



**ECRE Comments on the Commission Proposal for a
Council Decision on provisional emergency measures
for the benefit of Latvia, Lithuania and Poland
COM (2021)752**

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TABLE OF CONTENTS

Summary of views	3
Introduction	5
I. The use of article 78 (3) TFEU?	7
II. Derogation from the Asylum Procedure Directive	11
Extended registration period (article 2 (1))	11
Expansion and prolongation of the asylum border procedure	12
Expansion of the scope (Article 2 (2)).....	13
No exemptions for vulnerable applicants.....	14
Prolongation of the border procedure (Article 2(5))	15
Curtailing the right to an effective remedy (Article 2(6))	16
(De facto) detention.....	17
Legal Assistance	18
III. Limiting material reception conditions (Article 3).....	19
IV. Return procedure (Article 4).....	19
V. Specific guarantees (Article 5)	20

Summary of views

ECRE does not support the measures proposed, which will have an adverse effect on the right to asylum without adequately responding to the situation at the EU's borders with Belarus. The main fundamental rights affected by the proposal are the right to human dignity (Article 1 EU Charter of Fundamental Rights (CFREU)), the right to asylum (Article 18 CFREU), the prohibition of torture and inhuman or degrading treatment or punishment (Article 4 CFREU), the right to liberty and security (Article 6 CFREU), protection in the event of removal, expulsion or extradition (Article 19 CFREU), the rights of the child (Article 24 CFREU) and the right to an effective remedy (Article 47 CFREU).

The negative impact on these rights derives from the expanded use of concepts and practices which undermine the right to asylum. Many elements of the emergency measures are already part of the legislative proposals launched with the Pact on Migration and Asylum, such as the border procedure¹ and allowing derogations.²

Generally, ECRE has concerns about the lack of a clear definition of “instrumentalization” and related uncertainty as to the scope of the measures. Doubts also arise as to the necessity and proportionality of the measures. If they are to move forward, ECRE submits the following (non-exhaustive) observations and recommendations, aimed at reducing the negative impact on fundamental rights.

Delayed registration (Article 2(1)): While in principle the rights of applicants should not be affected by delayed registration, in practice there is a risk that this does happen because delaying registration makes it more difficult for applicants to prove their status. It could then infringe their right to reception and protection from refoulement, along with other rights deriving from their status as asylum applicants under EU law. If the Article is maintained ECRE proposes amendments to ensure full respect for the right to human dignity, as enshrined in Article 1 of CFREU of Fundamental Rights (CFREU), the right to asylum (Article 18 CFREU), and protection in the event of removal, expulsion or extradition (Article 19 CFREU), and material reception conditions.

Extension and expansion of the border procedure (Article 2 (2)-(5)): Article 2 lays down the possibility for Member States to expand the border procedure for almost all applicants arriving at the border for up to 16 weeks, and does not exempt children and other vulnerable applicants. As evidence shows, the border procedure is also likely to happen in detention. This raises serious concerns regarding the right to asylum (Article 18 CFREU), the prohibition of torture and inhuman or degrading treatment or punishment (Article 4 CFREU, Article 3 ECHR), the right to liberty and security (Article 6 EU CFREU, Article 5 ECHR), protection in the event of removal, expulsion or extradition (Article 19 CFREU), and the rights of the child (Article 24 EU CFREU).

Right to an effective remedy (Article 2 (6)): The proposed measures curtail the right to an effective remedy by no longer providing for automatic suspensive effect pending appeal decisions. This raises serious concerns regarding the prohibition of torture and inhuman or degrading treatment or punishment (Article 4 CFREU), protection in the event of removal, expulsion or extradition (Article 19

¹ See: ECRE Comments on the Commission Amended Proposal for an Asylum Procedures Regulation regarding border asylum procedures and border return procedures COM (2020) 611, December 2020, available at: <https://bit.ly/3sxUtTP>

² See: ECRE Comments on The Commission Proposal for A Regulation Addressing Situations of Crisis And Force Majeure In the Field of Migration and Asylum COM (2020) 613, February 2021, available at: <https://bit.ly/3DhAaOL>

EU CFREU), and the right to an effective remedy (Article 47 EU CFREU). Providing an applicant with an automatic right to remain on the territory during the period within which the right to an effective remedy must be exercised and then pending the outcome in case the right is exercised, constitutes the best guarantee of respect for the right and for the principle of *non-refoulement*. It also avoids additional burdens on judicial systems as asylum seekers are not required to launch a separate request to remain on the territory.

Limitation of reception conditions (Article 3): Latvia, Lithuania and Poland may temporarily set modalities for material reception conditions which only cover the applicants' basic needs. Given that this may be for up to 16 weeks, it may not be in line with human dignity. ECRE also recommends adding text to specify that all applicants subject to the border procedure should have access to free legal assistance from the time they make their application for international protection.

Derogation from the Return Directive (Article 4): Derogating from the Return Directive almost in full appears to be disproportionate and creates risks for the persons concerned because the Directive provides for important guarantees beyond the principle of *non-refoulement*, and those related to detention, and healthcare. These include *inter alia* guarantees on remedies and procedural safeguards. The European Commission needs to demonstrate why no alternative less onerous measure is available.

Specific guarantees (Article 5): To ensure genuine and effective access to the asylum procedure, Latvia, Lithuania and Poland must not only ensure that a sufficient number of registration points, including at border crossings, are functioning and that applicants receive relevant information about them, but also that the applicants are able to safely and legally reach these points. If the latter criterion cannot be met, genuine and effective access to asylum procedures is not ensured.

Introduction

On 1 December 2021 the European Commission, presented a proposal for a Council Decision on provisional emergency measures for the benefit of Latvia, Lithuania and Poland.³ The draft Decision was accompanied by a Joint Communication to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions entitled Responding to State-sponsored Instrumentalization of Migrants at the EU External Border.⁴ The draft Decision followed a request to the Commission from the Council asking it to consider measures in response to the actions of Belarus.

The proposal has not been greeted with enthusiasm by political groups in the European Parliament – perhaps unsurprising given the use of a procedure where Parliament’s role is limited to consultation. Both the centre-left S&D group⁵ and the Greens⁶ expressed criticism, along with some MEPs from Renew.⁷ Response from the Member States also appears to be negative – partly because for some Member States, the proposal does not go far enough. Its fate is thus uncertain. ECRE has commented elsewhere on the politics of the situation, and on the legislative proposals already presented. These Comments will look in detail at the proposed Decision with a focus on the substance of the articles. The introduction first outlines some concerns with the overall approach.

First, the Commission uses Article 78(3) of the Treaty on the Functioning of the European Union (TFEU) as the legal basis for draft Decision, which is intended to: “establish provisional measures for the benefit of Latvia, Lithuania and Poland, in view of supporting them in managing the emergency situation caused by the actions of Belarus, leading to a sudden inflow of third country nationals in the current context of instrumentalization of migrants at the external borders.”⁸

While the measures address the “instrumentalization of migrants”, the concept of “instrumentalization” is not defined. That it is central can be discerned from the separate Communication and the references to it in the Explanatory Memorandum. It also appears in the subject matter as per Article 1, which refers to “a sudden inflow of third country nationals in the current context of instrumentalization of migrants at the external borders”. The forthcoming reform of the Schengen Borders Code also seeks “to give better tools to Member States to protect the external borders in situations of instrumentalization, while ensuring full respect for fundamental rights. They will also contain measures that will help those Member States who see unauthorised movements of migrants

³ European Commission, Proposal for a COUNCIL DECISION on provisional emergency measures for the benefit of Latvia, Lithuania and Poland, COM/2021/752 final, December 2021, available at: <https://bit.ly/3dxcoUk>.

