

**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

TABLE OF CONTENTS

Summary of views	3
Introduction	5
Definition of “Instrumentalisation” and authorisation procedure (Recital 1 and Article 7) .	8
Derogation from the Asylum Procedure Regulation	9
Extended registration period (Article 2(1)(a)).....	9
Expansion and prolongation of the asylum border procedure	11
Expansion of the scope (Article 2(1)(b))	11
No exemptions for vulnerable applicants.....	12
Prolongation of the border procedure (Article 2(1)(c)).....	13
Curtailing the right to an effective remedy	14
(De facto) detention	14
Limiting material reception conditions (Article 3).....	15
Return procedure (Article 4)	16
V. Specific guarantees (Article 6).....	16
Legal Assistance	16
Access to border crossing points and the asylum procedure	17

SUMMARY OF VIEWS

ECRE opposes the measures proposed in the Regulation addressing situations of instrumentalisation in the field of migration and asylum (COM(2021) 890) (hereafter the “Instrumentalisation Regulation”). The measures would have an adverse effect on the right to asylum by creating a parallel system of managing borders and asylum for situations of “instrumentalisation”, based on derogations from the standards in the asylum *acquis*. ECRE is opposed in principle to responses based on expanding and normalising derogation from EU asylum law, especially in the context of widespread non-compliance and given that the legal framework already provides sufficient flexibility for Member States.

The Regulation establishes a mechanism allowing for derogations from EU law on asylum and return which will be available to Member States on a permanent basis. As such, questions arise as to the measures’ proportionality, efficiency, necessity and its impact on fundamental rights. The fundamental rights affected include 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 in Europe and from an approach based on normalising derogations. While the Instrumentalisation Regulation mentions the principles of *non-refoulement*, best interests of the child, right to family life, and protection of health, it does not include the necessary guarantees to ensure that the rights are accessible in practice. ECRE also has concerns about the broad and unclear definition of “instrumentalisation” which captures most situations at the EU’s external borders. It continues the trend for proposals that seek to contain people at the EU’s external border, which increases the responsibilities of countries at the borders and may make denial of access more likely.

Finally, many elements of the Regulation have already been proposed as part of the Pact on Migration and Asylum, including the expanded use of the border procedure¹ and allowing derogations from the EU asylum *acquis* in some situations.² As these proposals are currently subject to legislative scrutiny, it appears inefficient and undemocratic to re-launch them in another form.

If the Regulation is to move forward, ECRE submits the following (non-exhaustive) observations and recommendations, aimed at reducing the negative impact on fundamental rights.

Definition of “Instrumentalisation” (Recital 1): The Instrumentalisation Regulation provides a description of “instrumentalisation” in Recital 1, however the article in the text refers to the definition in the Proposal for a Regulation amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders, the Schengen Borders Code (hereafter “SBC amendments”).³ In both cases, the definition is overly broad and includes numerous ill-defined terms, such as actions which are “indicative of an intention of a third country”, which creates legal uncertainty.

Delayed registration (Article 2(1)(a)): 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 on 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 EU Charter 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 Article 4 (Prohibition of torture and inhuman or degrading treatment or punishment).

Extension and expansion of the border procedure (Article 2(1)(b-c)): Article 2 also lays down the possibility for Member States to expand the border procedure to almost all applicants arriving at the border, with a procedure lasting up to 16 weeks. The proposal does not exempt children and other vulnerable applicants

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/3sxUiTP>
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>
3. 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>.

from the border procedure. As evidence shows, the border procedure usually takes place in detention, which is likely to be the case for the derogatory regime set out in the Regulation. 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 CFREU).

Right to an effective remedy: The Instrumentalisation Regulation does not include specific provisions on the right to an effective remedy. Instead, it points to the amended proposal for the Asylum Procedure Regulation (APR) according to which a person will have the right of appeal but without automatic suspensive effect pending the decision. 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 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 before the deadline for exercising the right to a remedy and pending the outcome in case the right is exercised, is the best way to guarantee an effective remedy and for the principle of non-refoulement. It also avoids additional burdens on judicial systems because applicants are not required to launch a separate request to remain on the territory.

