

# **ECRE COMMENTS ON THE REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ADDRESSING SITUATIONS OF CRISIS AND FORCE MAJEURE IN THE FIELD OF MIGRATION AND ASYLUM AND AMENDING REGULATION (EU) 2021/1147**

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## Summary of views

The Crisis and Force Majeure Regulation (“the Crisis Regulation” or “the Regulation”) creates three special legal regimes for managing the asylum system in three situations: crisis – mass influx, crisis – instrumentalisation, and force majeure. The special regimes are based on allowing Member States to derogate from EU asylum law, with a range of derogations that they can request when faced with one or more of the three situations.

In ECRE’s view, an approach based on allowing derogations will have a significant negative impact on the rights of people on the move, especially in a context of widespread non-compliance,<sup>1</sup> and given that the current and new legal frameworks already provide for sufficient flexibility to address challenging situations. The Regulation is an example of initially exceptional and temporary measures designed for limited use in emergency situations being integrated into permanent law.

The main fundamental rights affected are: the right to asylum (Article 18 EU Charter), the prohibition of torture and inhuman or degrading treatment or punishment (Article 4 EU Charter, Article 3 ECHR), the right to liberty and security (Article 6 EU Charter, Article 5 ECHR), protection in the event of removal, expulsion or extradition (Article 19 EU Charter), the rights of the child (Article 24 EU Charter), and the right to an effective remedy (Article 47 EU Charter, Article 13 ECHR).

The Crisis Regulation not only codifies new legal concepts, but also provides for the expanded and more flexible use of restrictive and harmful rules mainly found in the Regulation on Asylum and Migration Management (RAMM) and the Asylum Procedures Regulation (APR), such as allowing expanded use of the border procedure. Thus, it should be assessed in light of both these texts, as well as with reference to the amendments to the Schengen Borders Code (SBC Amendments).

From the launch of the two proposals<sup>2</sup> which were then merged in the final version of the Crisis Regulation, ECRE questioned their added value. However, given that the Regulation has been adopted, these comments will focus on its content and implementation considerations. ECRE’s assesses the impact on international protection in Europe, with reference to the global context, and proposes measures to minimise the harm to the fundamental rights of displaced people. A summary of views is contained here.

### **General observations**

- **Impact on harmonisation** : By creating three derogatory regime, the Crisis Regulation contributes to a risk of built-in de-harmonisation of the Common European Asylum System (CEAS), whereby Member States will be permitted to apply different legal rules. The Court of Justice of the EU (CJEU) cautioned against such an approach and it could be viewed as

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<sup>1</sup> See AIDA country reports, updated yearly, available at: <https://bit.ly/3o6UqgG>.

<sup>2</sup> Proposal for a Regulation of the European parliament and of the Council addressing situations of crisis and force majeure in the field of migration and asylum COM/2020/613 final, available at: <https://bit.ly/2XNBTsP>; 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>.

paradoxical to integrate the right to derogate from the law into a reform package primarily intended to further harmonise the CEAS with the introduction or switch to complex legal obligations largely contained in regulations. The situation is further complicated because each special regime provides a menu of derogations from which the Member State invoking the regime may choose.

- ***Application in line with fundamental principles*** : The special regimes are likely to be considered attractive to Member States, given that they will be able to derogate from certain obligations and may have the additional solidarity entitlements. It is for the Member State to claim that it is facing one of the three situations and it then makes a request to apply the related special legal regime, which is assessed by the European Commission and finally confirmed in a Council Decision. In order to avoid over-use or misuse of the Regulation, respect for fundamental principles will be paramount.

First, the Regulation itself states that it applies in “exceptional” situations. The special regime should not be applied in the general situation facing the EU. Given the tendency of the Member States – and on occasion the EU institutions – to describe normal and manageable situations of asylum applications as a “crisis” or “emergency” it will be necessary to apply a strict definition of exceptional, for instance with reference to CJEU jurisprudence on TFEU Article 72 and related provisions.

