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European Council
on Refugees and Exiles

ECRE COMMENTS ON THE COMMISSION PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ADDRESSING SITUATIONS OF INSTRUMENTALISATION IN THE FIELD OF MIGRATION AND ASYLUM

COM(2021) 890 FINAL

JANUARY 2022

INTRODUCTION

On 14 December 2021, the European Commission presented a proposal for a Regulation addressing situations of instrumentalisation in the field of migration and asylum (COM(2021) 890) (the "Instrumentalisation Regulation" or "the Regulation").[4] It can be viewed as part of a mini-package of three new proposals, along with the proposed Council Decision on provisional emergency measures for the benefit of Latvia, Lithuania and Poland of early December 2021 ("Instrumentalisation Council Decision" or "the Decision") and the proposal for a Regulation amending Regulation (EU)2016/399 on a Union Code on the rules governing the movement of persons across borders ("Schengen Borders Code amendments").[5]

The objectives and most of the content of the Instrumentalisation Regulation are identical to the measures in the Instrumentalisation Council Decision which was prepared by the European Commission following a request from some of the Member States for a response to the actions of Belarus.[6] The Decision would allow the three Member States affected to derogate from provisions in EU asylum law. ECRE has published Comments[7] which look in detail at the proposed Decision, with a focus on the substantive articles. The analysis here draws on those Comments, given the overlap in content. This introduction provides general comments on the objective of the Regulation and the concept of '"instrumentalisation" before the different provisions are analysed in detail in the sections that follow.

Derogations available on a permanent basis

The Instrumentalisation Regulation would make the emergency measures in the Decision available to Member States on a permanent basis for all situation of "instrumentalisation". That is, whenever a Member State is facing arrivals of people seeking protection with a link to instrumentalisation by a third state, it would be able to invoke the Regulation and put in place the measures provided for, based on derogations.

The Regulation sets out the process whereby Member States can request the use of derogations. The request is made to the Commission which, after an assessment, can submit a Council Implementing Decision. Following adoption by the Council, the Decision would allow the Member State concerned to apply the specific derogations for an initial period of up to six months, subject to review with potential prolongation for another six months.

While the proposed Council Decision was presented as a response to a specific situation at the EU's external borders, the Regulation enables all Member States to avail themselves of derogations to EU law in any situation of instrumentalisation. This is significant because it seeks to establish, as part of the EU's legal framework, the possibility for non-compliance to be available on a permanent basis. A derogatory regime would thus undermine the EU's legal order, especially given that the derogations are allowed in a wide range of circumstances and that this is a policy area where non-compliance of Member States with the legal framework is already widespread.

The Explanatory Memorandum and the Recitals argue that neither the current acquis including its flexibility provisions nor the 2016 or 2020 reform proposals are adequate to correspond to a situation of "instrumentalisation of migrants" but nowhere are the reasons provided as to why that is the case. In fact, provisions in the current legal framework allow for derogations – albeit tightly circumscribed by statute and CJEU jurisprudence.

Having argued that "instrumentalisation" is so specific that it requires its own legislation, it is surprising to read that most of the measures proposed are in fact already included in the 2020 New Pact on Migration and Asylum (see below) which is currently under negotiation. 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).

The CJEU warned that Article 78(3) should be used strictly for provisional measures – temporary measures – not for making permanent changes to EU asylum law. The Instrumentalisation Regulation attempts to make a permanent change building on a Decision using Article 78(3) as a legal basis – although that Decision itself

4. European Commission Proposal for a Regulation addressing situations of instrumentalisation in the field of migration and asylum, COM(2021) 890 final, December 2021, available at: https://bit.ly/3HCHerw
5. European Commission Proposal for a Regulation amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders, COM(2021) 891 final, available at: https://bit.ly/3zwqfV9
6. 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.
7. 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, available at: https://bit.ly/3sWoKhH

DEFINITION OF “INSTRUMENTALISATION” AND AUTHORISATION PROCEDURE (RECITAL 1 AND ARTICLE 7)

[illegible]

“A situation of instrumentalisation of migrants may arise where a third country instigates irregular migratory flows into the Union by actively encouraging or facilitating the movement of third country nationals to the external borders, onto or from within its territory and then onwards to those external borders, where such actions are indicative of an intention of a third country to destabilise the Union or a Member State, where the nature of such actions is liable to put at risk essential State functions, including its territorial integrity, the maintenance of law and order or the safeguard of its national security”

[illegible]

Recital 1:

[illegible] ~~instigates irregular migratory flows into the Union by~~ [illegible] ~~encouraging or~~ [illegible] ~~using~~ [illegible] *a significant number of* [illegible] ~~where such actions are indicative of an intention of a third country to destabilise the Union or a Member State~~ [illegible] *Member State affected can demonstrate that the* [illegible]

Article 7:

[illegible] *As part of the request, the Member State shall specify based on which risk listed in Recital 1 and the definition provided in [Article 2(27)] of the Schengen Borders Code the derogations are applied for and substantiate the request with thorough analysis and relevant data. This should include at a minimum, the number of people arriving, an assessment of the potential threat they pose by providing information on whether they carry weapons or regularly attack the border guards, and what the precise impact on law and order is.*

[illegible] *The Commission’s assessment shall include the proportionality, efficiency and impact on fundamental rights of the measures requested.* [illegible]

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Article 2(1)(a):

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In line with Article 16(1) of Regulation (EU) XXX/XXX [Asylum Procedures Regulation], the applicant should benefit from rights under the Asylum Procedures Regulation and the recast Reception Conditions Directive as soon as he or she makes an application, regardless of when the registration takes place.