⁴ Joint communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Responding to state-sponsored instrumentalization of migrants at the EU external Border*, JOIN (2021) 32 final, November 2021, available at: <https://bit.ly/3rK0v5V>

⁵ S&D Press release, press release S&D Group condemns Commission proposal to suspend asylum rules, 1 December 2021, available at: <https://bit.ly/3dzUm3L>

⁶ Greens/EFA, Press release: Commission plans tantamount to accepting pushbacks, 1 December 2021, available: <https://bit.ly/3lwrB6i>

⁷ Sophie in 't Veld on Twitter: "Instead of enforcing EU law, @EU_Commission caves in to pressure by the natl governments, basically legitimising human rights violations and the non application of asylum law. When will @Europarl_EN call @vonderleyen and @MargSchinas to come before plenary and explain? <https://t.co/oNRgAdgmM1>" / Twitter; Hilde Vautmans on Twitter: "Instead of pushing EU Member States to find a sustainable solution to efficiently regulate migration, we throw our fundamental values & rights in the trash bin. Unacceptable. @EU_Commission should protect our treaties, not provide ways to circumvent them. <https://t.co/bd1HSZVI7Z>" / Twitter

⁸ Implementation issues may arise as the proposal is not precisely defined. Article 1 refers to migrants, while neither the recast Reception Conditions Directive nor the recast Asylum Procedures Directive refers to it.

including the repercussions of instrumentalization far away from the external border.” A definition of instrumentalization might therefore also be forthcoming; it is absent from draft Decision.

Second, as well as a lack of clarity as to the definition of instrumentalization, the material scope of the measures is not clearly circumscribed. In contrast, when Article 78(3) was previously used (for the relocation decisions of 2015, see below), the objectives, material scope and definitions of the measures were set out. The draft Decision provides that it should apply to those arriving or already present on the territory of the Member States concerned “as a result of the actions of the Belarusian regime”. It is unclear how this phrase is to be defined, which may result in arbitrariness. Further confusion may be generated by the use of the term “migrants” which is not used in the main instruments of the Common European Asylum System (CEAS).

Third, Article 78(3) TFEU permits the adoption of measures which, in order to address a clearly identified emergency situation, derogate temporarily and on specific points from legislative acts in asylum matters, but they must not be intended to definitively eliminate, replace or amend provisions in legislative acts adopted on the basis of Article 78(2) TFEU, including the EU asylum acquis.⁹ By doing so, the measures would lead to an arbitrary system substantially different from the system laid down by the current CEAS instruments.¹⁰ While the measures proposed are temporary (and renewable), there is a risk that they become permanent, in the manner of other temporary and exceptional measures. In addition, the relationship between the measures and changes to domestic asylum legislation also requires examination. Analysis of legislation adopted in response to the crisis in Lithuania¹¹, Poland¹² and Latvia¹³ demonstrates that some of the changes put in place by the Member States are incompatible with the EU primary and secondary law, in particular as they allow for derogations from non-derogable rights under the Charter (including Article 4 and 19) as well as the right to asylum under Article 18. However, rather than seeking their disapplication, elements of the proposed Decision appear to legitimise these changes.

Fourth, a separate but related issue is the overlap between the measures proposed and the legislative proposals in the 2020 New Pact on Migration and Asylum. These proposals are currently subject to legislative scrutiny in a co-decision procedure, in which the European Parliament and the Council are co-legislators on an equal footing. By introducing similar measures in a Council Decision, which requires only the consultation of the European Parliament, the proposal may be construed as an effort to bypass the ordinary legislative processes and meaningful discussion about the impact of equivalent provisions proposed in the Pact.

Finally, the necessity and proportionality of the proposed measures are questionable. Given the impact on the situation and rights of the people affected, are they the most suitable measures? Were less onerous alternatives available? Are they proportionate given the restrictions envisaged? These questions remain largely unanswered in the proposal.

⁹ Opinion of Advocate General Bot, 26 July 2017, Cases C-643/15 and C-647/15, *Slovak Republic, Hungary v. Council of the European*, ECLI:EU:C:2017:618, paras. 75 – 78, available at: <https://bit.ly/3orP00l>

¹⁰ See also: CJEU, *Slovak Republic, Hungary v. Council of the European*, C-643/15 and C-647/15, §§ 332 – 333.

¹¹ ECRE Legal Note 11: Extraordinary Responses: Legislative Changes in Lithuania, 2021 | European Council on Refugees and Exiles (ECRE), available at: <https://bit.ly/31D5HgS>

¹² Helsińska Fundacja Praw Człowieka » The draft amendment of the Act on Foreigners and the Act on Granting Them Protection violate EU asylum law principles – legal opinion of the HFHR, 2021, available at: <https://bit.ly/3y5vlkZ>

¹³ UN High Commissioner for Refugees (UNHCR), *UNHCR observations on the Order of the Cabinet of Ministers of the Republic of Latvia on the Declaration of Emergency Situation (No 518)*, 13 October 2021, available at: <https://www.refworld.org/docid/61767bea4.html>

I. The use of article 78 (3) TFEU?

Article 78(3) of the Treaty on the Functioning of the European Union (TFEU) provides for the adoption of provisional measures in emergency migratory situations.¹⁴ It reads:

In the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament.

It should be noted that Article 78(3) does not refer to external relations. In line with Article 78(1), which provides for the development of a Common European Asylum Policy, the focus is assisting Member States to respond to an inflow of third country nationals, such as to constitute an emergency, and to help them guarantee the right to asylum and the principle of non-refoulement. The article allows the Council to take decisions by qualified majority, thus not applying the ordinary legislative procedure, which is now the usual procedure for decisions in the area of borders, asylum and immigration. Using a Council Decision means that the European Parliament will only be consulted rather than acting as co-legislator as it does in the ordinary legislative procedure.

What is “an emergency situation characterised by a sudden inflow of nationals of third countries”?