Second, fundamental principles of EU primary law will apply, including the need to demonstrate the necessity and proportionality of the requested response, as well as its respect for fundamental rights. The Member State’s request should demonstrate conformity with these principles and the Commission’s assessment should similarly assess whether the proposed application of a special regime and the particular derogations proposed would guarantee respect for these principles.

There are other safeguards that seek to prevent misuse, including that there should be serious consequences for the functioning of the CEAS as a whole, that the Member State should demonstrate that other available measures are not adequate, and that the system should have been well-prepared (see below). Monitoring the application of these requirements, in combination with fundamental principles, will be essential to avoid misuse.

- ***Complexity of the legal framework***: Overall, the Crisis Regulation significantly increases the complexity of the legal framework by providing for three special regimes for exceptional situations, which operate in addition to the already highly complex rules contained in the RAMM and the APR. As well as allowing derogations from these two instruments, the Crisis Regulation needs to be read in conjunction with the Screening Regulation and the SBC Amendments. The rules are so complex that monitoring, enforcement, scrutiny, and workability may be challenging.

- ***Unpredictable impact***: The impact of the Crisis Regulation is very unpredictable, both in terms of the impact on people affected and the impact on other Member States of the application of one or more of the special regimes elsewhere in the EU. First, despite taking the form of a regulation, a large amount of discretion is granted to the Member States, Commission and Council and the implementation level. Second, legal uncertainty is generated by a lack of detail and discrepancies in wording across the Regulation, including broadly

defined concepts, discrepancies in applicable timeframes, and substantial number of recitals, several of which repeat provisions but using different wording, or include additional information not in the operational provisions.

- **Lack of conceptual clarity:** There are significant risks of misuse of the provisions in the Regulation because the three concepts, mass influx crisis, instrumentalisation and force majeure, are not clearly defined and might be prone to political interpretation, as described below. There is a risk of overlap including with the concept of migratory pressure in the RAMM, and a lack of clear criteria to assess the existence of each situation. The concept of instrumentalisation is new and its codification in EU law is an unwelcome development which may also have an impact on the wider international refugee law and on the global protection system. While the concept of force majeure is not new, its application in the asylum context is, and similarly could have significant effects beyond Europe. These concepts should be used in a restricted way and subject to interpretation and supervision by the courts.

- **Contribution to preparedness:** There are measures which could assist in ensuring that asylum systems function better if they are well-used. Primarily, the concept of the well-prepared system which appears in the RAMM is also included as a safeguard. Member States can only benefit from a special regime if there is disruption to the functioning of a well-prepared system. They need to show that despite being well-prepared, the exceptional situation rendered the system non-functional. ECRE argues that “well-preparedness” should be defined as an asylum system that generally functions in compliance with the all elements of the CEAS which should render it robust enough to deal with an exceptional situation. A system where there are significant, long-standing or regularly occurring implementation gaps – concerning any area of the asylum acquis – is not a well-prepared system ready to deal with a crisis.

### **Governance: Articles 2 to 6**

- **Lack of rules for assessment of the situations:** Given that the concepts are at points unclear and due to the lack of detailed rules concerning the assessments both of the existence of a situation and of the suitability of the measures to be authorised, there is a strong risk assessments will not be based on objective evidence. There are also risks attached to the fact that most information to be taken into account comes from the Member State directly, including with regards to its preparedness.

- **Lack of overall time limits:** While there are time limits (of 12 months) on the application of a special regime based on a particular request from a Member State, there are no limits on the number of requests that can be made. Thus, at the end of 12 month or shorter period, a state may invoke the same or another one of the regime but with reference to a different set of circumstances. While it cannot use the same circumstances, it may argue that the situation has evolved and that provides new grounds for a new request..

- **Role of the Commission:** while ECRE cautiously welcomes the role of the Commission in determining the existence and persistence of the situation of crisis or force majeure, which is a requirement for measures to be authorised, the effectiveness of its role a safeguard from misuse of the Regulation remains to be seen in practice. It will be essential for the Commission to take a politically neutral, objective and evidence-based approach, with strict application of the fundamental principles of EU law and the related jurisprudence of the CJEU.