Limitation of material reception conditions (Article 3): The Member States concerned may temporarily set modalities for material reception conditions which only cover the applicants' basic needs. Given that this can be for up to 16 weeks, it may not be in line with human dignity. Specifically, the rights of children, people with disabilities and other vulnerable groups may be violated if access to key services is denied.

Derogation from the Return Directive (Article 4): Derogating from the recast Return Directive (rRD) almost in full as allowed by the Regulation is disproportionate and creates risks for the people concerned because the rRD provides important guarantees beyond the principle of non-refoulement and beyond guarantees related to detention and healthcare. These include inter alia guarantees on remedies and procedural safeguards. It is not demonstrated that alternative less onerous measures are unavailable.

Specific guarantees (Article 6): The Regulation condones limiting the number of registration points at the border without requiring that points are accessible. Member States should not only ensure that there are sufficient registration points, that they are functioning, and that applicants receive information about them, but also that applicants are able to safely and legally reach these points. If the latter is not met, genuine and effective access to asylum procedures is not ensured. 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.

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 Comments⁷ 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>

has not yet been accepted.

Expanding and normalising derogations

ECRE is concerned about a response which is based on expanding and normalising the use of derogations. The Instrumentalisation Regulation introduces the possibility of derogations from the proposed Asylum Procedures Regulation of 2016 and amended APR proposal of 2020 (APR), the proposed recast of the Reception Conditions Directive (rRCD) of 2016, and the proposed recast Return Directive (rRD) from 2018 in situations of “instrumentalisation”. Neither the Explanatory Memorandum nor the draft Regulation provide a satisfactory explanation as to why a permanently available mechanism for Member States to derogate from their legal obligations is necessary.

Expanding their use to the point of normalising derogations may signal the end of a common system, especially given the ease with which Member States would be able to invoke the derogatory regime and the broad definition of instrumentalisation. It will be derogation at will, generating the risk identified by the CJEU of an arbitrary situation, where Member States are following different rules and opting in and out of the CEAS as they wish.

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 even when emergency measures are in place. Thus, no 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, are lawful.⁸ Respect of non-refoulement can only be guaranteed when the associated rights are available and accessible in law and in practice. In this respect, the proposal clearly hinders effective access to right to asylum and the application of non-refoulement obligations. 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).

Broad definition of instrumentalisation

While the proposed Regulation aims to provide specific rules for Member States in the case of “instrumentalisation of migrants”, the definition of what constitutes “instrumentalisation” is only included in a Recital.⁹ The related Article¹⁰ instead refers to the definition provided in the SBC amendments. The definition is broad and contains many unclear terms. How Member States are to demonstrate that they are subject to instrumentalisation i.e. what information should be provided to the European Commission to make an assessment and decide on whether or not to propose a related Council Decision, is not specified.

Necessity and proportionality

The restriction of the fundamental rights of the people affected by the proposal is so extensive as to raise doubts as to the necessity and proportionality of the measures. While MS have the right to control their borders, they are also under the obligation not to remove people to places where they could face ill-treatment. People who have been subject to “instrumentalisation” by a third country may already have been subjected to ill-treatment and have no prospect of access to effective asylum procedures or reception conditions upon their return to the country. Thus, removing them from EU territory without applying relevant and necessary guarantees carries even higher human rights risks, particularly when they have specific vulnerabilities or special needs.

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?¹¹ These questions remain largely unanswered in the proposal.

8. 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>

9. Recital 1

10. Article 1

11. 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. 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.