According to the CJEU,¹⁵ Article 78(3) can be used in exceptional circumstances in the event of a sudden inflow of nationals of third countries, insofar as the situation renders the normal functioning of the asylum system impossible. It was first used during the 2015 migration crisis, when Italy and Greece, situated at the EU's external borders, were confronted with unprecedented arrivals of asylum applicants fleeing persecution or serious harm.¹⁶ That year, around 1.83 million irregular border crossing into the EU were detected and 1.3 million people applied for international protection in the EU, more than quadruple the number of the previous year, with Greece and Italy the most affected by this sharp increase.¹⁷

To alleviate migratory pressure on these Member States, the European Commission proposed a more even sharing of responsibility for asylum-seekers already present in the EU. Following the Commission proposals, the Council adopted two Decisions for a duration of two years, covering a temporary relocation scheme applying to a total of 40,000 people from Italy (24,000) and Greece (16,000) (Decision 2015/1523) and a second emergency mechanism designed to relocate a further 120,000 people seeking international protection from Italy and Greece (Decision 2015/1601). The

¹⁴ EPRS, At a glance: Emergency measures on migration: Article 78(3) TFEU, March 2020, available at: <https://bit.ly/31ityTh>

¹⁵ CJEU, Slovak Republic, Hungary v. Council of the European, C-643/15 and C-647/15, 6 September 2017, ECLI:EU:C:2017:631

¹⁶ See: Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece, available at: <https://bit.ly/308jUC1>

¹⁷ CJEU, Slovak Republic, Hungary v. Council of the European, C-643/15 and C-647/15, 6 September 2017, ECLI:EU:C:2017:631; § 119; The statistical data for the Hellenic Republic, which are mentioned in Recital 13 of the contested Decision, give an even clearer indication. In the first eight months of 2015, more than 211,000 irregular migrants arrived in Greece. During July and August 2015 alone, the Frontex Agency counted 137,000 irregular border crossings, an increase of 250% as compared with May and June 2015. Recital 14 of the contested decision states that, according to Eurostat and EASO figures, 39,183 persons applied for international protection in Italy between January and July 2015, against 30,755 in the same period of 2014 (an increase of 27%), while a similar increase was witnessed in Greece, where there were 7,475 applicants (a 30% increase).

Decisions therefore involved a limited and temporary derogation from certain provisions of the Dublin Regulation, which sets out the usual rules on responsibility sharing.

The current numbers are of a different order. According to the European Commission's Explanatory Memorandum "in 2021 as of 21 November, 7,831 third country nationals have entered the territories of Latvia, Lithuania and Poland from Belarus in an unauthorised manner, compared to 257 in the entire 2020." During this entire period, there have been 2,676 asylum applications in Lithuania, 579 applications in Latvia and 6,730 applications in Poland. In addition, 42,741 attempts to cross have been prevented by the three Member States. No objective data is available as to the numbers stranded in Belarus, but the Commission estimates there to be 10,000 people there.

Following the approach in Court's assessment of the 2015 emergency measures,¹⁸ the numbers should be evaluated to assess whether:

- (a) their scale would severely disrupt the Member States' asylum systems and
- (b) the complete saturation of the reception system could be reached.

During the press conference announcing the recent proposal, Commissioner Johansson acknowledged that the numbers are indeed not that high, however she explained that the key element justifying the measures is "the instrumentalization of migrants for political purposes". Latvia, Lithuania and Poland may thus need flexibility to respond effectively to the hostile actions of Belarus at the same time as managing the arrivals.

Two questions arise. First, whether "instrumentalization" falls within the scope of Article 78(3); and second, given the manageable numbers of arrivals at the border, is the curtailment of the rights of the persons concerned necessary and proportionate? Overall, does the situation indeed justify a derogation from the asylum *acquis* as provided for by Article 78(3) TFEU?

In ECRE's view the situation at the border is manageable, and should be approached with a sense of perspective. It requires a clear-headed response that includes a firm defence of the human dignity, non-refoulement and the right to asylum, and of EU and international law, rather than allowing flexibility in applying the asylum *acquis*. Furthermore, the arrival of large numbers of third-country nationals or stateless persons requesting international protection is already provided for in EU legislation, in particular in Article 6(5), Article 14(1), Article 31(3)(b) and Article 43(3) of the recast Asylum Procedure Directive 2013/32 (APD), in Article 10(1) and Article 18(9) of the recast Reception Directive 2013/33 (RCD) and in Article 18 of the Return Directive 2008/115 (RD). These rules allow Member States flexibility in emergency situations and allow them to depart, to a certain extent, from the generally applicable rules.¹⁹

Duration of the measures

Under Article 78(3) TFEU, only "provisional measures" may be adopted. The CJEU states in this regard that a measure may be classified as "provisional" in the usual sense of the word only if it is not intended to regulate an area on a permanent basis and only if it applies for a limited period. Nevertheless, by contrast with Article 64(2) EC, under which the period of application of measures

¹⁸ Ibid, §§. 214, 218 and 256.

¹⁹ CJEU, *European Commission v Hungary*, C-808/18, 17 December 2020, ECLI:EU:C:2020:1029, § 137.

adopted on the basis of that provision could not exceed six months, Article 78(3) TFEU, the successor provision, no longer includes a time limit.²⁰ The EU Institutions thus have a certain discretion as to the length of time during which the provisional measures should temporarily apply.²¹ The CJEU specified that the duration has to be determined in the light of the circumstances of the case and, in particular, of the specific features of the emergency situation justifying the measures.²²

The proposal foresees a duration of six months (Article 10), which can be extended pursuant to Article 9(3). It applies to all third-country nationals arriving on the territory of Latvia, Lithuania and Poland from the date of entry into force of the Decision, as well as to those already present in the territory of the said countries “as a result of the actions of the Belarussian regime” and whose applications for international protection have not been registered or for whom the return procedure has not started. The measures will be applied during the whole length of their asylum procedure.

What kind of measures can be taken?

The EU Institutions have a margin of appreciation when deciding on the content of support measures.²³ According to CJEU jurisprudence, the concept of “provisional measures” within the meaning of Article 78(3) TFEU is sufficiently broad as to cover all the provisional measures necessary to respond effectively and swiftly to an emergency situation characterised by a sudden inflow of nationals of third countries.²⁴

The Court confirmed in the same ruling that the Council can decide to derogate, on the basis of Article 78(3), from secondary law. By contrast, any permanent amendment of secondary legislation outside of the confines of the ordinary legislative procedure cannot be decided on the basis of Article 78(3) TFEU.²⁵ The jurisprudence is important because key elements of the emergency measures strongly resemble some of the contested provisions in the 2020 Pact legislative proposals, specifically the derogation on the registration of application, the expanded use of the fiction of non-entry, and the extension and expansion of the border procedure. These measures would have a significant impact on asylum in the EU, as set out inter alia in the European Parliament’s impact assessment,²⁶ and the Opinion of the Council Legal Service.²⁷

The question arises as to whether the proposal constitutes an effort to circumvent the democratic process, given the limited role the European Parliament has in the adoption of provisional measures under Article 78(3) TFEU.

²⁰ CJEU, *Slovak Republic, Hungary v. Council of the European*, C-643/15 and C-647/15, 6 September 2017, ECLI:EU:C:2017:631; §§ 89-91.

²¹ Erschienen in: *EU Immigration and Asylum Law: A Commentary* / Hailbronner, Kay; Thym, Daniel (Hrsg.). - 2nd edition. - München: C.H. Beck, 2016. - S. 1023-1053, available at: <https://bit.ly/31CUddf>

²² CJEU, *Slovak Republic, Hungary v. Council of the European*, C-643/15 and C-647/15, 6 September 2017, ECLI:EU:C:2017:631; § 92.