### ***Solidarity: Articles 7 to 9***

- **Solidarity measures:** The Member State claiming to face one of the three situations and requesting a special regime can request additional solidarity measures of any type. Whether these will be agreed, depends on the assessment of the Commission and on the availability of pledges in the system. A new Solidarity Forum may have to be convened. The Member State will have priority when it surplus pledges.

Whether the solidarity measures requested – and agreed – actually assist with the situation facing the Member State is uncertain. The impact of certain solidarity measures on the fundamental rights of refugees, including the right to asylum, is a general concern but one that may be heightened in situations of crisis (and notably instrumentalisation) and force majeure. There may be a risk that solidarity in the form of measures which seek directly or indirectly to prevent the arrival of people are considered suitable for crisis and force majeure situation, which will need to be assessed at the stage of the request. It should be noted that the presentation of derogations as a form solidarity contributes to the further distortion of the concept of solidarity and risk of generating tension between solidarity for Member States and solidarity with people on the move.

One promising form of solidarity that would benefit both the state facing a crisis and applicants is the mandatory use of responsibility offsets – the assumption of responsibility for applicants on the territory of the supporting Member State when otherwise they would be transferred back to the Member State facing a crisis.

### ***Derogations: Articles 10 to 14***

- **Delayed registrations:** In practice, the opportunity to delay registrations, which will be immediately available to Member State from the moment they request the Commission recognise them as facing a situation of crisis or force majeure, carries heightened risks of cascading violations of fundamental rights, including the right to asylum, the right to access reception per the rRCD and thus the right to human dignity, etc. as people risk lacking documents proving their status.

- **Key importance of vulnerability detection:** as the limited exceptions or adjustments to the derogations foreseen concern minors and persons with special reception and/or procedural needs, effective and fair vulnerability detection mechanisms and age assessment mechanisms will be crucial to effective implementation. Yet, the Regulation does not provide any standards in that matter but only refers to the rest of the Pact, despite the current low standards of such mechanisms in practice.

- **Lengthening and expansion of the border procedure:** the regulation foresees even further lengthening and expansion of the scope of the border procedure from what is foreseen in the APR, despite the heightened risks for violations of fundamental rights, particularly the right to liberty, and the increased administrative burden this would create for States that are precisely in a situation where they have limited capacity compared to the circumstances they are facing. There are well-justified fears that this will lead to further mass detention, and will only exacerbate the humanitarian crises this regulation seeks to address.

• **Derogations to the responsibility rules of the RAMM:** the derogations adjust the rules on responsibility by extending the deadlines for requests, responses and transfers for take back notifications and take charge requests. While the latter may create an increased period of uncertainty, it could also have benefits in that it makes it more likely that take charge requests result in a transfer. Given concerns about the short deadlines for such requests in the RAMM, which may lead to an even lower rate of use and successful completion of such requests than under Dublin, it is a welcome element.

Under Articles 12 and 13, derogations would allow for the temporary cessation of incoming take-back transfers. If they are not completed within a year – even if due to the crisis or force majeure situation – responsibility shifts. In the “most exceptional” circumstances, responsibility can shift immediately. While subject to a number of restrictions, these provisions are very useful in providing practical assistance to Member States facing a crisis situation. ECRE has long criticised the insistence of effecting transfers back to Member States dealing with exceptional crises – and often legal challenges may be taken in these situations. Rather than relying on the courts, allowing a change in the rules to recognise the need to limit responsibility in order to assist a Member State to overcome a crisis is a useful measure that should be used as much as possible.

***Expedited procedures: Article 14***

• **Expedited procedure:** the inclusion of the expedited procedure is a positive development. If recommended by the Commission and taken up by Member States it has the potential to significantly improve the situation of crisis and/or force majeure while also enhancing access to asylum.

