 3 have genuine and effective

access to means of legal entry. According to the ECtHR case law, this assessment must take into account the location of border crossing points, the rules and procedures for lodging asylum applications, and evidence of whether asylum applications have actually been made at those border crossing points (*N.D. and N.T. v. Spain*, § 212–217; *A.A. and others v. North Macedonia*, 55798/16 and 4 others, § 116–122; *Shahzad v. Hungary*, 12625/17, § 63–67 and *M.H. and others v. Croatia*, 15670/18 and 43115/18, § 295–304). The burden of proof of genuine and effective access to means of legal entry rests with the State. ECtHR case law does not yet include rulings on such appeals related to entry into a country that would have involved instrumentalised migration. The Court has not thus been called upon to deal with a situation akin to the situation currently taking place at Finland's eastern border.

If a person has not made use of the means of legal entry available to them but entered the country illegally, the ECtHR has in its case law assessed whether the person had a cogent reason attributable to the Contracting State (for example, overregulated reception of asylum applications) not to use these means. In the absence of such cogent reasons attributable to the Contracting State, the illegal entry of a person may be considered as a consequence of the person's own conduct, which could justify the lack of individual identification, leading to the assessment that the prohibition of collective expulsion had not been violated. The proposed regulation would mean that the possibility for a person to lodge an asylum application would be restricted in the area referred to in the government decision. In order to take the prohibition of collective expulsion into account in the application of the regulation, particular attention should be paid to providing the possibility of genuine and effective entry into the country, and therefore the possibility of the asylum procedure, elsewhere in Finland.

9.2.8 Equality

The proposed regulation would put people and groups of people in different positions in many ways, which is why it should also be assessed from the perspective of equality.

Section 6 of the Constitution expresses not only the traditional requirement of equality before the law but also the idea of de facto equality. Among others, this section contains a general equality clause (subsection 1) and prohibition of discrimination (subsection 2).

An act cannot arbitrarily put persons or groups of person in a more advantageous or disadvantageous position than others (government proposal HE 309/1993 vp, p. 42). The equality clause does not, however, require that all persons should be treated equally in all respects, unless the circumstances pertaining to the matter are the same. The equality perspectives are relevant both when granting benefits and rights and imposing obligations by law. On the other hand, a typical feature of legislation is that it treats people differently because of a specific and acceptable social interest, including the promotion of de facto equality. The established opinion of the Constitutional Law Committee consequently is that the general equality principle does not place strict restrictions on the legislator’s discretion when aiming for regulation required by current societal developments (PeVL 11/2012 vp, p. 2, PeVL 2/2011 vp, p. 2, PeVL 64/2010 vp, p. 2, PeVL 35/2010 vp, p. 2, PeVL 5/2008 vp, p. 5, PeVL 38/2006 vp, p. 2, PeVL 1/2006 vp, p. 2, PeVL 15/2001 vp, p. 3). The key question is whether the differences in treatment can in each case be acceptably justified in terms of the fundamental rights system (PeVL 75/2014 vp, PeVL 67/2014 vp, PeVL 31/2014 vp, PeVL 46/2006 vp, p. 2, PeVL 16/2006 vp, p. 2, PeVL 73/2002 vp). In different contexts, the Committee has derived from the equality provisions in the Constitution the requirement that differences in treatment may not be arbitrary or unreasonable (see e.g. PeVL 47/2018 vp, PeVL 20/2017 vp, PeVL 58/2014 vp, PeVL 7/2014 vp, pp. 5–6, PeVL 11/2012 vp, p. 2, PeVL 37/2010 vp, p. 3, PeVM 11/2009 vp, p. 2, PeVL 18/2006 vp, p. 2).

The introduction of the proposed regulation would put asylum seekers arriving in an area subject to a government plenary session decision referred to in section 3, subsection 1 of the proposed act in a different position from asylum seekers arriving at the Finnish border in another area. While persons arriving in the area in question may apply for asylum elsewhere in Finland, this may be challenging for practical reasons. As a basic premise, the different positions cited above may to some extent be problematic in terms of section 6, subsection 1 of the Constitution. A situation involving instrumentalised migration may, however, be considered an acceptable reason for putting persons in different positions. The impacts of the different positions are significant as they are linked to such issues as compliance with the principle of non-refoulement, effective protection under the law, and the realisation of other rights besides those referred to above. In addition, asylum seekers would be put in a different position compared to other persons within Finland's jurisdiction who can have their cases heard by a competent authority. In the Constitutional Law Committee's statements, migrant status has been regarded as equivalent to origin, which is specifically cited in section 6, subsection 2 of the Constitution among prohibited grounds for discrimination (PeVL 55/2016 vp, p. 4).

The proposed act is also somewhat problematic from the perspective of equality for other reasons. The proposed derogation provision in section 5 aims to safeguard the rights of certain persons in a particularly vulnerable position, among others, and to ensure that the principle of non-refoulement would not be violated in practice. Considering the summary nature of the case-by-case assessment made by a border guard, the application of the derogation provision may lead to a situation where all persons within the scope of the provision are not treated equally. Recognising persons who are within the scope of the provision could be difficult in a situation where the asylum applications of some persons are not received, which means that their circumstances are not thoroughly examined. Persons who are clearly underage and persons with visible disabilities are easy to recognise, which is why their right to lodge an asylum application can be realised. Where a disability is not obvious from the person's appearance in a short interaction situation, for example, it could be challenging to recognise persons with disabilities. On the other hand, the premise is that also the person themselves should, on their own initiative, mention circumstances related to this.

Thus, persons in a particularly vulnerable position and persons covered by the non-refoulement obligation may be put in a different position depending on how easily their position can be identified. This is somewhat problematic from the perspective of equality. Sufficient interaction between a border guard and a migrant when carrying out a case-by-case assessment is essential from the perspective of the provision concerning official duty in section 2, subsection 3 of the Constitution, and it strengthens not only the realisation of the migrant's rights but also the legal protection of the border guard.

Non-discrimination, equality and gender equality are the foundation of international human rights and the basic principle of human rights treaties. All key human rights treaties of the UN and the Council of Europe are underpinned by the principle of equality and non-discrimination. Most human rights treaties contain a separate provision on the obligation to guarantee the rights acknowledged in the treaty to everyone within the state's jurisdiction, with no discrimination on the grounds of race, colour, sex, language, religion, political or other opinion, ethnic or social origin, wealth, descent or other status, and/or a separate provision prohibiting discrimination.

Here, the question of whether the different treatment discussed above is proportionate to the objective of the proposed act and whether limitations associated with non-discrimination prevent the enactment of the act in the ordinary legislative procedure is not assessed separately. For the reasons cited above, however, the proposed regulation cannot be enacted in the ordinary legislative procedure.

9.2.9 Assessment of general preconditions for restricting fundamental rights

Based on what has been described above, it may be noted that the proposed act is somewhat problematic from the viewpoint of the general preconditions for restricting fundamental rights. The proposed restriction would be unproblematic in that provisions on the powers associated with this restriction would be laid down in an act. Assessing the application of the act would be left to the Government, whereas the actual situations in which the act could be applied would be determined by law. As noted above, constitutionally acceptable reasons for restricting fundamental rights could be considered to exist as such.

The restrictions of fundamental rights contained in the proposed act would, at least to some extent, be specific and precisely circumscribed, whereas they would not be unproblematic in terms of the requirements concerning non-interference with core content, adequacy of arrangements for protection under the law and compliance with human rights obligations. On the other hand, it should be noted that the general preconditions for restricting fundamental rights have not usually been applied to the fundamental rights that are considered absolute.

This is why the proposed act must be assessed in respect of whether it can be adopted in other than the ordinary legislative procedure.