²³ Erschienen in: *EU Immigration and Asylum Law: A Commentary* / Hailbronner, Kay; Thym, Daniel (Hrsg.). - 2nd edition. - München: C.H. Beck, 2016. - S. 1023-1053, available at: <https://bit.ly/31CUddf>

²⁴ Judgment of 6 September 2017, *Slovak Republic and Hungary v Council*, Joined Cases C643/15 and C647/15, paragraphs 77, 78

²⁵ Erschienen in: *EU Immigration and Asylum Law: A Commentary* / Hailbronner, Kay; Thym, Daniel (Hrsg.). - 2nd edition. - München: C.H. Beck, 2016. - S. 1023-1053, available at: <https://bit.ly/31CUddf>

²⁶ EPRS, Cornelisse, G., & Campesi, G. (2021). *The European Commission's New Pact on Migration and Asylum: European Substitute Impact Assessment*, available at: <https://bit.ly/31G0a9h>.

²⁷ Opinion of the Council Legal Service, April 2021, available at: <https://bit.ly/332DKja>

It should be noted that the asylum *acquis* set out in Article 78(1) TFEU – including the obligations to respect non-refoulement, the 1951 Geneva Convention, and the EU Charter on Fundamental Rights (CFREU) – continue to apply when emergency measures are in place. Article 78(3) cannot therefore be used to introduce derogations that would violate the 1951 Convention or the principle of non-refoulement, or that would breach the CFREU, which has the “same legal value” as the Treaties.²⁸ Rather, pursuant to Article 80 TFEU, emergency measures should be governed by the principles of solidarity and shared responsibility.

As explained below, some of the proposed derogatory measures raise serious human rights concerns in particular regarding the right to human dignity (Article 1), the right to asylum (Article 18 CFREU), the prohibition of torture and inhuman or degrading treatment or punishment (Article 4 CFREU, Article 3 ECHR), the right to liberty and security (Article 6 CFREU, Article 5 ECHR), protection in the event of removal, expulsion or extradition (Article 19 CFREU), the rights of the child (Article 24 CFREU), and the right to an effective remedy (Article 47 CFREU, Article 13 ECHR). In addition, if the emergency measures set a precedent and derogations are used in similar situations in the future, then the principle of solidarity could also be undermined.

While Article 78(3) TFEU permits the adoption of measures which, in order to address a clearly identified emergency situation, derogate temporarily and on specific points from legislative acts in asylum matters, these measures must not be intended to definitively eliminate, replace or amend provisions in legislation.²⁹

ECRE is concerned that by resorting to the use of Article 78(3) to justify derogations in this case, the Commission and the Council will both legitimise unlawful or at very least questionable changes to domestic law and will set a precedent which encourages Member States to adopt such changes in the future.

ECRE is also concerned that the emergency measures will contribute to eliminating and replacing existing provisions of EU asylum *acquis*. As a result this will lead to an arbitrary system with some measures in place in some contexts which differ substantively from those laid down by the instruments of the Common European Asylum System (CEAS).

In order to avoid such a situation arising, not only do time limits need to be clearly set out, the material scope of the measures also need to be clearly circumscribed. In addition, the measures chosen should be necessary and proportionate to the objective pursued. When there is a choice between several appropriate measures, recourse must be had to the least onerous and the disadvantages caused must not be disproportionate to the aims pursued.³⁰ Therefore, while a set of measures to support Member States could be an appropriate use of Article 78(3) the limitation of the fundamental rights of the people affected in this case is so extensive as to raise doubts as to the necessity and proportionality of the measures.

²⁸ See Steve Peers, Blogspot EU Law Analysis: A Pyrrhic victory? The ECJ upholds the EU law on relocation of asylum-seekers, 2017, available at: <https://bit.ly/3lwwhcm>

²⁹ AG *opinion ECLI: EU:C:2017:618, paras. 75 – 78*) at <https://bit.ly/3orP00l>

³⁰ See, *inter alia*, judgment of 4 May 2016, *Poland v Parliament and Council*, C358/14, EU:C:2016:323, paragraph 78 and the case-law cited.

II. Derogation from the Asylum Procedure Directive

Article 2 of the proposal provides for various derogations from the current APD:

Extended registration period (article 2 (1))

The proposal provides for a four-week extension for Poland, Latvia and Lithuania to register applications for international protection. This entails a derogation from Article 6 APD which foresees registration within 3 or 10 days.

By way of derogation from Article 6(1) of the Asylum Procedures Directive, the registration, in relation to third country nationals or stateless persons apprehended or found in the vicinity of the border with Belarus after an unlawful entry or after having presented themselves at border crossing points, may take place no later than four weeks after the application is made.

It should be noted that under the APD an extension of the registration deadline is already provided for in case of a large number of applications. A claim is to be registered within 3 working days of the making, subject to different rules for applications made with authorities other than the one responsible for registration. Under the APD, the “making” and the “registration” of an asylum application do not necessarily coincide.³¹ The registration can be extended to 10 working days in case of a simultaneous arrival of large numbers of applications.³²

The main difference compared to the existing provision is the specific reference to persons apprehended or found in the vicinity of the border with Belarus. In this regard the European Commission explained in its Explanatory Memorandum that the provisions go further than those foreseen in the APD and aim to cater for the specific situation of “instrumentalization” of migrants, without undermining the right to asylum or the principle of non-refoulement. It states that the APD’s provisions are not designed to deal with situations where the Union’s integrity and security are under attack as a result of instrumentalization.

It should be reiterated that both the APD and the RCD clarify that a person holds the status of “applicant” from the moment he or she makes the application, i.e. expresses the intention to seek protection.³³ The rights under those instruments are thus applicable from the moment the application has been made, e.g. from the moment the person expressed a wish to apply for international protection, regardless of when the registration takes place. Therefore, an extension of the registration period to four weeks cannot lead to a derogation from the rights under the APD and RCD. Access to reception should be made available from the making of the application. A delayed registration can in no case justify that access to the asylum procedure, and the right to asylum, are hindered.

³¹ CJEU judgment ECLI :EU :C :2020:495, Paras. 90 - 92

³² Article 6(5) recast Asylum Procedures Directive.

³³ Article 2(d) recast Asylum Procedures Directive; Article 2(b) recast Reception Conditions Directive. Article 17(1) recast Reception Conditions Directive also stresses that material reception conditions shall be made available as soon as the applicant “makes” his or her claim. CJEU, C36/20 PPU, 25 June 2020, ECLI:EU:C:2020:495, §§ 90-92.

While the rights of people seeking protection should not in principle be affected by delayed registration, in practice there is a risk that this will occur because the delayed registration makes it more difficult for applicants to prove their status, which is necessary for them to access their rights. A delay of registration potentially infringes their right to reception, protection from refoulement, and other rights that are attached to their status as asylum seeker. This concern is further exacerbated following the evidence that there already is a widespread practice of violence and pushbacks at the border.³⁴

Therefore, ECRE recommends deleting article 2.