***Changes to the rules in situations of crisis – mass arrivals, instrumentalisation and force majeure.***

Solidarity measures			
Available measures that may be requested or proposed	Crisis - Mass arrivals	Crisis - Instrumentalisation	Force majeure
Article 8 Relocation – of applicants; BIPs under certain conditions.	Yes	Yes	N/A
Article 8 Financial contributions – for projects that specifically address the crisis.	Yes	Yes	N/A
Article 8 Alternative solidarity measures (capacity support etc, as per RAMM) –	Yes	Yes	N/A

specifically to respond to the crisis.			
Article 9 (mandatory under certain circumstances) Application of responsibility offsets (assumption of responsibility for applicants sur place by contributing Member State). Apply only if relocation pledges do not meet needs and not to be combined with Article 13 responsibility derogations.	Yes	Yes	N/A

<b>Derogations by situation</b>			
Available measures which can be requested or proposed	Crisis - mass arrivals	Crisis - Instrumentalisation	Force majeure
<b>Derogations from the APR</b>			
Article 10 Extended registration (to be combined with mandatory prioritisation of certain vulnerable groups)	Yes	Yes	Yes
Article 11(1) Prolongation of the border procedure	Yes	Yes	Yes
Article 11(2) Exemption from applying the border procedure to certain applicants	Yes	No	Yes
Article 11(3) Restriction of the scope of mandatory use of the border procedure	Yes (mandatory only for 5% recognition rate or below)	No	No
Article 11(4) Expansion of the scope of mandatory use of the border procedure	Yes (mandatory for up to 50% recognition rate)	Yes (up to 100% recognition rate)	No
<b>Derogations from the RAMM</b>			
Article 12	Yes	No	Yes



Extension of time limits for take charge and take back requests, replies and transfers.			
Article 12(4) Suspension of incoming take back transfers	Yes	No	Yes
Article 13 Removal of responsibility for certain applications ➤ Responsibility offsets make up the gap between relocation pledges and relocation needs (other MS have to take responsibility for applicants sur place)	Yes	No	No

## Introduction

In September 2020, building on its proposals to reform the Common European Asylum System (CEAS) in 2016 and 2018, the European Commission presented a New Pact on Migration and Asylum (“the Pact”), aimed at providing “a comprehensive approach” to external borders, asylum and return systems, the Schengen area of free movement and external cooperation on migration. The Pact included a set of legislative proposals, amongst which a proposal addressing situations of crisis and force majeure in the field of migration and asylum (COM(2020) 613).

The Regulation’s specific role within the Pact was to create an adapted legal regime for:

“exceptional situations of mass influx of third-country nationals or stateless persons arriving irregularly in a Member State, being of such a scale and nature that it would render a Member State’s asylum, reception or return system non-functional and which risk having serious consequences for the functioning of, or result in the impossibility of applying, the Common European Asylum System and the migration management system of the Union... [and] situations of force majeure in the field of asylum and migration management within the Union”.<sup>3</sup>

### **The process**

In 2021, following events at the EU’s border with Belarus, the European Commission considered that this Crisis Regulation proposal did not cover all potential scenarios that might arise. In particular, it was “not designed to deal with situations where the Union’s integrity and security is under attack as a result of the instrumentalisation of migrants”.<sup>4</sup> On 14 December 2021, the European Commission thus presented a new proposal for a Regulation addressing situations of instrumentalisation in the field of migration (COM(2021) 890), (“the Instrumentalisation Regulation”), alongside a proposal for reform of the Schengen Borders Code (“SBC Amendments”). The Instrumentalisation Regulation was initially separate from the Pact and not part of any interinstitutional roadmaps.<sup>5</sup> Instead, it built on the proposal for a Council Decision on provisional emergency measures for the benefit of three Member States bordering Belarus put forward on 1 December 2021 (ultimately never formally adopted by the Council), as a response to the situation at the EU-Belarus border.

Taking the view that such situations were likely to be repeated, the Instrumentalisation Regulation aimed at providing Member States a permanent framework for “flexibility to act within a legal framework designed to address that particular situation and ensure that the

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<sup>3</sup> European Commission, *Proposal for a Regulation of the European Parliament and of the Council addressing situations of crisis and force majeure in the field of migration and asylum*, COM(2020) 613, 23 September 2020, available at: <https://bit.ly/3x7GBq0>, p.2.