Pursuant to section 23 of the Constitution, provisional exceptions to fundamental rights that are compatible with Finland's international human rights obligations and that are deemed essential in the case of an armed attack against Finland or in the event of other emergency conditions, as provided by an act, which pose a serious threat to the nation may be provided by an act or by government decree to be issued on the basis of authorisation given in an act for a special reason and subject to a precisely circumscribed scope of application. The grounds for provisional exceptions must, however, be laid down by an act. Government decrees concerning provisional exceptions shall without delay be submitted to Parliament for consideration. Parliament may decide on the validity of the decrees. The current wording of section 23 of the Constitution entered into force on 1 January 2012. Since then, the application of section 23 of the Constitution has been assessed in the context of COVID-19 legislation (incl. PeVL 11/2021 vp, paragraph 2, PeVL 6/2021 vp, paragraph 5). However, the proposal at hand would not concern emergency conditions referred to in section 23 of the Constitution.

The proposed regulation is not compatible with the general preconditions for restricting fundamental rights, which is why the proposed act cannot be adopted in the ordinary legislative procedure. It must consequently be assessed if the proposed act can be adopted in the procedure referred to in section 73 of the Constitution as a so-called exceptive act.

9.3 Assessment of the proposed act from the perspective of the possibility of adopting an exceptive act referred to in section 73 of the Constitution

9.3.1 Principle of avoiding exceptive acts

Under section 73, subsection 1 of the Constitution, Parliament may pass bills that would mean limited derogations from the Constitution. An exceptive act refers to an act enacted in the procedure for constitutional enactment which, without amending the wording of the Constitution, means a substantive derogation from the Constitution. In the preliminary work on the Constitution, it is noted that any derogations should be limited as laid down in section 73. The government proposal concerning the Constitution stated that the expression ‘limited derogation’ primarily refers to a factual limitation of the scope of the derogation. An exceptive act should be clearly limited in relation to the Constitution as a whole. As such, however, this

expression does not refer to the number of provisions derogating from the Constitution in a proposed act. The requirement of the derogation being limited means that an exceptive act may not interfere with key solutions of the Constitution, including the fundamental rights system as a whole and Parliament's status as the highest governmental body. The basic premise of the provision is that resorting to the exceptive act procedure should be avoided and that the scope of any derogations from the Constitution should be as narrow as possible. Consequently, any conflicts between the Constitution and proposed acts should primarily be eliminated by amending the proposed act, rather than adopting it without changes as an exceptive act. Should enacting an exceptive act turn out to be unavoidable, however, the derogation should be limited to what is essential by means of a specific and precisely circumscribed wording. At the same time, the possibility of limiting the period of validity of the derogation should be considered (HE 1/1998 vp, p. 125).

The Constitutional Law Committee's report on the Constitution noted that the Committee agreed with the rationale of the proposal concerning the basic premise of regulation, according to which the exceptive act procedure should be avoided. The Committee found that enacting new, purely national acts that derogate from the Constitution should be avoided (PeVL 10/1998 vp). The Constitutional Law Committee noted that the exceptive act procedure should only be resorted to in exceptional cases and for pressing reasons. In recent times, the use of exceptive acts has mainly been associated with bringing into force international obligations nationally. With some very rare exceptions, it has been ensured that the contents of national acts are consistent with the Constitution. The Constitutional Law Committee noted that, if exceptive acts are used in national contexts in the future, in the Committee’s opinion the primary aim should be limiting the period of validity of any derogations from the Constitution, in other words ensuring that they are temporary. The established practice, according to which the enactment documents of an exceptive act show inclusively the points in which it derogates from the Constitution, should also be continued (PeVM 10/1998 vp, pp. 22–23).

The scope of using exceptive acts adopted for national reasons has been considered very narrow. Additionally, Parliament has a few times concurred with bringing into force an international obligation in the so-called simplified procedure for constitutional enactment, and such acts have consequently had the nature of exceptive acts in terms of constitutional law (HE 1/1998 vp, p. 125/I). Such situations have, however, been so closely associated with the case in question and highly context-sensitive that discussing them further in this connection is not appropriate (PeVL 45/2000 vp, PeVL 18/2003 vp, PeVL 2/2024 vp).

The potential conflict between the government proposal and obligations under international treaties cannot be resolved by means of exceptive acts. While the Constitution Act was in force, the Constitutional Law Committee stated: ”Separation between the Constitution Act and international treaties also includes the fact that a conflict between a certain government proposal and the Constitution Act may also be eliminated by adopting the proposed act as an exceptive act. Similarly, a conflict between a certain regulatory proposal and an international treaty binding on Finland always leads to a breach of an international obligation, regardless of the procedure in which the proposed act in question was enacted in Finland.” (PeVL 12/1982 vp).

As noted above, the basic solutions of the proposed act are such that, according to the assessment, it cannot be adopted as an ordinary act. This is why the next question to be discussed is whether the proposed act can be adopted as an exceptive act referred to in section 73, subsection 1 of the Constitution.

9.3.2 Constitutional Law Committee’s examination of exceptive acts use in the 2000s

While the current Constitution has been in force, the Constitutional Law Committee has approved of the adoption of two acts as permanent exceptive acts. The Constitutional Law Committee has found that some proposed acts could have been adopted as temporary exceptive acts. In some matters, the Constitutional Law Committee has specifically stated as its opinion that the proposed act could not be adopted as an exceptive act.

While the current Constitution has been in force, the Constitutional Law Committee has on five occasions found that the Emergency Powers Act and its amendments could be adopted as exceptive acts referred to in section 73, subsection 1 of the Constitution (PeVL 29/2022 vp, PeVL 20/2011 vp, PeVL 6/2009 vp, PeVL 57/2002 vp, PeVL 1/2000 vp). On the most recent occasion, the Constitutional Law Committee noted in its statement PeVL 29/2022 vp that amendments to the Emergency Powers Act could be adopted as an exceptive act. In its statements on the enactment of the Emergency Powers Act, the Constitutional Law Committee drew attention to the fact that, because of the basic premise of avoiding exceptive acts, exceptive acts enacted for purely national reasons should not be accepted. However, the Committee has stressed that the essential need for such legislation for times of crisis as the Emergency Powers Act is indisputable (PeVL 29/2022 vp, paragraph 37). In the same statement, the Constitutional Law Committee noted as its opinion that, also in the assessment situation in question, serious reasons could be found for derogating from the principle of avoiding exceptive acts and passing the bill on amending the Emergency Powers Act in the procedure for constitutional enactment. In particular, the Constitutional Law Committee justified this assessment by noting that the government proposal (p. 72) made reference to the fact that the international security environment has suddenly deteriorated within a short period of time, while tensions and factors of uncertainty have increased globally and in Finland's neighbouring regions, which also exacerbates the risk of multisectoral and unsymmetrical threats and incidents that may be difficult to recognise and put society's functioning at a serious risk also in Finland. The Constitutional Law Committee noted as its opinion that what is stated in the government proposal is an adequate justification for preparing for hybrid threats against Finland, also by expanding the scope of the Emergency Powers Act as proposed (PeVL 29/2022 vp, paragraph 38).

The Constitutional Law Committee has also found a permanent exceptive act possible in another context. When assessing the Act on Military Crisis Management, the Committee considered that a proposed act that was problematic regarding the division of competence between the highest governmental bodies could be adopted as a permanent exceptive act (PeVL 6/2006 vp).

In the context of the currently possible scope of using exceptive acts, it should be noted that the preliminary work on the Constitution states that, if exceptive acts are used in the future in national contexts, in the Committee's opinion an effort should be made to primarily adopt any derogations from the Constitution as acts whose period of validity is limited, in other words temporary acts (PeVM 10/1998 vp, pp. 22 –23). While the current Constitution has been in force, the Constitutional Law Committee has found that a few proposed acts could have been adopted as temporary exceptive acts. These situations are few and far between. All such situations appear to be assessments completed in the early years of the current Constitution’s validity, in which an exceptive act would have been accepted based on a highly context-sensitive assessment of an individual case. This is why significant conclusions on the situations in which temporary exceptive acts could be considered acceptable cannot be made on the basis of these statements issued in 2001–2005 (see PeVL 59/2001, PeVL 67/2002 vp, PeVL 46/2004 vp, PeVL 25/2005 vp, PeVL 54/2005 vp).