Legitimising national-level changes

The relationship between the measures and changes to domestic asylum legislation in different Member States also requires examination. Analysis of legislation adopted in response to crises which have their roots in foreign policy disputes and have a migration component in Greece¹², Lithuania¹³, Poland¹⁴ and Latvia¹⁵ demonstrates that some of the changes put in place by the Member States are incompatible with 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 Regulation appear to legitimise these changes. As a result, this will lead to an arbitrary system with measures in place in some Member States which differ substantively from those laid down by the instruments of the Common European Asylum System (CEAS). It may also lead to a situation where the practice of requesting derogations spreads among Member States. Judging from the dynamics related to the proposed Council Decision for emergency measures for Latvia, Lithuania and Poland this is likely to happen, given that other Member States are already requesting the “right” to derogate.

Relationship with the Pact

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 by the European Parliament and the Council as co-legislators. By introducing similar measures in a separate Regulation, the proposal risks undermining and further complicating the current legislative process. In fact, all of the derogations that are introduced make reference to legislative proposals that are either subject to ongoing negotiations (APR and rRD) or that are on hold due to an impasse among co-legislators (rRCD). This poses a challenge to considered and diligent law-making. (For the purpose of this document, the analysis is based on the respective European Commission proposals with reference to amendments or positions adopted by the co-legislators where the latter are relevant and known.) The situation is further complicated by the fact that in the case of the APR, both the 2016 proposal and the amended proposal from 2020 have to be considered and that the proposed amendments to the Schengen Borders Code, published on the same day, includes amendments to the rRD.

Responding to instrumentalisation

ECRE questions why the actions of third country governments using people, including those seeking international protection, to destabilise the EU should result in a lowering of asylum standards in Europe. First, the applicable legal framework provides already sufficient flexibility for Member States to deal with a change of situation at their border if the scale and nature of the change requires this. The proposal does not provide a convincing argument as to why individuals who arrive at the EU's external borders after activities by third country governments that constitute instrumentalisation should be treated differently from other applicants for international protection. The suggestion that they are less likely to have protection needs is unfounded. The Regulation contributes to rather than resists the destabilising effect that third country governments are seeking by eroding protection of fundamental rights and standard rule of law principles in the EU. This is concerning in itself but also because hollowing out the EU's asylum system will not have an impact on the motives and actions of third country governments. Rather, their actions take place as part of foreign policy conflicts which neither EU asylum law nor the treatment of the people at the EU's borders will influence. Indeed, a reaction based on calm management in line with EU law is more likely to take the wind out of the sails of third countries who are trying to use migration to create panic in the EU.

Finally, it should also be noted that countries frequently manipulate displaced people. It is something that has happened throughout history and continues to happen for political and security reasons. There is no logical reason why manipulation of people should necessitate a different asylum regime or why it would justify derogation from legal obligations. The proposal appears to be part of ongoing efforts to find grounds for the increasing the people contained at borders and subject to border procedures.

12. AIDA Report Greece, 2020, Overview of the main changes since the previous report update, available at <https://bit.ly/3eOZLow>

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

14. 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/3y5vIkZ>

15. 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>

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

Recital 1 of the proposal includes a proposed definition of “instrumentalisation” which is identical to the proposed definition included in the SBC amendments to which the substantive Article 1 on the Subject Matter of this Regulation refers:

“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”

The definition is problematic as it is overly broad and contains a number of unclear terms. This is particularly so for the reference to assessing the intention of the third country concerned. It is not mentioned how the intention of a third country will be assessed nor who will make the decision as to which indicators of intention to consider.

Similarly, how to judge whether the action of a third country puts “essential State functions” or territorial integrity at risk is not specified. Article 7 of the authorisation procedure suggests that the European Commission will assess whether the request for derogations is valid but neither the criteria for making the assessment nor the information that the Member State in question is required to provide are set out. It is also noteworthy that the proposal does not refer to any quantitative indicators related to the numbers of people arriving.