If Article 2 is maintained ECRE proposes amendments for clarification and to ensure full respect for the right to human dignity, as enshrined in Article 1 CFREU, the right to asylum (Article 18 CFREU), protection in the event of removal, expulsion or extradition (Article 19 CFREU), and for material reception conditions:

Article 2: By way of derogation from Article 6(1) of the Asylum Procedures Directive, the registration, in relation to third country nationals or stateless persons apprehended or found in the vicinity of the border with Belarus after an unlawful entry or after having presented themselves at border crossing points, may take place no later than four weeks after the application is made

In line with Article 17(1) of Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), the applicant should benefit from rights under the Asylum Procedures Directive and the Reception Conditions Directive as soon as he or she makes an application, regardless of when the registration takes place.

It should also be noted that similar provisions have already been incorporated in the Commission proposal for a Regulation addressing situations of crisis and force majeure in the field of migration and asylum (COM(2020) 613) (“the Crisis Regulation”) extensively commented on by ECRE.³⁵

In his draft report, the Rapporteur on this file³⁶ deleted references to the extension of the registration period. The draft report is open to amendments, so the Parliament’s position is not yet final. Nevertheless, by introducing measures – albeit temporary – that strongly resemble those in the legislative proposals currently subject to scrutiny, leads to questions as to whether the democratic process is being circumvented.

Expansion and prolongation of the asylum border procedure

³⁴ See: Amnesty International, Poland-Belarus border: Protection crisis, 2021, available at: <https://www.amnesty.org/en/latest/research/2021/09/poland-belarus-border-crisis/>; Human Rights Watch, Belarus’ and Poland’s Shared Responsibility for Border Abuses, 2021, available at: <https://bit.ly/3rMKVX1>

³⁵ ECRE Comments on The Commission Proposal for a Regulation Addressing Situations of Crisis and Force Majeure in the Field of Migration and Asylum COM (2020) 613, February 2021, available at: <https://bit.ly/31EAF8A>

³⁶ LIBE Committee (EP), DRAFT REPORT on the proposal for a regulation of the European Parliament and of the Council addressing situations of crisis in the field of migration and asylum (COM(2020)0613 – C9-0308/2020 – 2020/0277(COD)), November 2021, available at: <https://bit.ly/31zGXqk>

The Commission proposal provides for both an extension of the scope of the border procedure and for its prolongation. It thereby constitutes a derogation of Article 43 of the APD, which provides the current legal basis for the use of border procedures and the standards to be applied.

Expansion of the scope (Article 2 (2))

Under Article 43, Member States may use border procedures to examine whether the grounds for non-admissibility apply. If they do not apply, applicants have to be granted access to the territory and their application has to be processed in a regular procedure. If a Member State wishes to examine the substance of an asylum claim at the border or in a transit zone, it has to justify that decision on the basis of the individual circumstances of the case. These circumstances are exhaustively enumerated in the APD.³⁷

Thus, under the current rules, the merits of an application may be examined in a border procedure only in very limited circumstances. In the proposed Decision, on the contrary, the Commission seeks to extend the border procedure to all applicants because no categories of applicants are exempted. The proposal allows Latvia, Lithuania and Poland to apply the accelerated border procedure to decide on the admissibility and substance of all applications, except where adequate support for applicants with particular health issues cannot be provided. The measure appears to go beyond derogating from the APD to amend or replace measures adopted through the legislative process through the use of Article 78(3). This may result in an arbitrary and parallel system of processing applications.

The European Commission believes that this measure will limit the possibility for Belarus to select for “instrumentalization” the third-country nationals to whom the border procedure cannot be applied under the current rules.³⁸ This justification is highly questionable: it is based on the presumption that the Belarussian authorities have analysed legal provisions in the *acquis* that have been assessed (recently by the EPRS) as lacking clarity and which are not uniformly applied across the EUMS.³⁹

It is not clear that the measure is suitable for obtaining the objective of influencing how or whether Belarus targets people for “instrumentalization”. Nor is it clear why alternative measures within the existing legal instruments (e.g. Article 43) could not have achieved the objectives just as effectively. In addition, it remains unclear how the processing of (almost) all applications in the border procedure will reduce or eliminate pressures on MS’ asylum systems and help them manage the situation at the border. Nor is it clear how it will help to reduce the risks of human rights abuses by a third country with a high record of human rights violations.

It should also be noted that in the case of the *European Commission v. Hungary*, the Commission itself acknowledged that Article 43 was suitable for dealing with a situation in which a large number of people simultaneously arrive and ask for protection. It considered four weeks to be a suitable timeline. The addition of the element of “instrumentalization” alone does not justify the departure from

³⁷ EPRS, *Asylum Procedures at the Border: European Implementation Assessment, Part 2: Legal assessment of the implementation of Article 43 of Directive 2013/32/EU on common procedures for granting and withdrawing international protection*, written by Dr Galina Cornelisse and Dr Marcelle Reneman, available at: <https://bit.ly/3m8tJoy>

³⁸ Recital 21.

³⁹ European Parliamentary Research Service, *Asylum procedures at the border: European Implementation Assessment*, available at: <https://bit.ly/3m8tJoy>,

this position (endorsed by the CJEU ruling⁴⁰). There is also a risk that inconsistency in the Commission's stance may undermine its position vis-à-vis the Member states.

ECRE opposes the use of border procedures. Evidence suggests a more restrictive approach to protection claims in border procedures compared to similar caseloads examined in regular procedures, and further suggests that significant protection gaps result from the unavailability or inadequacy of procedural guarantees when the border procedure is used.⁴¹

ECRE strongly opposes an expansion of the scope of the border procedure as proposed by the Commission, and therefore suggests the deletion of Article 2(2):

ECRE proposes deletion of Article 2(2)

While proposed Article 2(3) includes the mandatory prioritisation of well-founded claims and those of families and children, ECRE argues that families and children should not be subject to a border procedure in the first place. As border procedures involve fewer procedural guarantees, including limited access to assistance and the deprivation of liberty, they are ill-suited to the particular vulnerability of children. Generally, border procedures are not able to guarantee the special protection and reception needs of vulnerable applicants. Therefore, more favourable provisions should be applied not only for families with children, but for all vulnerable applicants as per Article 21 RCD.

ECRE opposes the use of border procedures for vulnerable applicants.

If Article 2(2) is maintained, ECRE proposes amendments as follows:

Latvia, Lithuania and Poland ~~shall prioritise the examination of applicants that are likely to be well-founded or lodged by~~ **not apply the border procedure to children and their family members, and vulnerable persons as listed in Article 21 of Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast).**⁴²

No exemptions for vulnerable applicants

The APD does not provide for a clear-cut exemption from the border procedure of vulnerable applicants, including torture and trafficking victims, pregnant women, persons with mental disorders and unaccompanied children. However, it makes the use of border procedures for these applicants contingent on the State's capacity to provide adequate support. Article 24(3) APD states that when special procedural guarantees cannot be provided within the framework of border procedures and where the applicant is in need of such "special procedural guarantees as a result of torture, rape or other serious forms of psychological, physical or sexual violence, Member States shall not apply, or shall cease to apply" the border procedure. With this proposal, The Commission further limits the

⁴⁰CJEU, Commission vs Hungary, C808/18, 17 December 2020, ECLI:EU:C:2020:1029, §§ 132-134.