While the current Constitution has been in force, the Constitutional Law Committee has also several times taken a critical view of the possibility of enacting exceptive acts, even temporary ones. When assessing a proposal on amending the Maritime Act, the Committee noted that as the proposed section that was problematic in terms of the Constitution did not directly arise from an international obligation, the proposed act could only be adopted in the procedure laid down in section 73 of the Constitution, and as no urgent need for adopting an exceptive act was considered to exist, the Constitutional Law Committee required that the proposed section in question be removed (PeVL 12/2000 vp, p. 4). In 2004, the Constitutional Law Committee examined a proposal which would have added to the Criminal Code penal provisions concerning unlawful wearing of a mask which would, in practice, have criminalised wearing a mask while participating in a demonstration. The Constitutional Law Committee found that the criteria for using an exceptive act were not fulfilled and suggested that the problematic proposal for a section and the bill be rejected (PeVL 26/2004, p. 5). Additionally, the Constitutional Law Committee found in 2010 that the preconditions of a particularly exceptional case and pressing reason were not met for arranging private parking supervision as set out in the proposal (PeVL 57/2010 vp, p. 5).

When examining proposals for an overhaul of legislation on healthcare and social welfare, the Constitutional Law Committee found in its three statements that a proposed act could not be adopted in the procedure laid down in section 73 of the Constitution. While these proposals did not contain any reference to a proposed act being adopted as an exceptive act, a statement excluding this option was issued on the Constitutional Law Committee's initiative. The Committee found that in this case, the preconditions did not exist even for adopting the proposed acts as temporary exceptive acts (PeVL 67/2014 vp, p. 14, PeVL 75/2014 vp, p. 8 and PeVL 26/2017 vp, p. 77).

In the early years of the 2000s, the Constitutional Law Committee can be regarded as having taken at least a slightly more positive view of the potential scope of using exceptive acts. The Constitutional Law Committee considered some exceptive acts possible in that period, whereas in more recent statements, the Committee has taken a critical view of the possibility of enacting exceptive acts. A highly critical view of exceptive acts can be regarded as being the Constitutional Law Committee's prevailing interpretation.

As the basic premise regarding the acceptable scope of exceptive acts may be used the Constitutional Law Committee's principle included in its statement 29/2022 vp, according to which the first thing that should be assessed is whether serious reasons exist in the relevant situation for derogating from the principle of avoiding exceptional acts in individual cases and for adopting the proposed act in the procedure for constitutional enactment (PeVL 29/2022 vp, paragraph 38). In this statement, the Constitutional Law Committee also assessed the matter from the perspective of whether the proposed act comprised a precisely circumscribed exception referred to in section 73, subsection 1 of the Constitution (PeVL 29/2022 vp, paragraphs 39 and 40). The following assessment is further based on the very high threshold for potentially enacting exceptive acts and the serious reasons that must exist for a derogation. The basic premise is that the derogation must be temporary. The premise included in the Constitutional Law Committee's report PeVM 10/1998 vp, according to which the exceptive act procedure should only be resorted to in highly exceptional cases and for pressing reasons, has been used as the foundation of the assessment (PeVM 10/1998 vp, p. 22–23 and e.g. PeVL 57/2010 vp, PeVL 26/2004 vp). Another fundamental premise is that, as part of the potential exceptive act's scope, the derogation must in principle be temporary.

9.3.3 On the basic premises of the scope for using an exceptive act referred to in section 73, subsection 1 of the Constitution

The government proposal concerns regulation on a phenomenon that could not be recognised when the Constitution was enacted. However, the interpretation of the Constitution and its justifications must, even in this situation, be linked to the valid law and existing judicial practices (see e.g. PeVL 2/2024 vp, paragraph 8, PeVL 80/2022 vp, paragraph 3 and PeVL 26/2017 vp, p. 9). Consequently, an assessment relating to section 73, subsection 1 of the Constitution must be based on the preliminary work on the Constitution and earlier statements of the Constitutional Law Committee.

Under section 73, subsection 1 of the Constitution, a derogation must be limited. The preliminary work on the Constitution adds detail to this principle, stating that an exceptive act must be clearly limited in relation to the Constitution as a whole. According to the preliminary work, the requirement of the derogation being limited also means that an exceptive act may not interfere with the key solutions of the Constitution, including the fundamental rights system as a whole and Parliament's status as the highest governmental body. According to the preliminary work, the exceptive act procedure should only be resorted to in exceptional cases and for pressing reasons. The potential scope of using an exceptive act is also limited by the Constitutional Law Committee's statement according to which, if exceptive acts are used in national contexts, in the Committee's opinion the primary aim should be limiting the period of validity of any derogations from the Constitution that are adopted, in other words ensuring that they are temporary.

Consequently, it may be concluded from the wording of the statements contained in the preliminary work on the Constitution that some criteria allow more scope for discretion, while others are more absolute. The fulfilment of all these criteria should be assessed based on judicial principles. From the judicial viewpoint, the legislator would have the least room for manoeuvre regarding two of these criteria, as their wording is more absolute: 1) an exceptive act should be clearly limited in relation to the Constitution as a whole, and 2) an exceptive act cannot interfere with the key solutions of the Constitution, including the fundamental rights system as a whole and Parliament's status as the highest governmental body.

The question of whether the proposed act can be regarded as being a precisely circumscribed derogation referred to in section 73, subsection 1 of the Constitution should be assessed in the light of these criteria.

9.3.4 Assessment of whether the scope of the exceptive act is limited

The scope of an exceptive act should be limited. A derogation should also be limited in relation to the Constitution as a whole. In this respect the proposed act can, first of all, be assessed regarding whether or not it has been appropriately limited, and secondly, if it has been appropriately limited in relation to the Constitution as a whole.

On the limitations of the proposed act

Section 3 of the proposed act would limit the scope of the derogation. Firstly, the criteria laid down in subsection 1 of this section should be fulfilled in order for the provision to be applied. The section could only be applied if the restriction is unavoidable and no other means would be adequate to counteract the threat. The threshold for applying the section would be precisely limited to the situations defined in this section.

Under section 3 of the proposed act, the geographic scope and period of validity of the government decision would have to be limited to the essential minimum. The decision could only be valid for one month at a time, the fulfilment of the criteria for the decision would have to be monitored during its period of validity, and if the preconditions for the decision no longer existed, it should be rescinded. The objective of these restrictions laid down in the relevant section is to make it mandatory to limit the geographical scope and period of validity of the exceptive act to what is strictly necessary.

Regardless of an aforementioned decision having been made, an application for international protection is under the proposed section 5 received if, according to a case-by-case assessment made by a border guard, this would be essential for safeguarding the rights of a child, a person with disabilities or another person in a particularly vulnerable position. A person's application would also be received if the person has presented, or there have arisen, circumstances which, according to an assessment made by a border guard, make it evident that the person faces a real risk of being subjected to the death penalty, torture or other treatment violating human dignity primarily in the state from which the person has arrived in Finland. This would be about the authority's statutory obligation to take action in situations where the fulfilment of these criteria were recognised. The derogation contained in the proposed act would be precisely circumscribed.

Section 6 of the proposed act concerns exceptional situations in which a case-by-case assessment referred to in section 5 would not be carried out. The section applies to situations where violence or a large number of people is used to forcibly enter the country and the forcible entry may be prevented without carrying out the above-mentioned case-by-case assessment, if this is necessary to safeguard the life and health of people and the procedure can be deemed justifiable when assessed as a whole. The proposed act would be precisely circumscribed in respect of the exceptional situations.