Both the broadness and the lack of clarity mean that many situations could be construed as falling under the definition. Indeed, many of the current situation at the EU’s external borders arguably fit within it. Such a definition means that Member States will be able to frequently invoke the Regulation in order to evade from their legal obligations. The measures will be permanently available and be used more or less permanently.

ECRE rejects the introduction of a mechanism for derogations from asylum and return standards related to the concept of instrumentalisation. If the European Parliament and the Council decide to legislate, the following amendments are aimed at improving the related provisions to ensure clarity and avoid a situation where Member States try to fit within the definition of instrumentalisation in order to evade their responsibilities.

Recital 1:

A situation of instrumentalisation of migrants may arise where a third country ~~instigates irregular migratory flows into the Union by~~ actively ~~encouraging or~~ facilitates the movement of ~~a significant number 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 *Member State affected can demonstrate that 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.

Article 7:

1. A Member State faced with the arrival of third-country nationals or stateless persons at its external border as a consequence of a situation of instrumentalisation of migrants, may request the authorisation to apply the derogations provided for in Articles 2, 3 and 4. *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.*

2. *The Commission’s assessment shall include the proportionality, efficiency and impact on fundamental rights of the measures requested.* Where the Commission considers it appropriate,

on the basis of the information provided by the requesting Member State facing a situation of instrumentalisation of migrants, the Commission shall, without delay, make a proposal for a Council Implementing Decision referred to in paragraph 3. ***The Commission shall present its assessment of the request by the Member State and consult the European Parliament ahead of finalizing the proposal.***

5. The Commission shall keep the situation of instrumentalisation of migrants under constant monitoring and review ***and respond to requests from the European Parliament about the assessment of the situation and the impact of the measures.*** Where the Commission considers it appropriate, it may propose the repeal of the Council Implementing Decision referred to in paragraph 3 or the adoption of a new Council Implementing Decision authorising the prolongation of the application of the specific derogations referred to in Articles 2, 3 and 4 for a period, which shall not exceed six months. ***Ahead of deciding on a prolongation, the European Parliament shall be consulted.*** The Member State concerned shall provide the Commission specific information needed for it to carry out this review and to make the proposal for repeal or prolongation as well as any other information the Commission may request.

DEROGATION FROM THE ASYLUM PROCEDURE REGULATION

Article 2 of the proposal provides for various derogations from both the 2016 proposal for an APR and the 2020 amended proposal for an APR.

It specifies that particular derogations may apply to third country nationals or stateless persons, “who are apprehended or found in the proximity of the external border with the third country instrumentalising migrants in connection with an unauthorised crossing or who have presented themselves at the border at crossing points”

The proposed geographic description leaves too much room for interpretation when it comes to how close to the border a person would have to be in order to be subject to the proposed measures. To avoid uncertainty and misuse, ECRE suggests the following revisions to Article 2(1):

Article 2(1):

In a situation of instrumentalisation of migrants as referred to in Article 1, the Member State faced with the arrival of third-country nationals or stateless persons at its external border as a consequence of such situation may apply, in relation to third country nationals or stateless persons who are apprehended or found in the ***immediate*** proximity of the external border with the third country instrumentalising migrants in connection with an unauthorised crossing or who have presented themselves at border crossing points, one or more of the following derogations, in accordance with the procedure laid down in Article 6:

Extended registration period (Article 2(1)(a))

The proposal provides for a four-week extension for countries to register applications for international protection. This entails a derogation from Article 27 APR which foresees registration within 3 or 10 days.

“By way of derogation from Article 27 of Regulation (EU) XXX/XXX [Asylum Procedure Regulation], register applications for international protection made within the period during which this point is applied no later than four weeks after the application is made.

Where applying this derogation, the Member State concerned shall prioritise the registration of applications likely to be well-founded and those of unaccompanied minors and minors and their family members.”