⁴¹EPRS, Asylum procedures at the border: European Implementation Assessment, available at: <https://bit.ly/3m8tJoy>

⁴² Article 21 Directive 2013/33 - General principle: Member States shall take into account the specific situation of vulnerable persons such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, victims of human trafficking, persons with serious illnesses, persons with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, such as victims of female genital mutilation, in the national law implementing this Directive.

already narrow exemption to those whose “health” requires it. This measure is disproportionate to the objective the Commission aims to pursue.

As the border procedure is by definition unsuitable for these claims and does not offer sufficient time and support to such applicants to put forward their protection claims, ECRE proposes replacing Article 2(4) as follows:

~~For applicants whose state of health requires a support that cannot be ensured adequately at the border or in transit zones, including when this becomes apparent during the procedure, the border procedure shall cease to apply and the applicant shall be granted entry to the territory in order for the application to be examined, without necessarily restarting the procedure.~~ ***Latvia, Lithuania and Poland shall not apply the border procedure when***
a) the applicant has been identified as an applicant with special procedural or reception needs
(c) there are medical reasons for not applying the border procedure;
(d) detention is used in individual cases and the guarantees and conditions for detention as provided for in Articles 8 to 11 Reception Conditions Directive are not met or no longer met and the border procedure cannot be applied to the applicant concerned without detention.

The Member States should systematically and as early as possible after the application has been made at the border assess whether an individual applicant is in need of special procedural guarantees. An early and effective identification mechanism must be established to that end and special attention to vulnerable applicants should be paid throughout all stages of the border procedure, taking into account their specific concerns.⁴³

Prolongation of the border procedure (Article 2(5))

The proposal further foresees that a decision on the application including on a possible appeal against an administrative decision should be taken within 16 weeks, thereby derogating from the four-week limit in Article 43 APD. It should be noted that the four weeks does not include an appeal before a court or tribunal.⁴⁴ In the proposal, the Commission extends the border procedure to 16 weeks including the appeal. The Commission justifies this extension on the basis that MS need to reorganise their resources and increase their capacity, including with the support of the EU agencies.

As, according to the Commission, the number of cases to be processed in the border procedure will be greater (because it is expanded to almost all applicants apprehended or found in the vicinity of the border), the extension should enable the Member State to apply the fiction of non-entry for a longer period of time, thus providing more flexibility to deal with the increased workload. The reasoning can be questioned, given that the increased workload is self-inflicted, i.e. it is generated by the provision that expands the use of the border procedure.

ECRE strongly opposes the use of the fiction of non-entry. The border context does not release states from their human rights obligations under international law. Nonetheless, states typically rely on this fiction to deny jurisdiction or to otherwise claim the non-applicability of safeguards for affected people.

⁴³EPRS, Asylum Procedures at the Border: European Implementation Assessment, available at: <https://bit.ly/3m8tJoy>, pp.211-212

⁴⁴ EPRS, Asylum Procedures at the Border: European Implementation Assessment, Part 2: Legal assessment of the implementation of Article 43 of Directive 2013/32/EU on common procedures for granting and withdrawing international protection, written by Dr Galina Cornelisse and Dr Marcelle Reneman, available at: <https://bit.ly/3m8tJoy>, p.66.

When EU Member States use the fiction of non-entry it may in certain circumstances undermine the right to asylum under Article 18 CFREU, prohibition of torture and inhuman or degrading treatment or punishment under Article 4, the principle of non-refoulement under Article 19, and the right to an effective remedy under Article 47.

ECRE therefore recommends the removal of the fiction of non-entry.⁴⁵

ECRE also opposes the extended duration of the asylum border procedure because it will lead to an extension of the time spent in custody.

Given its significant impact on the fundamental rights of the persons concerned, as well as the questions that arise as to whether expansion of the border procedure is a suitable response in a crisis situation, ECRE proposes deletion of Article 2(5).

ECRE recommends deletion of Article 2(5).

Once again, it should be noted that the European Commission has previously proposed similar measures as part of the Pact. Specifically, the proposed amendments to the Asylum Procedure Regulation (APR) in September 2020 (COM (2020) 611) extend the use of the border procedure and render it mandatory in certain circumstances (under Article 43 APD it is optional). The APR proposal foresees a 12-week border procedure, which can be extended to 20 weeks in times of crisis (as per the Crisis regulation proposal). (Please see ECRE's Comments for more details.⁴⁶)

The measures proposed here thus already appear in a proposal currently being examined – and amended – by the co-legislators. The question, thus, arises, once again as to whether the provisional emergency measures involve circumventing an ongoing legislative process, by introducing similar proposals in the form of a Council Decision.

Curtailling the right to an effective remedy (Article 2(6))

The Commission proposal further curtails the right to an effective remedy, as Latvia, Lithuania and Poland may also extend the application of the rules set out in Article 46(6) APD (which allows Member

⁴⁵ The application of the fiction of non-entry does not discharge states from their legal obligations. This has been confirmed by the ECtHR, inter alia, in the case of N.D. and N.T. v. Spain, where the ECtHR stated “*that the special nature of the context as regards migration cannot justify an area outside the law where individuals are covered by no legal system capable of affording them enjoyment of the rights and guarantees protected by the Convention which the States have undertaken to secure to everyone within their jurisdiction.*”

In M.K. and other v. Poland, the ECtHR found that the Polish authorities had failed to review the applicants' requests for international protection despite their procedural obligations and contrary to Article 3 ECHR, by failing to allow the applicants to remain on Polish territory pending the examination of their applications. In addition, in the ECtHR's view, in order for the State's obligation under Article 3 ECHR to be effectively fulfilled, a person seeking international protection must be provided with safeguards against having to return to his or her country of origin before such a time as his or her allegations have been thoroughly examined. Therefore, the ECtHR considers that, pending an application for international protection, a State cannot deny access to its territory to a person presenting himself or herself at a border checkpoint who alleges that he or she may be subjected to ill-treatment if he or she remains on the territory of the neighbouring state, unless adequate measures are taken to eliminate such a risk. (ECtHR (Grand Chamber) 13 February 2020, App. nos. 8675/15 and 8697/15 N.D. and N.T. v. Spain, § 110; ECtHR 23 July 2020, App nos 40503/17, 42902/17 and 43643/17, M.K. and others v Poland.

⁴⁶ ECRE Comments on the Commission Amended Proposal for an Asylum Procedures Regulation regarding border asylum procedures and border return procedures COM (2020) 611, December 2020, available at: <https://bit.ly/3sxUtTP>; ECRE Comments on the Commission Proposal for a Regulation Addressing Situations of Crisis and Force Majeure in the Field of Migration and Asylum Com(2020) 613, February 2021, available at: <https://bit.ly/31EAF8A>

States to limit the automatic suspensive effect of an appeal) to all border procedures. It instead confers on a court or tribunal the power to rule whether or not the applicant may remain on the territory provided that the guarantees under Article 46(7) and (8) are respected.

Once again, the measure is similar to the Pact legislative proposals (amended APR) regarding border asylum procedures and border return procedures, which are still under discussion.

In ECRE's view, providing an applicant with an automatic right to remain on the territory during the period within which the right to an effective remedy is exercised and pending the outcome of the remedy if the applicant exercises the right, constitutes the best guarantee of respect for their right to an effective remedy and for the principle of non-refoulement.