Limitation of the proposal in relation to the Constitution as a whole

According to the preliminary work on the Constitution, an exceptive act should be clearly limited in relation to the Constitution as a whole. As such, however, this expression does not merely refer to the number of provisions derogating from the Constitution in a regulatory proposal (HE 1/1998 vp, p. 125/I). The preliminary work does not discuss in detail what the Constitution as a whole refers to. Regarding this requirement, the Constitutional Law Committee's assessments have been case specific, and the Committee has not commented in detail on the interpretation of this criterion.

Efforts have been made to limit the scope of the proposed regulation by different means in terms of both its content and its scope of application. The main rule is that the case-by-case assessment referred to in section 5 of the proposed act and the derogation provision of the same section seek to ensure that the application of the act would not lead to a violation of the absolute principle of non-refoulement. In certain exceptional situations referred to in section 6 of the proposed act in which violence or a large number of persons comparable to violence are used to forcibly enter the country, a summary case-by-case assessment could not necessarily be carried out. In such situations, forcible entry into the country could be prevented immediately at the national border, if this were essential to safeguard the lives and health of people and if the procedure could be deemed justifiable when assessed as a whole. In these situations, compliance with the principle of non-refoulement could not necessarily be ensured.

The proposed act does not safeguard every person's right to lodge an asylum application after arriving in the territory of Finland, which is why there are tensions between the proposed act and human rights obligations binding on Finland. The fact that a person would not have the right to have their case heard by a competent authority in all situations can also be considered problematic in terms of the requirements concerning protection under the law.

The proposed act is associated with a limited number of provisions in the Constitution, and an effort has been made to limit the application of the act specifically to those situations in which the regulation can be considered justified. Efforts have been made to limit the impact of the proposed act in relation to the Constitution as a whole.

9.3.5 Assessment of the proposal in relation to key solutions of the Constitution

According to the preliminary work on the Constitution, the requirement of any derogations being limited means that an exceptive act may not interfere with key solutions of the Constitution, including the fundamental rights system as a whole and Parliament's status as the highest governmental body (HE 1/1998 vp, p. 125/I). The criterion of not interfering with the key solutions of the Constitution may be regarded as a legal precondition for accepting an exceptive act, and as a basic premise, a proposed act that could mean interference with the key solutions of the Constitution could not be acceptable as an exceptive act. In the preliminary work on the Constitution, two examples are given of the key solutions of the Constitution: the system of fundamental rights as a whole and Parliament's position as the highest governmental body. The proposed act would not interfere with the division of competence between the highest governmental bodies or, for example, issues concerning the delegation of legislative power. Examining if the proposed act concerns an issue that would interfere with the fundamental rights system as a whole as part of the key solutions of the Constitution is the key to this assessment.

The preliminary work on the fundamental rights reform (HE 309/1993 vp, p. 27) notes, in connection with the exceptive act procedure: "International human rights treaties are today associated with substantive requirements of protecting many rights that also are national fundamental rights, as the application of the procedure for constitutional enactment does not justify derogations from the provisions of human rights treaties (see PeVL 12/1982 vp)." This may be considered a key solution of the Constitution, as it would concern an essential matter related to the relationship between the fundamental rights system and the scope of using exceptive acts. In practice, this may be considered to create a precondition that if a proposed exceptive act obviously conflicts with a human rights obligation, it could not be enacted as an exceptive act for this reason. An obvious conflict of this type could, for example, exist if an attempt was made to directly and completely pre-empt a human rights obligation by virtue of a statute. Consequently, the judicial assessment has a particular focus on whether the proposed act may be considered compatible with the human rights obligations. For these reasons, the next step of the assessment is linked to whether the proposed regulation conflicts with the human rights obligations in a way that would mean derogations from these obligations.

Relationship of the proposal with the principle of non-refoulement

Under certain conditions, the proposed regulation would make it possible to restrict the reception of applications for international protection in a limited part of Finland's national border and in its immediate vicinity for a fixed period. The objective of the proposed derogations in section 5 would be to enable limited lodging of applications for international protection in situations where this would be necessary to fulfil human rights obligations binding on Finland.

By derogation from the main rule arising from other legislation, an application for international protection would only be received if, according to a case-by-case assessment made by a border guard, it were essential for safeguarding the rights of a child, a person with disabilities or another person in a particularly vulnerable position. The objective of the derogation would be to take into account the rights of a child, among others, including the best interests of the child and protection of family life. The rationale specific to the proposed derogation provision mentions that the asylum applications of a child's family members could also be received, if this were considered to be in the best interests of the child. It would also safeguard the rights of persons with disabilities and other particularly vulnerable persons, at least in situations where the person's disability or particularly vulnerable position can be recognised.

Under the derogation provision, a person's asylum application would also be received if the person has presented, or there have arisen, circumstances which, according to an assessment made by a border guard, make it evident that the person faces a real risk of being subjected to the death penalty, torture or other treatment violating human dignity primarily in the state from which the person has arrived in Finland. The objective of the provision in question is to secure compliance with the principle of non-refoulement in such situations.

The proposed regulation seeks to take the absolute principle of non-refoulement into consideration as set out in section 5. In practice, the principle of non-refoulement has been addressed through the obligation to nevertheless receive applications for international protection in situations referred to in this section. The practical precondition for this would be that, when the person interacts with the Finnish authorities, the authority would have to assess the need for applying the derogation. Although this would in practice consist of a summary assessment, there should be sufficient interaction between a border guard and each migrant to enable the border guard to conduct an individual assessment. The migrant themselves would have the duty to present the circumstances on the basis of which the border guard could assess the person's real risk of being subjected to the treatment referred to in the provision. In practice, the information obtained on the matter would be much more general than what has been considered necessary under other legislation to ensure that the principle of non-refoulement is not violated. Although the examination would be summary, the assessment would be carried out in a manner that would be necessary for safeguarding the rights of the person or for ensuring border security or national security or due to other circumstances. The border guard should also ensure that the person is adequately understood.

As the assessment would primarily examine the situation in relation to the country from where the person is seeking to enter Finland, the assessment would focus on whether the country in question could be considered sufficiently safe for the person seeking to enter Finland. The premise would be that, in the case of instrumentalised migration, a state using such a phenomenon to exert pressure on another state would not pose a systematic and concrete danger to a person to whom it has issued a legal entry permit. Even if the safety of a country were not, in a given situation, assessed in the light of the general criteria established in the case law of the European Court of Human Rights and EU law, the assessment would always be based on the person's individual situation, and when interacting with the authorities, the person would have an opportunity to present circumstances as to why the country in question would not be safe for them. In addition, violence or treatment violating human dignity that can be observed immediately at the border and circumstances based on other sources would be of relevance in the individual assessment.

The primary objective of the derogation provision is to safeguard compliance with the principle of non-refoulement in a situation where not all asylum applications are received and each person's individual situation is not thoroughly investigated in an asylum procedure. However,

in certain exceptional situations referred to in the proposed section 6, a summary case-by-case assessment could not necessarily be carried out, because a situation involving violence, for example, would require that the authorities take measures essential for safeguarding the lives and health of people to prevent a forcible entry into the country. As noted before, the absolute principle of non-refoulement has a factual link to the Convention relating to the Status of Refugees, for example, and consequently to the right to apply for asylum. The relationship between the proposed regulation and international conventions on applying for asylum is obviously strained.

The proposed regulation consequently involves the risk of a border guard failing to recognise all persons at risk of facing the death penalty, torture or other treatment violating human dignity. This can be regarded as problematic, considering that the authorities have an obligation to safeguard fundamental and human rights. However, the objective of the proposed case-by-case assessment and adequate interaction situation is to mitigate the risk of violating the principle of non-refoulement and to obtain sufficient certainty as to whether a person is in real danger of being subjected to the death penalty or torture, for example. As a rule, compliance with the principle of non-refoulement would, under the proposed act, be ensured in a very summary assessment compared to the normal asylum procedure. However, in certain very exceptional situations, such as situations of forcible entry into the country by using violence, a summary assessment would not necessarily be carried out, if preventing the forcible entry into the country immediately at the national border were necessary to safeguard the lives and health of people. It must be assessed whether the proposed regulation would result in the absolute nature of non-refoulement being made relative. If application of the regulation would lead to violating the absolute principle of non-refoulement, this would be problematic in terms of the Constitution, international human rights obligations and EU law.