It should be noted that under the 2016 APR proposal, the currently applicable option of an extension of the registration deadline is already provided for in case of a large number of applications. A claim is to be registered by the relevant authorities within 3 working days of the making.¹⁶ The making of the claim is defined as the wish expressed to apply for international asylum and does not necessarily coincide with the registration of the claim. The proposed APR maintains the current rule that the registration can be extended to 10 working

16. Article 27(1) proposal for Asylum Procedures Regulation (2016)

days in case of a simultaneous arrival of large numbers of applications.¹⁷

The main difference compared to the provision in the APR is the specific reference to persons apprehended or found in the proximity of the external border with a third country instrumentalising migrants. The European Commission explained in its Explanatory Memorandum that the provisions in the 2016 and 2020 proposals are not adequate. While the 2020 proposals were developed to manage a high number of arrivals, the specific situation of instrumentalisation was not addressed. The proposed Regulation has the “aim to cater for such specific situation without undermining the right to asylum or the principle of non-refoulement of people instrumentalised”.

It is also mentioned that the proposed Screening Regulation should apply¹⁸ and that Member States may be able to extend the proposed five days for the procedure to ten days. Again, this is a reference to a Pact proposal currently under negotiation. The draft EP report on the file which has not been finalised removes the possibility to extend the duration of the screening procedure to ten days.

It should be reiterated that both the APR and the rRCD 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.¹⁹ The rights under those instruments are thus applicable from the moment the application is made, i.e. from the moment the person expresses a wish to apply for international protection, regardless of when the registration takes place. Therefore, an extension of the deadline for registration to four weeks cannot lead to a derogation from the rights under the APR and rRCD. Access to reception should be made available from the making of the application. Delayed registration can in no case justify hindering access to the asylum procedure and the right to asylum.

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 in registration potentially infringes their right to reception, protection from refoulement, and other rights that are attached to their status as asylum applicant. This concern is further exacerbated following the evidence that there already is a widespread practice of violence and pushbacks at EU external borders.²⁰

Therefore, ECRE recommends deleting Article 2(1)(a).

If Article 2(1)(a) 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(1)(a):

By way of derogation from Article 27 of Regulation (EU) XXX/XXX [Asylum Procedure Regulation], register applications for international protection made within the period during which this point is applied no later than four weeks after the application is made.

Where applying this derogation, the Member State concerned shall prioritise the registration of applications likely to be well-founded and those of unaccompanied minors and minors and their family members.

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.

It should also be noted that similar provisions have already been incorporated in the Commission proposal for

17. Article 27(3) proposal for Asylum Procedures Regulation (2016)

18. Explanatory Memorandum p.4, Recital 7.

19. Article 25 (2) proposal of Asylum Procedures Regulation (2016); Article 2(2) proposal for Reception Conditions Directive recast (2016). Article 16(1) proposal for Reception Conditions Directive recast (2016) also stresses that material reception conditions shall be made available as soon as the applicant “makes” his or her claim as per the rules currently applicable CJEU, C36/20 PPU, 25 June 2020, ECLI:EU:C:2020:495, §§ 90-92.

20. 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/3rMKVX1I>; UN Special Rapporteur on the human rights of migrants (2021), Report on means to address the human rights impact of pushbacks of migrants on land and at sea, available at: <https://bit.ly/3FWWfnK>; ECRE (2021) Asylum adjourned – the situation of applicants for international protection in 2020, available at: <https://bit.ly/3qMyf0j>

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.²¹

In his draft report, the Rapporteur on this file²² deleted references to the extension of the registration period. 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

The Commission proposal provides for both an extension of the scope of the border procedure and for its prolongation. It thereby constitutes a derogation from Article 41(2)(a) and (b) and Article 41(5) of the amended APR from 2020 which already provides for an expanded use of the border procedure including its mandatory application in certain cases.