<sup>4</sup> European 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, 14 December 2021, available at: <https://bit.ly/3vocVV6>, p.4 (hereinafter Explanatory memorandum on Instrumentalisation).

<sup>5</sup> European Parliament and Rotating Presidencies of the Council, *Joint Roadmap of the European Parliament and Rotating Presidencies of the Council on the organisation, coordination, and implementation of the timeline for the negotiations between the co-legislators on the CEAS and the New European Pact on Migration and Asylum*, 7 September 2022, available at: <https://bit.ly/4a0yquk>.

rights of those falling victim to instrumentalisation are respected”,<sup>6</sup> instead of resorting to *ad hoc* measures as was the case early December. This was to be done “by setting up a specific emergency migration and asylum management procedure, and, where necessary, providing for support and solidarity measures, to manage in an orderly, humane and dignified manner the arrival of persons who have been instrumentalised by a third country, with full respect for fundamental rights.”<sup>7</sup>

At first, the Crisis Regulation and the Instrumentalisation Regulation were negotiated separately, both in the European Parliament and in the Council. However, following a failed attempt to agree on a General Approach on instrumentalisation by the Council in December 2022, the Swedish Presidency, working with the European Commission, merged the two regulations. The Spanish Presidency followed through with this idea and put forward multiple compromises in the second half of 2023.

Meanwhile, in March 2023, the European Parliament had adopted its negotiating mandate on the Crisis Regulation, without any mention of instrumentalisation. Work on the Instrumentalisation Regulation had not started in earnest because the Parliament was awaiting the results of a commissioned substitute impact assessment<sup>8</sup>, which was ultimately presented in the LIBE Committee in November 2023. The Parliament was putting pressure on the Council to adopt a position on the Crisis Regulation because it – the Parliament – remained wedded to the “package approach” to the Pact, whereby “all or nothing” would be accepted. The Parliament went as far as halting other political trilogue processes in order to pressure the Council. In October 2023, the Council adopted its General Approach on a merged Crisis, force majeure and instrumentalisation regulation. The Council had a position on the merged instrument, whereas the European Parliament only had a negotiating mandate on the Crisis Regulation and no position on Instrumentalisation. Nonetheless, trilogues started immediately after the adoption of the Council General Approach and, despite some internal pushback, the Parliament effectively accepted the Council’s gambit in bringing instrumentalisation into the Crisis Regulation.

### ***The content***

The final instrument (referred to here as “the Crisis Regulation” or “the Regulation” for short) largely reflects the Council General Approach of October 2023. The objective of the instrument is to provide three special regimes, for situations of crisis, force majeure and instrumentalisation (considered as a form of crisis under the Regulation) respectively which will be permanently available to Member States. The three special regimes adapt the standard regime through access to increased solidarity and the use of derogations. An optional expedited procedure is also included.

The procedure to access the solidarity mechanism is simplified and quicker, and the proposal foresees enhanced solidarity, including responsibility offsets. In addition, Member States facing a situation of crisis (including instrumentalisation) and/or force majeure can benefit from derogations from both APR and RAMM including:

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<sup>6</sup> Explanatory memorandum on Instrumentalisation, p.3.

<sup>7</sup> Explanatory memorandum on Instrumentalisation, p.2.

<sup>8</sup> The Commission having not answered the Parliament’s request for an institutional impact assessment on the Instrumentalisation proposal, the Parliament commissioned an external substitute assessment.

- longer time limits and exceptions to the responsibility rules under the RAMM (i.e. the Dublin rules);
- extended time periods to register applications; and
- the opportunity to reduce or significantly broaden the scope of the newly mandatory border procedure foreseen in APR, the length of which is also extended.

Derogations from the recast Reception Conditions Directive (rRCD), initially suggested by the European Commission in its Instrumentalisation proposal, are not included. However, the Crisis Regulation should be read in conjunction with the SBC amendments, which introduce the option to limit the opening hours of or even to close border crossing points in situations of instrumentalisation, as well as allowing Member States to use unspecified “necessary measures” to address a “large number” of people attempting to cross the external border in an unauthorised manner, en masse and using force. It should also be noted that the possible expansions of border procedures will likely result in an increase in cases of de facto detention, thus producing detrimental effect on people's reception conditions.