Consequently, the proposed regulation has a strained relationship with human rights obligations binding on Finland. This is why it must be assessed if the proposed regulation as a whole constitutes such a limited derogation from the Constitution that can be adopted in the procedure for constitutional enactment.

Assessment of the proposal from the perspective of protection under the law

The derogation provision in section 5 of the proposed act would, in practice, mean that lodging an asylum application in an area subject to a government decision referred to in the proposed section 3 would only be possible if the person is deemed to belong to a group entitled to lodge an asylum application. In the exceptional circumstances referred to in the proposed section 6, lodging an asylum application would not be possible at all in the area specified in the government decision referred to in section 3 of the proposed act. From the perspective of the requirements concerning protection under the law, it is somewhat problematic that a person would not be issued with a separate decision on the derogation in question not being applied to them and on their removal from the country, nor would they have a possibility of requesting a review of this measure. The questions of protection under the law are also associated with the fact that the procedure would not in all situations make it possible to examine before a court if the person faces a risk due to which the principle of non-refoulement would apply to them.

The proposed regulation that does not safeguard everyone’s right to lodge an asylum application and consequently have their case appropriately heard by a competent authority is also somewhat problematic in terms of the fundamental right to protection under the law laid down in section 21 of the Constitution. Section 21, subsection 2 of the Constitution requires that the guarantees of good governance be laid down by law. The concept of good governance draws on section 21

of the Constitution. It refers not only to the requirements for prompt and appropriate action by the authorities referred to in subsection 1, but also to the list of the elements of good governance provided in subsection 2. The provision lists the main elements of good governance: publicity of the proceedings, right to be heard (statements of the Constitutional Law Committee PeVL 25/2013 vp, p. 3, PeVL 16/2010 vp, p. 7, PeVL 23/2007 vp, p. 2–3, PeVL 46/2006 vp, p. 3, PeVL 70/2002 vp, p. 6, PeVL 12/2002 vp, p. 6, PeVL 1/2002 vp, p. 2), right to receive a reasoned decision (PeVL 27/2012 vp, p. 2, PeVL 10/2012 vp, p. 5–6, PeVL 10/2011 vp, p. 2, PeVL 48/2006 vp, p. 5, PeVL 10/2006 vp, p. 3, PeVL 4/2004 vp, p. 8–9, PeVL 46/2002 vp, p. 8, PeVL 12/2002 vp, p. 6) and right to request a review (PeVL 27/2013 vp, p. 4/II). The requirement of impartiality in official actions, as well as the service principle laid down in the Administrative Procedure Act (434/2003), may be linked to the requirement of appropriate processing provided in subsection 1. For example, the right to legal assistance is included in the guarantees of good governance referred to in the Constitution.

The main rule of the proposed regulation, according to which a person could not have their case heard at all by a competent authority or subsequently by a court, may be considered a restriction of a fundamental right that interferes with the very core of protection under the law. With regard to protection under the law, it must be assessed whether the elements guaranteeing protection under the law included in the proposed legislation are, however, sufficient so that a restriction interfering with the essence of a fundamental right could be accepted and considered acceptable also from the perspective of human rights obligations binding on Finland and EU law, even though the restriction would have tensions with them.

Section 9.2.5 describes the case law of the European Court of Human Rights regarding issues related to protection under the law. Particularly worthy of notice is the European Court of Human Rights' judgement in which the court found that, from the perspective of Article 3, a Contracting State cannot deny an asylum-seeker access to its territory or remove him or her, even on the assumption that that person might be able to return through some other means of entry, without a proper evaluation of the risks that such a denial or removal might have for his or her rights protected under that provision (*S.S. and others v. Hungary*, 56417/19, 44245/20, paragraph 68). In terms of evaluating this proposal, the significant issue is whether the assessment referred to in the proposed section 5 can be regarded as being a proper evaluation referred to in the cited judgement. Even though the assessment referred to in section 5 of the proposed act would be summary in nature, it would nevertheless be individual and based on interaction between a border guard and a migrant. The migrant themselves would have to present evidence of their real risk of facing the treatment referred to in the section, and the border guard should, when assessing the real risk, also take into account other circumstances that have arisen. In interaction situations taking place prior to a person's removal from the country, the border guard should ensure that the person is adequately understood. Under the aforementioned conditions, the matter could be considered to have been examined in a reasonable, objective and individual manner from the perspective of adequate protection under the law.

The right to request a review is one of the guarantees of a fair trial and good governance. One of the requirements with regard to protection under the law is that a person has the right to appeal against a decision affecting them. An asylum seeker must also have the right to petition the court to prohibit the enforcement of their return and to allow them to wait the outcome of the decision in Finland before they are returned, if the court prohibits the enforcement (e.g. Articles 3 and 13 of the ECHR). Generally, with regard to removal decisions, Article 13 read in conjunction with Article 2 (Right to life) and Article 3 (Prohibition of torture) of the ECHR have been considered to require that the person must in practice have an effective remedy and

that the remedy has suspensive effect where the person has made a substantiated claim that their rights under Article 2 and/or 3 would be violated as a result of removal.

A migrant would not have the right to appeal against removal from the country effected under the proposed act or against the fact that the migrant's application for international protection is not received in the area where the act applies. Under the proposed act, however, a migrant would, in connection with their removal from the country, be guided to move to a place where applications for international protection are received. This information would also be provided to the person in writing. The person would also have an opportunity to file a complaint about the measure in accordance with the Administrative Procedure Act. This alone cannot be considered a sufficient legal remedy but, in situations where the act would be applied, importance should also be attached to the fact that entry into the country and lodging of applications for international protection would not be restricted in the entire territory of Finland. Thus, other legal routes for entry into the country and lodging an asylum application would be available.

In cases concerning the prohibition of collective expulsion, the ECtHR has required, as regards protection under the law, that migrants must have effective access to procedures for legal entry. The burden of proof to demonstrate this rests with the state involved. Matters to be taken into account have been considered to include the location of border crossing points; the modalities for lodging asylum applications; the availability of interpreters or legal assistance to inform asylum seekers of their rights; and the fact that the applications were actually lodged at those border crossing points (*N.D. and N.T. v. Spain*, 8675/15 and 8697/15, §§ 212-217; *A.A. and Others v. North Macedonia*, 55798/16 and 4 others, §§ 116-122). When making decisions under section 16 of the Border Guard Act, Finland has justified its decisions by stating that effective access to asylum procedure in Finland is secured despite the closure of certain border crossing points. For the time being, the ECtHR has no case law concerning a situation akin to the situation currently taking place at Finland's eastern border.

As the proposed act would restrict a person's possibility to have the question of their right to asylum examined in an administrative procedure and before a court in the area where the act would be applied, the proposed act would, at the very least, have a strained relationship with human rights obligations binding on Finland and with EU law, even though it does include certain key elements of protection under the law. It must be assessed whether the proposed act nevertheless provides sufficient guarantees for protection under the law for it to be adopted in the procedure for constitutional enactment.