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Prolongation of the border procedure (Article 2(1)(c))

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LQWHUDOLDLQWKHEDVLVRI 1.7. 6SDLQZKHUWKH(W+5VWDWHG *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.

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(a) Member States 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

(b) an applicant for international protection should not be held in detention for the sole reason that he or she is seeking international protection. Detention should only be used as an exceptional measure of last resort when it proves necessary and on the basis of an individual assessment of each case, and if other less coercive alternative measures cannot be applied effectively. Children, families with children and applicants with special reception needs shall not be detained.

(c) Appeals of negative decisions under the border procedures shall have automatic suspensive effect.

LIMITING MATERIAL RECEPTION CONDITIONS (ARTICLE 3)

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RETURN PROCEDURE (ARTICLE 4)

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V. SPECIFIC GUARANTEES (ARTICLE 6)

7KHSURYLVLRQRIFHUWDLQVDUWLFOHRIWKHVSHFLILFJXDUDQWHHVWKDWPHPEHU6WDWHVDSSO\GHURJDWLRQVDOO ZHUH . ,WUHTXLUHVWKHPWRGXO\LQIRUPWKLUGFRXQWU\QDWLRQDOVRUVWDWHOHVVSHUVRQVLQDODQJ SHUVRQXQGHUVWDQGVRULVUHDVRQDEOH\H[SHFWHGWRXQGHUVWDQGDERXWWKHPHDVXUHVDSSOLH SRLQWVDFFHVVLEOHIRUUHJLVWHULQJDQGORGJLQJDQDSSOLFDWLRQIRULQWHUQDWLRQDOSURWHFWLRQ SRLQWZKHUHWKH\FDQORGJHDQDSSOLFDWLRQIRULQWHUQDWLRQDOSURWHFWLRQWKHSRVVLELOLW\WR DQGWKHGXUDWLRQRIWKHPHDVXUHV

Legal Assistance

(VWURQJO\UHFRPPHQGVWKDWDFFHVVWROHJDODGYLVHUVLVSHOG DVIRUHVHHQLQUWLFOHFU . ,QDGGLWLRQWKHSURSRVHG35LQFOXGHVDULJKWWROHJDODVVLVWDQFHDQGUHSUHVHQWDWLRQDWDOO SURFHGXUHUWLFOHDQGWKHREOLJDWLRQRQ0HPEHU6WDWHVWRSURYLGHIUHHOHJDODVVLVWDQFHDQGUH LQWKHDGPLQLVWUDWLYHDQGDSSHDOSURFHGXUHUWLFOHRIWKHSURSRVHGUHWVWHVWLQFOXGHGLQUWLFOH OHDVH[WHQVLHVFRSHIRU0HPEHU6WDWHVWRGHSULHDSSOLFDQWVRIWKHULJKWWRIUHHOHJDODVVLVW KDVEHHQFULWLFLVHGE\(5(

. 8QGHUUWLFOHRIWKH6FKHQJHQ%RUGHUVRGHDSHUVRQZKRGRHVQRWIXOILODOOWKHHQWU\FRQGLWLRQVODLGGRZQLQUWL VKRXOGEHUHIXVHGHQWU\WRWKHWHUULWRULHVRIWKHPHPEHUVWDWHVZLWKRXWSUHMXGLFHWRWKHDSSOLFDWLRQRIVSHFL SURYLVLRQVFRQFHUQLQJWKHULJKWRIDV\OXPDQGWRLQWHUQDWLRQDOSURWHFWLRQ6FKHQJHQ%RUGHUVRGHHQWU PDQQHUHIXVHGEDVXEVWDQWLDWHGGHFLVLRQVWDWLQJWKHSUHFLVHUHDVRQVIRUWKHUHIXVDORIHQWU\XSRQEHLQJPHDQV RIDVWDQGDUGIRUPDVSSHQGHGWRWKH6FKHQJHQ%RUGHUVRGHILOOHGLQEWKHDXWKRULWHPSRZHUHGEDWLRQDOODZWRUH 7KHFRPSOHWHGVWDQGDUGIRUPVKRXOGEHKDQGHGWRWKHSHUVRQFRQFHUQHGZKRVKRXOGDFNQRZOHGJHUHFHLSWRIWKHGHFLVLR HQWU\EPHDQVRIWKDWIRUPUHIXVHGHQWU\RIWKH6FKHQJHQ%RUGHUVRGHSHRSOHUHIXVHGHQWU\VKRXOGKDYHWKHULJKWWRDSSHDO

. 6HH(5(RPPHQWVRQWKHRPPLVVLRQ3URSRVDOIRUDQ(83URFHGXUHV5HJXODWLRQ0DLODEOHDW KWWSVELWO\ O16E

[illegible]

Access to border crossing points and the asylum procedure

[illegible]

Recommended making the following amendment to article

. Where applying the derogations referred to in articles and the Member State concern
duly inform third country nationals or stateless persons in a language which the
or stateless person understands or is reasonably supposed to understand about
the location of the registration points including the border crossing points ac
lodging an application for international protection and the duration of the me

<u>(a) The Member State concerned shall also 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 and that applicants are able to safely and legally reach them.</u>

<u>(b) Member States shall ensure access to free legal assistance for all applicants subject to the border procedure at administrative and appeal stage.</u>

. The Member State facing a situation of instrumentalisation of migrants shall
and longer than what is strictly necessary to address the situation of instrumen
and in any case no longer than the period set out in the Council Implementing decisio
paragraph of Article .

European Council on Refugees and Exiles
[illegible]