

# A STEP TOO FAR: INTRODUCING “INSTRUMENTALISATION” IN EU LAW

**ECRE’S ASSESSMENT OF THE RISKS INHERENT IN CODIFYING THE CONCEPT OF “INSTRUMENTALISATION” IN EU LAW AND OF CREATING A PERMANENTLY AVAILABLE MECHANISM FOR DEROGATION FROM EU ASYLUM LAW.**

## I. 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”). 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 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](#)”).

ECRE opposes the “Instrumentalisation Regulation” because it provides for the expanded use of concepts and practices which undermine the right to asylum in Europe. ECRE also has concerns about an approach based on normalising derogation from the standards in the asylum acquis. 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. In addition, several of the measures proposed are included in the 2020 New Pact on Migration and Asylum and as such are currently subject to scrutiny by the co-legislators. By introducing similar measures in a separate Regulation, the proposal undermines and further complicates the current legislative process.

ECRE rejects in principle 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. ECRE argues for the withdrawal of the proposed Instrumentalisation Regulation. If the Regulation moves forward, this policy note puts forward recommendations aimed at reducing the negative impact on fundamental rights. It should be read in conjunction with ECRE's more detailed Comments on the [Instrumentalisation Regulation](#) and the [Schengen Borders Code amendments](#).

## II. ANALYSIS

### Derogations available on a permanent basis

The Instrumentalisation Regulation would enable all Member States to avail themselves of derogations to EU law in any situation of instrumentalisation. This includes 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. This is significant because it seeks to establish, as part of the EU's legal framework, the possibility for non-compliance on a permanent basis, leading inter alia to different standards being in place across the EU.

### 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 its necessity and proportionality. While Member States 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 subjected to "instrumentalisation" by a third country may already have experienced ill-treatment and likely have no prospect of access to asylum 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. 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.

### Broad definition of instrumentalisation and unclear authorisation procedure

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 Recital 1. The related Article 1 instead refers to the definition provided in the Schengen Borders Code amendments. The definition is broad and contains many unclear terms, such as the reference to assessing the intention of the third country concerned and whether the action of a third country puts "essential State functions" at risk.

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 is not specified. 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 situations at the EU's external borders arguably fit within it. This means that Member States will be able to frequently invoke the Regulation in order to evade their legal obligations. The measures will be permanently available and are likely to be used more or less permanently.

### Extended registration period for asylum applications

The proposal provides for a four-week extension for countries to register applications for international protection for persons "apprehended or found in the proximity of the external border with a third country instrumentalising migrants". 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. 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. While the rights of people seeking protection should not in principle be affected by delayed registration, in practice there is a risk that this occurs because delayed registration makes it more difficult for applicants to prove their status, in turn 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 heightened due to the evidence of widespread practices of violence and pushbacks at the EU's external borders.

### Expansion of scope and length of the border procedure

The Commission proposal provides for both an extension of the scope of the border procedure and for its prolongation in situations of "instrumentalisation". It goes further than what has already been proposed in the Pact on Migration and Asylum by introducing derogations from the amended Asylum Procedures Regulation

(APR) to enable Member States to decide on the admissibility and the merits of all applications registered. The length of the procedure is expanded to 16 weeks, including a possible appeal, all of which would be carried out with a fiction of non-entry in place.

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 Member States' asylum systems and help them manage the situation. Instead, it will likely exacerbate the challenges while subjecting people to an asylum procedure that is inadequate in terms of procedural guarantees and, when applied, has led to more restrictive approaches to protection.

#### No exemption of vulnerable groups from the border procedure

The proposal does not foresee exemptions from the border procedure based on vulnerability or special needs. 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, as well as to others with special protection and reception needs.

#### De facto detention

The proposed Instrumentalisation Regulation does not specify whether the border procedure will take place in detention. However, research on border procedures shows that they almost always happen either in a formal regime of detention or in situations that amount to de facto detention. 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.

#### Limiting material reception conditions

The proposed Regulation allows Member States to set lower standards for reception of people who have been instrumentalised in relation to their basic needs, including food, water, clothing, adequate medical care and temporary shelter. Given that under the current rules, Member States already have the possibility to diverge from standards in duly justified cases, and that covering only basic needs for a period of over 16 weeks will likely not be in line with human dignity, this provision should be deleted.

#### Curtailing the right to an effective remedy

The Instrumentalisation Regulation makes reference to the amended APR proposal from 2020 which is currently subject to legislative scrutiny. The APR suggests removing the suspensive effect of an appeal in cases decided in the border procedure. 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 its outcome is the best guarantee of the right to an effective remedy and the principle of *non-refoulement*. Here, suspension of a removal decision is essential given that the person would be expelled to a third country which is forcing people, including refugees, to the borders with the EU. Upon return, the treatment that the people concerned will face is unlikely to be compatible with international law. Therefore, EU and international law will preclude removal of the people concerned due to the risk of ill-treatment.

#### Derogating from the recast Return Directive

The proposal allows Member States to not apply the border procedures proposed in the 2020 Pact and the recast Return Directive (rRD). Instead, people who have arrived due to instrumentalisation by a third country and whose asylum application has been rejected, will be subject to a refusal of entry decision in accordance with the Schengen Borders Code. Thus, the Regulation proposes derogating from almost all of the rRD, which is both disproportionate and unnecessary, particularly as it would affect rights underpinned by the Charter.

#### Inadequate specific guarantees

The proposal includes an article on specific guarantees that Member States applying derogations should ensure. It should be expanded to explicitly include access to legal assistance and legal aid, which is especially important for asylum procedures at the border. In addition, in order to ensure effective access to the asylum procedure, ECRE recommends explicit references to the prerequisites for effective access when there are limited border crossing points, in line with the recent jurisprudence of the European courts.

### III. RECOMMENDATIONS

- ECRE rejects the introduction of a mechanism for derogation from asylum and return standards in situations of “instrumentalisation” and thus recommends the withdrawal of the Regulation.
- If instrumentalsalisation is codified in EU law, it must be defined narrowly and clearly. The authorisation procedure must specify the information that needs to be provided by a Member State and the European Commission’s assessment must cover the proportionality, efficiency and impact on fundamental rights of the measures requested, and it must be presented to the European Parliament before its finalisation.
- ECRE recommends deleting Article 2(1)(a) on the extended period for registering an asylum claim. Should the provision be maintained, the rights that applicants have from the moment they express their intention to apply for asylum should be explicitly mentioned.
- ECRE strongly opposes an expansion of the scope of the border procedure as proposed and therefore suggests the deletion of Article 2(1)(b). If it were to be applied, families with children and all vulnerable applicants as per Article 2(13) and Article 29 rRCD should be exempt. Appeals of negative decisions under the border procedure should have automatic suspensive effect. Member States should ensure access to free legal assistance for all applicants subject to the border procedure at administrative and appeal stage.
- An applicant for international protection should not be held in detention for the sole reason that he or she is seeking international protection. Where measures prevent asylum seekers from leaving a transit zone or other border facilities, they should be classified as detention in accordance with relevant jurisprudence of the European Courts.
- ECRE recommends deleting Article 3 on limiting material reception conditions and Article 4 on the non-application of the recast Return Directive.
- ECRE recommends adding explicit reference to prerequisites for effective access to border crossing points and the asylum procedure including the obligation of Member States to 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.