Overall assessment of the proposal's relation to key solutions of the Constitution

The objective of the main rule laid down in section 5 of the proposed act is to secure the possibility to lodge an application for international protection when, in situations referred to in the section, this would be essential and possible, particularly to safeguard compliance with human rights obligations binding on Finland. In situations where the act would be applied, the proposed act would not safeguard everyone's right to lodge an application for international protection in an area subject to a government decision referred to in section 3 of the proposed act, and in these situations and areas, lodging an application for international protection would only be possible for the exceptional groups referred to in the said section. Primarily, the proposed model would seek to ensure that the principle of non-refoulement is not violated even though this would not be ensured in the asylum procedure as usual. A migrant's application for international protection would be received if, according to a case-by-case assessment made by a border guard, this were essential for safeguarding the rights of a child, a person with

disabilities or another person in a particularly vulnerable position. An application would also be received if a person has presented or there have otherwise arisen circumstances which, according to an assessment made by a border guard, make it evident that the person faces a real risk of being subjected to the death penalty, torture or other treatment violating human dignity primarily in the state from which the person has arrived in Finland. The aim with setting these criteria is to ensure that the principle of non-refoulement would not be violated but, instead, the assessment would give access to the asylum procedure for persons in whose case it is necessary to further assess, in the asylum procedure, whether a risk of violating the principle of non-refoulement exists.

In certain exceptional situations referred to in section 6 of the proposed act in which violence or a large number of persons comparable to violence are used to forcibly enter the country, an aforementioned case-by-case assessment could not necessarily be carried out. In these situations, forcible entry into the country could be prevented immediately at the national border, if this were essential to safeguard the lives and health of people and if the procedure could be deemed justifiable when assessed as a whole. In these situations, migrants would have no opportunity to lodge an application for international protection in the area specified in the government decision referred to in section 3 of the proposed act.

Based on what has been stated above, the proposed act would have a strained relationship with the right to asylum, as the summary assessment would not safeguard the right of each instrumentalised migrant to lodge an asylum application in the area referred to in the government decision.

Whether the right to asylum could nevertheless be regarded as being adequately safeguarded when applying the proposed regulation may, however, be further assessed.

Under section 4 of the proposed act, if the Government has made a decision referred to in section 3, subsection 1, the main rule is that a migrant who is exploited in efforts to exert influence and is present in the area referred to in the decision is prevented from entering the country. A migrant who has entered the country is removed from the country and guided to move to a place where applications for international protection are received. In such situations, the authority would have a duty to tell the person where they can lodge their application for international protection.

However, under the proposed section 5, a migrant’s application for international protection would be received if, according to a case-by case assessment made by a border guard, this is essential for safeguarding the rights of a child, a person with disabilities or another person in a particularly vulnerable position. The assessment would take into account the best interests of the child and whether the removal from the country would pose an immediate danger to the person's life or health. Secondly, a person’s application for international protection would also be received if the person presents, or there have arisen, circumstances which, according to an assessment made by a border guard, make it evident that the person faces a real risk of being subjected to the death penalty, torture or other treatment violating human dignity primarily in the state from which the person has arrived in Finland. In particular, the assessment would take into account any documents and electronic material presented by the person, the externally observable circumstances related to the person and up-to-date information obtained from various sources on the safety of the state under assessment for the person to be removed from the country.

Situations referred to in section 5 of the proposed act concern an assessment that a border guard is responsible for conducting. The assessment would be carried out in a manner that would be necessary for safeguarding the rights of the person or for ensuring border security or national

security or due to other circumstances. When making the assessment, the border guard should ensure that the person is adequately understood. The Border Guard should issue instructions on the measures laid down in the act and on the procedure for carrying out the case-by-case assessment referred to in section 5. When applying the regulation, compliance with the principle of non-refoulement would thus be ensured both by organisation-level guidelines issued by the Border Guard and the actions of an individual border guard.

The European Court of Human Rights has not assessed situations of this type from the perspective of compliance with the absolute principle of non-refoulement. A separate government decision would be needed to apply the act. When the act would be applied, the authorities would also assess in each individual case whether the person is an instrumentalised migrant and, after this, whether the statutory obligation to accept an application for international protection in the area in question is fulfilled, regardless of a decision referred to in section 3. In certain exceptional situations, usually those involving violence, a case-by-case assessment referred to above could not necessarily be carried out at all. In such cases, preventing forcible entry into the country would be essential to safeguard the lives and health of people, and the procedure could be considered justifiable when assessed as a whole.

All in all, it can be stated that there would be tensions between the proposed act and the human rights obligations related to the right to asylum binding on Finland, in particular the principle of non-refoulement, and the requirements concerning protection under the law related to the principle of non-refoulement. Through the regulation model described above, the proposed act seeks to address and mitigate these tensions in the practical application of the act, ensuring that the provisions of human rights treaties would not be violated in applying the act. In certain exceptional situations involving violence, the principle of non-refoulement could not necessarily be taken into account, as the authorities would have to use all possible and essential means to safeguard the lives and health of people in an acute situation. In such a case, the authorities would primarily focus on securing the other essential fundamental rights of those involved in the situation, such as the right to security of person and, ultimately, also the right to life, in their activities. Pursuant to section 22 of the Constitution, the public authorities must guarantee the observance of fundamental and human rights, and no risks should be associated with the realisation of these rights.

According to the preliminary work on the Constitution, the requirement of any derogations being limited means that an exceptive act may not interfere with the key solutions of the Constitution, including the fundamental rights system as a whole and Parliament's status as the highest governmental body. As noted above, the fact that an exceptive act is compatible with the human rights obligations is part of the fundamental rights system as a whole and, simultaneously, one of the key solutions of the Constitution. As described above, the practical objective of applying the regulation would be doing so in a manner compatible with the human rights obligations and EU law. In any case, the precondition for applying the act would always be a separate decision to introduce the powers referred to in section 3. Nevertheless, the application of a decision made pursuant to section 3 of the act should take place in compliance with the Constitution of Finland, the human rights obligations and the principle of interpreting the law in a manner favourable for fundamental and human rights (see also HE 309/1993 vp, 31/II, PeVM 25/1994 vp, p. 4/I).

The Constitutional Law Committee has not assessed in detail the question of what the key solutions of the Constitution, including the fundamental rights system as a whole and the status of Parliament as the highest governmental body, should mean. As described above, the proposed act would have some tensions with the human rights obligations binding on Finland, at least with regard to the realisation of the right to asylum related to the principle of non-refoulement

and the requirements concerning protection under the law. In exceptional situations, compliance with the principle of non-refoulement could not be fully ensured. As stated above, the objective of the obligations under section 5 of the proposed act is to ensure that the application of the act would not, as a rule, lead to a violation of the principle of non-refoulement. Protection under the law is addressed through various elements. In certain exceptional situations, ensuring the realisation of other essential fundamental rights, such as the right to security of person and, ultimately, the right to life, would be emphasised in the authorities' activities instead of ensuring compliance with the principle of non-refoulement. The Constitutional Law Committee has not previously assessed whether compliance with the principle of non-refoulement and the requirements concerning protection under the law can in such situations be ensured in a manner other than by examining an application for international protection in the asylum procedure, and whether the obligation of the public authorities to guarantee the observance of fundamental and human rights under section 22 of the Constitution can in certain exceptional situations primarily mean guaranteeing the other essential fundamental rights instead of the principle of non-refoulement. Taking into consideration everything that has been said about the assessment referred to in section 5 it may, however, be considered that the principal model proposed contains sufficient guarantees and is consequently adequate as, taking the circumstances in question into account, it would seek to safeguard compliance with the principle of non-refoulement in the best possible way available in the situation.

As an overall assessment of what has been said above, the proposed act may be deemed not to interfere with the key solutions of the Constitution, including the fundamental rights system as a whole and Parliament's status as the highest governmental body. As described above, it may be estimated that the proposed guarantees in the assessment referred to in section 5 are sufficient for preventing violations of the principle of non-refoulement and for ensuring that protection under the law is sufficiently taken into consideration. In addition, measures under the proposed section 6 can be deemed acceptable when they are based on the objective of ensuring the realisation of the essential fundamental rights, such as the right to security of person and, ultimately, also the right to life. The proposed act cannot therefore be considered to be manifestly incompatible with the principle of non-refoulement guaranteed by the Constitution and the requirements concerning protection under the law.