Expansion of the scope (Article 2(1)(b))

Under the current rules set out in Article 43 Asylum Procedures Directive (APD), the merits of an application may be examined in a border procedure only in very limited circumstances. In the proposal for the amended APR of 2020, however, the Commission puts forward an expansion of the scope when the border procedure may be applied to assess admissibility and/or the merits of an application and situations in which it the border procedure must be applied. ECRE opposes the mainstreaming of border procedures and has commented on the proposal.²³

The Regulation goes even further by enabling derogations from the amended APR to enable Member States to decide on the admissibility and the merits of all applications registered while maintaining the fiction of non-entry. While the exemption for medical cases is mentioned in the recitals, this is not specified in the articles. Likewise, the reference to not applying the border procedure in cases where special procedural guarantees are necessary appears in the recitals but not in the articles.²⁴ Well-founded cases and those lodged by unaccompanied children or children and their family members shall be prioritised, but not exempted from the border procedure. How they would be efficiently and effectively assessed under the proposed border procedure is not indicated.

The European Commission believes that this measure will limit the possibility for third country governments to select for instrumentalisation the third-country nationals to whom the border procedure cannot be applied under the current rules.²⁵ This justification is highly questionable: it is based on the presumption that the third country governments are analysing legal provisions and highly complex and intertwined proposals from the European Commission in the acquis that have been assessed (recently by the European Parliament Research Service) as lacking clarity and which are not uniformly applied across the EUMS.²⁶

It is not clear that the measure is suitable for obtaining the objective of influencing how or whether third country governments target people for instrumentalisation. Nor is it clear 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. This is acknowledged by the European Commission, which even uses the fact that all applications are carried out at the border to justify that MS concerned need more time to assess applications. In addition, it is not 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. Indeed, the fact that people have been instrumentalised by third countries is indicative of human rights violations they may face upon return, should they be accepted back.

21. 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>

22. 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>

23. ECRE (2021), Comments on the amended Proposal for an Asylum Procedures Regulation COM (2020) 611, available at: <https://bit.ly/3zrTR6e>

24. Recital 7.

25. Recital 6.

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

It should also be noted that in the case of the European Commission v. Hungary, the Commission itself acknowledged that Article 43 of the current APD 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 instrumentalisation alone does not justify the departure from this position (endorsed by the CJEU ruling²⁷). 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.²⁸

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(1)(b):

ECRE proposes deletion of Article 2(1)(b)

No exemptions for vulnerable applicants

While proposed Article 2(1)(b) 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.

The proposed measures affect provisions on care and protection applying to all children in a non-discriminatory way as set out in the comprehensive Strategy on the Rights of the Child, which considers children in migration among the particularly vulnerable groups to include in efforts to combat violence against children and ensuring child protection.

The recitals suggest that Member States should exclude persons with medical conditions from the border procedure but this is not included in the relevant articles. Likewise, the appeal to not apply the border procedure in cases where special procedural guarantees are necessary appears in the recitals but not in the articles.²⁹

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 2(13) and Article 29 rCD.

ECRE opposes the use of border procedures for vulnerable applicants.

If Article 2(1)(b) is maintained, ECRE proposes amendments as follows:

~~Where applying this derogation, the Member State concerned shall prioritise the examination of applications for international protection likely to be wellfounded and those lodged by unaccompanied minors and minors and their family members~~ **not apply the border procedure to children and their family members, applicants with special reception needs as listed in Article 2 (13) of Directive XXX/XXX [Reception Conditions Directive Recast] and where there are medical reasons for not applying the border procedure.**

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

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

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

29. Recital 7.

30. Article 2 (13) Reception Conditions Directive Recast - Definitions: applicant with special reception needs': means an applicant, who is in need of special guarantees in order to benefit from the rights and comply with the obligations provided for in this Directive, such as applicants who are 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.

be paid throughout all stages of the border procedure, taking into account their specific concerns.³¹

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

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 proposed 12-week limit in Article 41.11 amended APR proposal. 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.³²

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 proximity 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. 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.³³

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(1)(c).

ECRE recommends deletion of Article 2(1)(c).