The CJEU concluded that in order to ensure that the requirements arising from Article 47 of the Charter (right to an effective remedy and to a fair trial) and the principle of non-refoulement are respected an appeal against (in casu) a return decision must have automatic suspensive effect, since the enforcement of that decision may, inter alia, expose the person to a real risk of being subjected to treatment contrary to Article 18 of the CFREU, read in conjunction with Article 33 of the Geneva Convention, or contrary to Article 19(2) of the CFREU.⁴⁷

Automatic suspensive effect not only reduces the risk of violations of the principle of non-refoulement and guarantees the respect of the principle of effectiveness, but it also reduces the burden on judicial systems because asylum seekers are not required to launch a separate request concerning their right to remain on the territory, and courts are thus not required to address this issue separately.

ECRE recommends deletion of Article 2(6).

(De facto) detention

The draft Decision does not specify whether or not the border procedure will take place in detention. However, Recital 23 specifies that Member States shall not hold a person in detention for the sole reason that he or she is an applicant for international protection. If detention is used, the grounds and conditions of detention set out in Article 8 RCD shall apply. The safeguards for detention as provided for in the RCD are to apply, read in light of CJEU jurisprudence, in particular concerning specific groups such as minors and their families. In this regard, the Recital further states that alternatives to detention, such as restrictions on freedom of movement, may be as effective as detention in the current circumstances, and should therefore be considered by the authorities, particularly for minors.

Research on the practical implementation of the current border procedure has shown, however, that border procedures almost always happen either in a formal regime of detention (for example Belgium, Portugal, or France) or in situations that amount to de facto detention (for example Austria, Germany, or Greece).⁴⁸ The placement of an individual in a waiting zone is acknowledged as a measure of deprivation of liberty.⁴⁹ The ECtHR held in the 1996 landmark judgment of *Amuur v. France* that the

⁴⁷ CJEU, Ghandi, C 181/16, 19 June 2018, EU:C:2018:465, § 56.

⁴⁸ EPRS, Asylum Procedures at the Border: European Implementation Assessment, November 2020, available at: <https://bit.ly/3gAwIVH>

⁴⁹ EDAL, ECtHR - *Amuur v. France*, Application No 19776/92, Judgment of 25 June 1996

placement of individuals in hotel accommodation near Orly airport constituted deprivation of liberty and therefore needed to comply with the safeguards set out in Article 5 of the ECHR.

More recently, the CJEU explicitly qualified keeping people at the border as detention. In the *FMS* case,⁵⁰ the Court held that the obligation for a person to remain permanently in a transit area whose perimeter is restricted and closed, within which the person's movements are limited and monitored, and which the person cannot legally leave voluntarily, in any direction whatsoever, appears to be "detention" within the meaning of the RD and RCD.⁵¹ To reach this conclusion, the Court relied on the definition of detention in Article 2(h) RCD, according to which detention refers to confinement of an applicant within a particular place, where the person is deprived of his/her freedom of movement. This definition also applies to detention regulated by the RD, which does not include a definition.⁵²

Once a measure amounts to detention, it becomes subject to specific requirements flowing from the right to liberty. The *FMS* ruling reaffirmed these guarantees in the context of detention in the transit zone,⁵³ hence it has wide-ranging implications for border detention. Like in-country detention, detention carried out at the border should comply with the requirements of lawfulness, necessity, and proportionality, be maintained for the shortest period possible, be subject to a review, and be carried out in dedicated facilities.

ECRE opposes detention of asylum applicants at the border. If it continues to be possible, then it should remain an exceptional measure of last resort, used only where less coercive measures cannot be applied, and it must be reviewed regularly. Vulnerable persons and children should never be detained.

Where measures prevent asylum seekers from leaving a transit zones or other border facilities to access other parts of the territory, Member States and the EU through the asylum acquis should legally classify such measures as detention, in accordance with the jurisprudence of the European Courts, as well as Article 5 of the ECHR, Article 6 of the CFREU, and Article 8 of the RCD.

Legal Assistance

ECRE strongly recommends that access to legal advisers is upheld, as foreseen in Article 18(2)(C). It should be emphasised that the basic principles and guarantees of Chapter II of the APD apply to ensure that the rights of those who seek international protection are protected. These include, inter alia, free legal assistance and representation in appeals procedures (Article 20 APD) and right to legal assistance and representation at all stages of the procedure (Article 22 APD).

Quality legal assistance and representation throughout the asylum procedure is an essential safeguard to ensure the asylum applicant's access to justice and the overall fairness and efficiency of the asylum process. Asylum applicants find themselves by definition in a disadvantaged position in the asylum process, as they are unfamiliar with the legal framework and in most cases do not speak the language in which the procedure is conducted. This disadvantaged position is further exacerbated

⁵⁰ Judgment of 14 May 2020, *FMS* and Others, C-924/19 PPU and C-925/19 PPU, ECLI:EU:C:2020:367.

⁵¹ Judgment of 14 May 2020, *FMS* and Others, C-924/19 PPU and C-925/19 PPU, ECLI:EU:C:2020:367, §231.

⁵² Judgment of 14 May 2020, *FMS* and Others, C-924/19 PPU and C-925/19 PPU, ECLI:EU:C:2020:367, §223-225.

⁵³ Judgment of 14 May 2020, *FMS* and Others, C-924/19 PPU and C-925/19 PPU, ECLI:EU:C:2020:367, §281.

when applicants are subject to border procedures. In such a context, professional and independent legal assistance and representation is indispensable.

As the three affected countries face particular issues in ensuring access to legal assistance and legal aid (inter alia due to restrictions limiting access and due to a lack of lawyers) the right to legal assistance must be emphasised in the Decision. This is crucial to ensure the right to an effective remedy, as enshrined in Article 47 of the CFREU. ECRE recommends going beyond the requirements of Article 20 APD that foresees free legal assistance only from the appeal procedure.

ECRE recommends adding the following paragraph to Article 2:

Latvia, Lithuania and Poland shall ensure access to free legal assistance for all applicants subject to the border procedure, pursuant to Council Decision XX/XX

Latvia, Lithuania and Poland shall take into account the best interest of the child and provide for tailored services as well as respect the protection of their family life.

Children, families with children and applicants in need of special procedural and reception needs shall not be detained.

III. Limiting material reception conditions (Article 3)

By way of derogation from Directive 2013/33/EU, the RCD, Latvia, Lithuania and Poland may temporarily “set modalities” for material reception conditions that differ from those required by Article 17 and 18 RCD. This is allowed in relation to applicants apprehended or found in the vicinity of the border with Belarus after an unlawful entry or after having presented themselves at the border crossing points, and subject to the measures in Article 2(1) of this Decision. The alternative modalities for reception are allowed provided that the Member States cover the applicants’ basic needs, in particular food, water, clothing, adequate medical care, and temporary shelter adapted to the seasonal weather conditions, and “in full respect of human dignity”.

First, it is highly questionable that provisions that allow the Member State to cover only limited basic needs for a period of up to 16 weeks could be regarded as in line with human dignity.