9.3.6 Assessment of the exceptional nature of the situation and existence of pressing reasons for adopting an exceptive act

Today, the precondition for using the exceptive act procedure is that the situation at hand must be highly exceptional and that there must be pressing reasons for adopting an exceptive act (PeVM 10/1998 vp, pp. 22–23). The Constitutional Law Committee has assessed the fulfilment of this criterion on a case-by-case basis. When assessing a proposal on amending the Emergency Powers Act, for example, the Constitutional Law Committee found that in the situation assessed, serious reasons existed for derogating from the principle of avoiding exceptive acts and adopting the proposed act on amending the Emergency Powers Act in the procedure for constitutional enactment. In particular, the Committee linked its assessment to the fact that the government proposal described a sudden change in the international security environment that poses new types of threats to Finland's security. The Committee noted that what is stated in the government proposal is an adequate justification for preparing for hybrid threats against Finland, including by expanding the scope of the Emergency Powers Act as proposed (PeVL 29/2022 vp, paragraph 38). In its statement issued in 2009 on the reform of the Emergency Powers Act, the Constitutional Law Committee found that there is an essential need for such legislation for times of crisis as the Emergency Powers Act. The Committee noted that the powers would be more precisely circumscribed than in the previous Emergency Powers Act, and due to the nature of legislation on emergency conditions, eliminating all inconsistencies with the Constitution was

impossible. As its overall assessment the Committee concluded that, in its opinion, exceptional reasons existed for passing the reformed Emergency Powers Act that justified the use of the exceptive act procedure (PeVL 6/2009 vp, p. 16). As the basic premise, it may be said that the prerequisites for an exceptional case and pressing reason should be assessed in each individual case.

The proposal refers to laying down new powers, as the situation involves a new type of issue for which it was not possible to fully prepare in earlier legislation. Sections 2.1 and 2.2 of the proposal describe instrumentalised migration as a phenomenon as well as the threats that it poses for Finland. The proposal would contain regulation that also provides for unexpected situations for which it is not fully possible to prepare in advance. The proposal is about being prepared for situations where influence activities would threaten Finland's sovereignty or national security as described in the relevant section. They may be regarded as serious situations in which preparedness is ensured for highly exceptional cases, and as the existing legislation does not fully cover them, pressing reasons for enacting an exceptive act would exist.

9.3.7 Question of limiting the exceptive act's period of validity

According to the proposal, the act would remain in force for one year from its entry into force. The Constitutional Law Committee required in its report on the Constitution that, if exceptive acts are used in the future in national connections, in Committee's opinion an effort should be made to primarily adopt any derogations from the Constitution as acts whose period of validity is limited, in other words temporary acts (PeVM 10/1998 vp, p. 23). In its statements (see e.g. PeVL 59/2001, PeVL 67/2002 vp, PeVL 46/2004 vp, PeVL 25/2005 vp and PeVL 54/2005 vp), the Constitutional Law Committee has required that temporary exceptive acts must be valid for a short term only. The period of validity of one year cited in the government proposal can be regarded as being limited as intended in the preliminary work on the Constitution. Additionally, considering that the Constitutional Law Committee has previously accepted a period of validity of one year, the proposal would be in line with this assessment of a fixed period.

9.3.8 Summary of the assessment from the viewpoint of section 73, subsection 1 of the Constitution

As noted above, the proposed act would be clearly limited in relation to the Constitution as a whole. The exceptive act would be temporary, and consequently valid for a limited period. Above, it has been found that the act would be applied in highly exceptional cases and for pressing reasons.

As discussed above, it is possible to conclude that the exceptive act would not interfere with the key solutions of the Constitution, including the fundamental rights system as a whole and Parliament's status as the highest governmental body. This is justified by the fact that the proposed manner of ensuring compliance with the principle of non-refoulement, observing the requirement of protection under the law and, in certain situations, ensuring the right of individuals to security of person and, ultimately, the right to life would be sufficient to ensure compliance with the human rights obligations binding on Finland and to protect individuals, even though the proposed procedure derogates from the normal asylum procedure. Therefore, any manifest conflict with the Constitution, EU law or Finland's human rights obligations would not arise. The solution model can consequently be considered judicially adequate for a precisely circumscribed derogation referred to in section 73, subsection 1 of the Constitution. However, the Constitutional Law Committee has not previously assessed an identical proposal in a corresponding situation. The Constitutional Law Committee's statement would also have relevance from the perspective of the application of section 106 of the Constitution, if the

application of a provision of the proposed act were to be assessed in a matter being heard by a court.

Assessment of the proposal from the viewpoint of section 73, subsection 2 of the Constitution

The proposal refers to laying down new powers on the grounds that the authorities currently lack adequate means for responding appropriately to the use of migrants in order to exert pressure on Finland. These powers would be of the type which the rationale describes as urgently needed. Consequently, it must be assessed whether the proposed act can be adopted in the procedure referred to in section 73, subsection 2 of the Constitution.

The criteria for declaring an act urgent have been assessed in a few statements and reports of the Constitutional Law Committee. In the context of amendments to the Constitution, the Constitutional Law Committee has considered it relatively important that the urgent amendment procedure referred to in section 73, subsection 2 of the Constitution is only used for essential reasons and in pressing situations (PeVM 10/2006 vp, p. 6). The Constitutional Law Committee has found that the same principle can also be applied to adopting exceptive acts of a permanent nature (PeVL 6/2009 vp, p. 17).

The Constitutional Law Committee assessed the preconditions for using an urgent procedure in 2018. On this matter, the Committee stated: ”When the proposal amending section 10 of the Constitution was heard by Parliament in 2018, the Constitutional Law Committee exceptionally found that enacting the amendment to the Constitution in an urgent procedure was possible. The Committee attached importance to the time difference between the expedited and ordinary legislative procedure. The Constitutional Law Committee noted the statements it had received from other special committees, which drew attention to the changes having occurred in Finland's security environment and the uncertainties associated with them, which accentuate the need to produce objectively verified and analysed information on security threats against Finland to support both political decision-making and the security authorities’ decisions. This situation differed from amendments to the Constitution previously examined by the Committee in that exceptionally, there was an essential need for using the urgent procedure in a pressing situation. Consequently, there was no absolute constitutional objection to exceptionally adopting the amendment to the Constitution in the urgent procedure referred to in section 73, subsection 2 of the Constitution (PeVM 4/2018 vp, pp. 9—11).” (PeVL 29/2022 vp paragraph 44).

When evaluating the proposal on amending the Emergency Powers Act in 2022, the Committee assessed the preconditions for adopting the proposed act in an urgent procedure as follows: ”The Constitutional Law Committee draws attention to the fact that adopting the proposed act to be assessed in the ordinary procedure laid down in section 73, subsection 1 of the Constitution would postpone the entry into force of the reform by approximately one year compared to a situation where the proposed act would be heard in the urgent procedure laid down in section 73, subsection 2 of the Constitution. The Committee finds this difference significant, particularly considering the objective of the regulation. According to the rationale of the government proposal (p. 72), the international security situation has deteriorated suddenly over a short period of time, while tensions and uncertainties have increased globally and in Finland’s neighbouring regions. They also exacerbate Finland’s risk of multisectoral and asymmetrical threats and incidents that may be difficult to recognise and that put the functioning of society at serious risk, which the current definitions of emergency conditions in the Emergency Powers Act do not unambiguously cover, and for which regulation in force in normal conditions does not provide adequate powers, either. The Constitutional Law Committee has no objections to enacting the first bill of the government proposal in the urgent procedure for constitutional

enactment laid down in section 73, subsection 2 of the Constitution." (PeVL 29/2022 vp, paragraph 45).