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 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 detail.³⁴)

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 proposal of a separate instrument to address the specific situation of “instrumentalisation” is warranted.

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

32. Recital 9.

33. 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.

34. 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>

Curtailing the right to an effective remedy

While the Explanatory Memorandum mentions access to remedies including in compliance with Article 47 CFREU, a specific provision on remedies is absent. A generic reference to the principles and guarantees of the proposed APR is made in Article 2(2) and Recital 9 underlines that an appeal shall have no suspensive effect in line with Article 54(3) of the amended APR proposal from 2020, which removes the suspensive effect of an appeal for cases subject to the border procedure.

In ECRE's view, providing an applicant with the 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 is the best guarantee of the right to an effective remedy and the principle of *non-refoulement*. This is a particularly pressing concern given that the measures would apply to the removal of a person to a third country which forces people, including refugees, to the borders with the EU. The treatment that the people concerned will face is unlikely to be compatible with international law. Therefore, EU and international law will preclude removal or people concerned due to the risk of ill-treatment. The CJEU concluded that in order to ensure respect for 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* 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.³⁵

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 to remain on the territory, and courts are thus not required to address this issue separately.

(De facto) detention

The draft Regulation does not specify whether the border procedure will take place in detention. However, Recital 8 stipulates that the rules and safeguards related to detention set out in the proposed rRCD should be applied. In this regard, the safeguards concerning detention as provided for in the RCD and included in the rRCD are to apply, read in light of CJEU jurisprudence, in particular concerning specific groups such as children and their families. The Recital further states that alternatives to detention, such as restrictions on freedom of movement, may be as effective as detention and should therefore be considered by the authorities, particularly for minors. The Recital also clarifies that if detention is applied but "the guarantees and conditions for detention are not met or cannot be met at the border, the emergency asylum management procedure should not apply or should cease to apply, as foreseen in Article 41(9)(d) of Regulation (EU) XXX/XXX [Asylum Procedure Regulation]".

Research on the implementation of the border procedure shows, 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).³⁶ The placement of an individual in a waiting zone is acknowledged as a measure of deprivation of liberty.³⁷ The ECtHR held in the 1996 landmark judgment of *Amuur v. France* that the 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**,³⁸ 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.³⁹ 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,

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

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

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

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

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

which does not include a definition.⁴⁰

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,⁴¹ 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.

The fact that a legislative proposal refers to principles and guarantees in another proposal that is subject to negotiations and amendments by co-legislators highlights the complexity of the process and constitutes a risk that important fundamental rights safeguards are overlooked or negotiated away. ECRE therefore proposes amendments to Article 2(2) to ensure that the necessary fundamental rights safeguards are included in the Regulation.

ECRE recommends the following amendments to Article 2(2):

Where applying this Article, the principles and guarantees of Regulation (EU) XXX/XXX [Asylum Procedures Regulation] shall apply, *in particular:*

(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)

By way of derogation from Directive XXX/XXX [Reception Conditions Directive recast], Member States may temporarily “set modalities” for material reception conditions that differ from those required by Article 16 and 17 rRCD. This is allowed in relation to applicants apprehended or found in the proximity of the border of the third country instrumentalising migrants after an unlawful entry or after having presented themselves at the border crossing points, and subject to the measures in Article 2 of this Regulation. 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 17(9) of the rRCD 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.

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

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

RETURN PROCEDURE (ARTICLE 4)

The Proposal provides that Member States faced with the arrival of third-country nationals or stateless persons as a consequence of a situation of instrumentalisation may decide not to apply the proposed border procedure for return included in the APR (Article 41a) or in the rRD, for people whose application for international protection is rejected after Article 2 (see above) is applied.