### ***The new legal concepts***

As set out in a number of publications,<sup>9</sup> ECRE had serious concerns about the Instrumentalisation Regulation and urged the co-legislators to reject it. ECRE also expressed concerns about the concept of force majeure in the crisis proposal and about the added value of the proposal as a whole. Above all, ECRE highlighted the risks attached to introducing permanently available derogations in EU asylum law, particularly on the basis of poorly defined concepts, and considering the widespread and flagrant lack of compliance in this area of EU law. An additional objection was that EU law already provides for certain limited derogations in emergency situations, both under provisions applicable to all areas of law and in EU asylum law specifically, all of which is tightly circumscribed by the Court of Justice of the EU (CJEU). Concerns about compatibility with the founding treaties, mainly the TFEU, have also been voiced.

ECRE has also continuously questioned whether the proposed measures are actually useful in achieving the stated goals of addressing situations of crisis and force majeure, and even more so instrumentalisation, which tends to derive from political rather than protection-related

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<sup>9</sup> *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/43mjR1y>; *ECRE, Alleviating or exacerbating crises? The regulation on crisis and force majeure*, February 2021, available at: <https://bit.ly/43ElgzT>; *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*, December 2021, available at: <https://bit.ly/31ZVJpY>; *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*, January 2022, available at: <https://bit.ly/3TErXzw>; *ECRE, A step too far: introducing “instrumentalisation” in EU law*, March 2022, available at: <https://bit.ly/3IKbHqq>; *ECRE, Joint Statement, Instrumentalisation Regulation will be the final blow to a COMMON European Asylum System (CEAS) in Europe*, 08 September 2022, available at: <https://bit.ly/3TMJ54h>; *ECRE, Joint Statement, Go no lower and reject the use of legal loopholes in EU asylum law reforms*, 14 July 2023, available at: <https://bit.ly/3XYwVrl>.

factors, meaning it is unclear as to why a reduction in protection standards for applicants would have an impact on political factors creating the situation.<sup>10</sup>

ECRE has also continuously refuted the main premise of the restrictive approach of the Pact as a whole – that an increasing proportion of those arriving are found not to be entitled to international protection. On the contrary, over half of the first instance decisions taken by the EU27 in 2023 were positive decisions granting some form of protection.<sup>11</sup> However, given that the instrument has now been adopted by the co-legislators, these comments will focus on its implementation, associated fundamental rights risks and requirements for proper compliance.

These comments should be read together with ECRE’s comments on the other newly adopted instruments, especially on the APR, RAMM and SBC amendments,<sup>12</sup> ECRE’s comments on the original proposals,<sup>13</sup> as well as the policy papers on the state of play of the reform throughout the negotiations.<sup>14</sup> The comments will follow the structure of the Regulation, starting with the definitions and governance of the mechanisms, following with the special measures on solidarity, the suggested derogations and finishing with the expedited procedure and final provisions.

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<sup>10</sup> See also CEPS. See *ECRE Comments on the proposal for provisional emergency measures; ECRE Comments on the instrumentalisation proposal*. See also Centre for European Policy Studies for the EPRS, *Proposal for a regulation addressing situations of instrumentalisation in the field of migration and asylum, substitute impact assessment*, October 2023, available at: <https://bit.ly/3TETrFe>.

<sup>11</sup> Eurostat, migr\_asydec1pc. For an overview on asylum statistics in 2021 and 2019, see: ECRE, *Asylum statistics and the need for protection in Europe*, December 2022, available at: <https://bit.ly/3XNUYm> and ECRE, *Asylum statistics in Europe: Factsheet*, June 2020, available at: <https://bit.ly/3XQUAKj>.

<sup>12</sup> See *ECRE Comments on the Regulation of the European Parliament and of the Council on asylum and migration management, amending Regulations (EU) 2021/1147 and (EU) 2021/1060 and repealing Regulation (EU) No 604/2013*, May 2024, available at: <https://bit.ly/3wqZPqW>, *ECRE Comments on the Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union* and *ECRE Comments on the Regulation of the European Parliament and of the Council amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across border*.