The existence of reasons due to which the proposed act could be adopted in the procedure referred to in section 73, subsection 2 of the Constitution should be assessed in this matter. The key to this question is evaluating if the reasons described in sections 2.1–2.3 may be regarded as essential and pressing reasons due to which the proposed act could be adopted in the procedure referred to in section 73, subsection 2 of the Constitution. As the proposal points out, the security environment has changed suddenly and for a long time ahead. Since autumn 2023, Finland has been targeted by instrumentalised migration, and the existing powers of the authorities have not been adequate to fully stop this phenomenon. Enacting the proposed act in the ordinary procedure laid down in section 73, subsection 1 of the Constitution would delay the entry into force of the proposed regulation by years, which cannot be considered an effective way of responding to the pressure exerted on Finland. On the basis of what has been said above, serious reasons exist for adopting the proposed act in the urgent procedure for constitutional enactment laid down in section 73, subsection 2 of the Constitution.

9.4 Summary of the assessment of the legislative procedure

Above, the proposed act has been assessed in terms of the general preconditions for restricting fundamental rights, concluding that the proposed act cannot be adopted in the ordinary legislative procedure referred to in section 72 of the Constitution. Consequently, the question of whether the proposed act could be adopted in the procedure referred to in section 73 of the Constitution has been assessed.

The proposed act has been considered to be problematic especially with regard to the fact that compliance with the principle of non-refoulement would, as a rule, be ensured in a different manner than in the normal asylum procedure, in other words in shorter interaction situations between border guards and migrants. As a rule, a border guard would conduct, for each migrant, an individual, albeit summary, assessment of whether the migrant faces a real risk of being subjected to the death penalty, torture or other treatment violating human dignity. The migrant themselves would have an opportunity and also an obligation to present circumstances related to their personal situation, or circumstances indicating the possibility of treatment referred to in the act could otherwise come to light, from which the border guard could conclude if the risk is real. The status of children, persons with disabilities and particularly vulnerable persons would be taken into account, and their rights would be safeguarded by making it possible to receive applications for international protection from these groups. The proposed model that would safeguard compliance with the principle of non-refoulement in practice can also be regarded to provide adequate legal guarantees for it.

In certain exceptional situations involving violence, the principle of non-refoulement could not necessarily be observed, as the authorities would have to use all possible and essential means to safeguard the lives and health of people in an acute situation. In such a case, the authorities would primarily focus on securing the other essential fundamental rights of those involved in the situation, such as the right to security of person and, ultimately, also the right to life, in their activities.

Under the proposed regulation, reception of applications for international protection could be restricted by government decision in a separately defined geographical area. The regulation would not restrict entry into the country and access to the asylum procedure anywhere else in Finland. Under the proposed act, information on this possibility would also be provided to a person to be removed from the country. This would address the requirement of protection under

the law by securing genuine and effective access to asylum procedure and compliance with the prohibition of collective expulsion.

On the basis of what has been said above, the restrictions of fundamental rights and derogations from international human rights obligations proposed here can be considered such that the proposed act does not interfere with the key solutions of the Constitution, including the fundamental rights system as a whole. Acceptable and serious reasons also exist for the restrictions.

The Government finds that the proposed act can be considered a limited derogation from the Constitution as described above. The derogation is precisely circumscribed in relation to the Constitution as a whole. It would be temporary and consequently limited in time. The proposed act would be applied in highly exceptional situations, and there are pressing reasons for submitting the proposal. The proposed act does not interfere with the key solutions of the Constitution, and the proposed act is not manifestly incompatible with the Constitution. The proposed act is also acceptable from the perspective of EU law and Finland's international human rights obligations.

In the Government's view, measures other than those proposed here are not sufficient for combating influence activities by a foreign state directed at Finland. The Government considers that the objectives of the proposed act are very important and acceptable and the Government considers them justified in the current circumstances.

On the basis of what has been said above, the Government finds that the proposed act can be adopted in the procedure laid down in section 73 of the Constitution, and that pressing reasons exist in this matter for adopting the proposed act in the urgent procedure for constitutional enactment laid down in section 73, subsection 2. As the Constitutional Law Committee has not previously assessed a similar proposal, the Government finds it essential to obtain a statement from the Constitutional Law Committee on this matter. The consideration by the Constitutional Law Committee and its statement is also essential to ensure that the authorities will not encounter unreasonable situations when applying the act but can, instead, comply with the act without a risk of being suspected of an offence due to their official actions.

Resolution

On grounds of the above, the following bill is submitted to Parliament for approval:

Bill

Act

on Temporary Measures to Combat Instrumentalised Migration

By decision of Parliament, made as provided in section 73 of the Constitution, the following is enacted:

Section 1

Objective of the Act

The objective of this Act is to combat efforts by a foreign state to exert influence on Finland by exploiting migrants.

Section 2

Scope of application of the Act

This Act applies to an alien's entry into the country and removal from the country as well as to the reception of applications for international protection in a situation where a foreign state is seeking to exert influence on Finland by exploiting migrants.

Section 3

Restriction on the reception of applications for international protection

The government plenary session may decide to restrict the reception of applications for international protection in a limited part of Finland's national border and in its immediate vicinity for a maximum of one month at a time if the President of the Republic and the Government have concluded in cooperation that:

1) it is known, or reasonable grounds exist to suspect, that a foreign state is seeking to exert influence on Finland by exploiting migrants;
2) the efforts to exert influence seriously endanger the sovereignty or national security of Finland;
3) the restriction is essential for safeguarding the sovereignty or national security of Finland; and
4) other means are not sufficient to safeguard the sovereignty or national security of Finland.

The decision referred to in subsection 1 does not restrict the reception of applications for international protection beyond the area referred to in the decision.

The reception of applications for international protection shall not be restricted to a larger extent or for a longer period than is essential for combating the serious endangerment of the sovereignty or national security of Finland. The government plenary session shall regularly review the content and scope of the decision as the situation develops, in cooperation with public authorities. The decision shall be rescinded when it is no longer essential for the purpose laid down in subsection 1. The Ministry of the Interior shall provide information on the decision referred to in this section to a sufficient extent.

Section 4

Preventing entry into the country, and removal from the country

If the Government has made a decision referred to in section 3, subsection 1, a migrant who is exploited in efforts to exert influence and is present in the area referred to in the decision is prevented from entering the country.

A migrant who is exploited in efforts to exert influence and has entered the country is removed from the country without delay and guided to move to a place where applications for international protection are received.

A person to be removed from the country shall be provided with written information on the grounds for the measure and on the place where the person may lodge an application for international protection. No review may be requested by way of appeal in respect of the removal from the country.

Section 5

Derogations

By derogation from the provisions of section 4, an application for international protection is received if, according to a case-by-case assessment made by a border guard, this is essential for safeguarding the rights of a child, a person with disabilities or another person in a particularly vulnerable position. The assessment shall take into account the best interests of the child and whether the removal from the country would pose an immediate danger to the person's life or health.

A person's application for international protection is also received if the person has presented, or there have arisen, circumstances which, according to an assessment made by a border guard, make it evident that the person faces a real risk of being subjected to the death penalty, torture or other treatment violating human dignity primarily in the state from which the person has arrived in Finland. In particular, the assessment shall take into account any documents and electronic material presented by the person, the externally observable circumstances related to the person and up-to-date information obtained from various sources on the safety of the state under assessment for the person to be removed from the country.

The assessment referred to in subsections 1 and 2 shall be carried out in a manner that is necessary for safeguarding the rights of the person, for ensuring border security or national security or due to other circumstances. When making the assessment, the border guard shall ensure that the person is adequately understood.

Section 6

Exceptional situations

Forcible entry into the country by using violence or a large number of persons may be prevented immediately at the national border without carrying out a case-by-case assessment referred to in section 5, if this is essential to safeguard the lives and health of people and if the procedure can be deemed justifiable when assessed as a whole.

Section 7

Entry into force

This Act enters into force on xx Month 20 and will remain in force for one year from the entry into force.

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Helsinki, 21 May 2024

Prime Minister

Petteri Orpo

Mari Rantanen, Minister of the Interior