Second, Article 18(9) of the RCD already allows Member States, in duly justified cases and under certain conditions, to set modalities for material reception conditions different from those generally required by the Directive, for a reasonable period which shall be as short as possible. The added value of Article 3 is thus limited.

IV. Return procedure (Article 4)

The Proposal provides that Latvia, Lithuania and Poland may decide not to apply Directive 2008/115/EC (the Return Directive (RD)), for third-country nationals and stateless persons whose application for international protection is rejected after application of Article 2 (see above). This derogation establishes a mechanism similar to the derogation set out in Article 2(2)(a) of the RD but

specifically for the people whose application for international protection has been rejected in the procedure in Article 2 of the proposed measure. By excluding them from the scope of the Return Directive they will be subject to a refusal of entry in accordance with Article 14 of the Schengen Borders Code.⁵⁴

The Commission reiterates that Latvia, Lithuania and Poland shall (a) respect the principle of non-refoulement and take due account of the best interests of the child, family life and state of health of the third country national concerned; and (b) ensure that their treatment and level of protection are no less favourable than as set out in Article 8(4) and (5) (Limitations on use of coercive measures), Article 9(2)(a) (postponement of removal), Article 14(1)(b) and (d) (emergency health care and taking into account needs of vulnerable persons), and Articles 16 and 17 (detention conditions) of the RD.

Derogating from almost all of the RD seems both disproportionate and unnecessary. The Directive provides for important guarantees beyond the principle of non-refoulement, detention, and healthcare under Article 4.2.b. These include inter alia guarantees on remedies (Article 13) and procedural safeguards (Article 12). The European Commission would need to demonstrate why no alternative less onerous measure is available. This is not demonstrated in Recitals 27 to 29 or in the Explanatory Memorandum. The Memorandum refers to Article 2(2)(a) of the RD which contains a similar derogation but without explaining why a separate derogation is necessary (the principle of necessity) and without providing an assessment of the proportionality of such a derogation. This is particularly relevant as rights underpinned by the Charter are affected.

ECRE recommends deletion of Article 4.

V. Specific guarantees (Article 5)

The Decision contains an article on the specific guarantees that the countries in question should ensure. It requires that Latvia, Lithuania and Poland duly inform third country nationals or stateless persons in a language which the person understands or is reasonably expected to understand about the measures applied, the dedicated points accessible for registering and lodging an application for international protection, in particular the nearest point where they can lodge an application for international protection, the possibility to appeal the decision, and the duration of the measures.

While it is important to emphasise the state's obligation to provide information, the text is more limited than that in the Explanatory Memorandum. The latter also includes information explaining that in order to ensure genuine and effective access to the asylum procedure, Latvia, Lithuania and Poland must ensure that a sufficient number of registration points, including border crossing points, are designated and open for such a purpose, and that the applicants must receive information about the location of the nearest points where their application can be lodged. In addition, Latvia, Lithuania and Poland

⁵⁴ Under Article 14(1) of the Schengen Borders Code, a person who does not fulfil all the entry conditions laid down in Article 6(1) should be refused entry to the territories of the Member States. However, this should be without prejudice to the application of special provisions concerning the right of asylum and to international protection. Under Article 14(2) of the Schengen Borders Code, entry may only be refused by a substantiated decision stating the precise reasons for the refusal. The decision should be given by means of a standard form, as appended to the Schengen Borders Code, filled in by the authority empowered by national law to refuse entry. The completed standard form should be handed to the person concerned, who should acknowledge receipt of the decision to refuse entry by means of that form. Under Article 14(3) of the Schengen Borders Code, people refused entry should have the right to appeal.

must ensure not only that a sufficient number of registration points, including border crossing points, function and that the applicants receive relevant information in this regard, but also ensure that the applicants are able to safely and legally reach them. Where the latter criterion cannot be met, genuine and effective access to asylum procedures is not ensured.

In order to ensure effective access to the asylum procedure, in compliance with the right to asylum (Article 18 CFREU), the prohibition of torture and inhuman or degrading treatment or punishment (Article 4 CFREU, Article 3 ECHR), protection in the event of removal, expulsion or extradition (Article 19 CFREU), ECRE recommends incorporating the text from the Memorandum in the provision.

ECRE recommends adding the following paragraph to article 5:

1. Latvia, Lithuania and Poland must ensure that a sufficient number of registration points, including border crossing points, are designated, open and accessible for registering and lodging an application for international protection.

~~1.~~ **2.** Where applying this Decision, Latvia, Lithuania and Poland shall duly inform thirdcountry nationals or stateless persons in a language which the third-country national understands or is reasonably supposed to understand about the measures applied, the dedicated points accessible for registering and lodging an application for international protection, in particular the nearest point where they can lodge an application for international protection, the possibility to appeal the decision, and the duration of the measures.

~~2.~~ **3.** Latvia, Lithuania and Poland shall not apply Articles 2, 3, 4 and 5 longer than what is strictly necessary to address the emergency situation caused by Belarus, and in any case no longer than the period set out in Article 10.

From the perspective of EU law, the APD⁵⁵ allows Member States to require the application for international protection in a specific designated place (Article 6(3)). However, the requirement cannot prejudice the obligation to ensure effective access to asylum. To be effective the border points must be open and accessible. In the absence of objective possibilities to apply at a border control post (such as when border crossing points are tens of kilometres away), such a theoretical possibility may be ineffective. This practice may give rise to the risk of breaches of the prohibition of collective expulsion stipulated in Article 4 of Protocol 4 to the ECHR and Article 19 of the CFREU.⁵⁶

As the ECtHR ruled on 8 July 2021 in the case *Shahzad v. Hungary*, the situation of foreigners crossing the border irregularly and pushed back to the external side of the border fence falls within the scope of the prohibition of collective expulsion under Article 4 of Protocol 4. The Court took into account the limited access to transit areas and the fact that there was no formal procedure accompanied by relevant safeguards guaranteeing the individual admission of people in such circumstances, and found that effective means of legal entry were not ensured.⁵⁷

⁵⁵ 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).

⁵⁶ For more on the ECtHR standards on the principle of non-refoulement and collective expulsion, see ECRE, Legal Note No 10: Across Borders: the Impact of N.D. and N.T. v. Spain in Europe, June 2021, link: <https://ecre.org/wp-content/uploads/2021/07/Legal-Note-10.pdf>

⁵⁷ *Shahzad v. Hungary*, ECHR, 8 July 2021, Application No. 12625/17, para. 65: <https://bit.ly/2WCi6zh>

Accordingly, the expulsion of foreigners without examining their personal circumstances, and without enabling them to put forward arguments against expulsion, was recognised as collective and, therefore, in violation of the Protocol.⁵⁸ The Court reiterated that decisions refusing entry taken as part of a wider policy of not receiving applications for international protection from persons presenting themselves at the border and pushing them back, are in violation of international law.⁵⁹

⁵⁸ D.A. and Others v. Poland, ECHR, 8 July 2021, Application No. 51246/17, paras. 78-80: <https://bit.ly/3kFip4v>

⁵⁹ Ibid, para. 83; M.K. and Others v. Poland, ECHR, 23 July 2020, Applications No 40503/17, 42902/17 and 43643/17, paras. 208 – 210: <https://bit.ly/3DxtdKH>