This derogation establishes a mechanism similar to the derogation set out in Article 2(2)(a) of the current Return Directive but specifically for the people whose application for international protection has been rejected in the procedure in Article 2 of the Instrumentalisation Regulation. By excluding them from the scope of the rRD, they will be subject to a refusal of entry in accordance with Article 14 of the Schengen Borders Code.⁴²

The Commission reiterates that Member States 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 10(4) and (5) (Limitations on use of coercive measures), Article 11(2)(a) (postponement of removal), Article 17(1)(b) and (d) (emergency health care and taking into account needs of vulnerable persons), and Articles 19 and 20 (detention conditions) of the rRD.

Derogating from almost all of the rRD seems both disproportionate and unnecessary: it provides for important guarantees beyond the principle of *non-refoulement*, and on detention, and healthcare included in the Regulation. These include inter alia guarantees on remedies (Article 16) and procedural safeguards (Article 15). The European Commission would need to demonstrate why no alternative less onerous measure is available. This is not demonstrated in Recitals 13 to 15 or in the Explanatory Memorandum. The Memorandum refers to Article 2(2)(a) of the current 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.

V. SPECIFIC GUARANTEES (ARTICLE 6)

The Decision contains an article on the specific guarantees that Member States applying derogations shall ensure. It requires them to 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.

Legal Assistance

ECRE strongly recommends that access to legal advisers is upheld, as foreseen in Article 17(2)(c) rRCD. In addition, the proposed APR includes the right to legal assistance and representation at all stages of the procedure (Article 14) and the obligation on Member States to provide free legal assistance and representation in the administrative and appeal procedure (Article 15). However, the proposed "merits test" included in Article 15 leaves extensive scope for Member States to deprive applicants of the right to free legal assistance which has been criticised by ECRE.⁴³

42. 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.

43. See ECRE Comments on the Commission Proposal for an Asylum Procedures Regulation COM(2016) 467, available at: <https://bit.ly/3JGWS7b>

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

Given the particular challenges that an asylum procedure carried out at the border and most likely in (de facto) detention poses to an applicant, ensuring access to legal assistance, legal aid and the right to legal assistance must be emphasised in the proposed Regulation. This is crucial to ensure the right to an effective remedy, as enshrined in Article 47 of the CFREU.

Access to border crossing points and the asylum procedure

While it is important to emphasise the state's obligation to provide information, the text is more limited than the Recitals. In Recital 5, it is stated that the Member State concerned should ensure that sufficient registration points, which may include border crossing points, are designated and open for such purpose and that applicants should be duly informed about the locations where their application will be registered and can be lodged. This is particularly important as the revised proposal for the SBC foresees the possibility for Member States to limit the number of border crossing points in a situation of instrumentalisation of migrants.⁴⁴

From the perspective of EU law, the current APD⁴⁵ allows Member States to require the application for international protection in a specific designated place (Article 6(3)). The proposed APR includes a similar provision in Article 28(5). 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.⁴⁶

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.⁴⁷

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.⁴⁸ 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.⁴⁹

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 making explicit reference to prerequisites for effective access to border crossing points and the asylum procedure.

44. Article 5(4) of revised 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)

45. 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).

46. 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>

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

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

49. *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/3DxttdKH>

ECRE recommends making the following amendments to article 6:

1. Where applying the derogations referred to in Articles 2, 3 and 4, the Member State concerned shall duly inform third-country nationals or stateless persons in a language which the third-country national or stateless person understands or is reasonably supposed to understand about the measures applied, the location of the registration points, including the border crossing points, accessible for registering and lodging an application for international protection, and the duration of the measures.

(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.

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

2. The Member State facing a situation of instrumentalisation of migrants shall not apply Articles 2, 3 and 4 longer than what is strictly necessary to address the situation of instrumentalisation of migrants, and in any case, no longer than the period set out in the Council Implementing Decision referred to in paragraph 4 of Article 7.



ecre

European Council
on Refugees and Exiles

European Council on Refugees and Exiles

Avenue des Arts 7/8

Brussels 1210

Belgium

T. +32 2 234 38 00

F. +32 2 514 59 22

ecre@ecre.org

www.ecre.org