<sup>13</sup> *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/43mjR1y>; *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*, January 2022, available at: <https://bit.ly/3TErXzw>.

<sup>14</sup> ECRE, *Quo vadis EU asylum reform? Stuck between gradual approach, (mini)-package deals and “instrumentalisation”*, September 2022, available at: <https://bit.ly/3x10DT8>; ECRE, *Reforming EU asylum law: the final stage*, August 2023, available at: <https://bit.ly/4ciMvVx>.

The following table presents a summary of the content of the Regulation and relevant articles:

<b>Crisis and force majeure regulation – summary table</b>			
	<b>Mass arrivals</b>	<b>Instrumentalisation</b>	<b>Force majeure</b>
Definition	Article 1(4)(a)	Article 1(4)(b)	Article 1(5)
Elements to demonstrate in the reasoned request	Article (2)(a)(i)	Article (2)(a)(ii)	Article (2)(a)(iii)
Assessment	Articles, 3(5), 3(6)(a)	Articles 3(4), 3(5), 3(6)(b), 3(7)	Articles 3(5), 3(6)(c)
Solidarity measures	Articles 8 and 9	Articles 8 and 9	N/A
<b>Derogations from the APR</b>			
Extended registration	Article 10	Article 10	Article 10
Prolongation of the border procedure	Article 11(1)	Article 11(1)	Article 11(1)
Exemption from applying the border procedure to certain applicants	Article 11(2)	N/A	Article 11(2)
Restriction of the scope of the border procedure	Article 11(3)	N/A	N/A
Expansion of the scope of the border procedure	Article 11(4)	Article 11(6)	N/A
<b>Derogations from the RAMM</b>			
Extension of time limits	Article 12	N/A	Article 12
Relief of responsibility for certain applications	Article 13	N/A	N/A

## Analysis of key provisions

### Chapter I: General provisions

#### *Article 1: Subject matter*

Article 1 of the Crisis Regulation sets out three situations in which Member States may apply different rules, covering increased solidarity measures and/or derogations from certain provisions in the RAMM and the APR. These are situations of crisis, which can be either a general crisis due to mass arrivals or the subcategory of crisis situations of “instrumentalisation”, and situations of force majeure. The definitions of these situations are discussed below, however the concerns are broadly the same across the board: the definitions are rather unclear and may thus be prone to political interpretation. The Council's notable interest towards the introduction of extraordinary regimes within the common framework suggests that numerous countries may frequently claim to be experiencing one or more of the situations, requiring strict assessments in implementation to ensure they are not misused.

Before defining the concepts, Article 1(2) recalls several core principles at play when restricting or derogating from human rights, mainly the principles of necessity, proportionality, and the requirement that the measures taken be appropriate for the stated objective. Similarly, Article 1(3) highlights that these are to be considered exceptional circumstances, and that the measures should only be applied temporarily and for only as long as they are strictly required. Article 1(2) also makes a general reference to the protection of rights of applicants and beneficiaries of international protection, and states that the application of the Regulation must be in line with the Charter for Fundamental Rights of the EU (hereinafter the Charter), international law and the EU asylum *acquis*. Lastly, Article 1(2) states that the Crisis regulation does not affect the fundamental principles and guarantees of the APR and RAMM, the two Pact instruments from which derogations are foreseen, but does not define these principles and guarantees.

#### *What is a mass arrivals crisis?*

The definition of the “mass arrivals”<sup>15</sup> crisis situation, contained in Article 1(4)(a), can be broken down into two elements.

- Mass arrivals...
- ...of scale and nature that even well-prepared asylum, reception or return systems are rendered non-functional

First, there must be mass arrivals of third country nationals and stateless persons in a single Member State. Contrary to the Commission proposal, the definition no longer specifies that the people must be “arriving irregularly”, which would indicate that people arriving through regular channels, with a visa or under visa exemption regimes, can also be counted towards

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<sup>15</sup> Throughout these comments, the phrasing “mass arrivals” will be used to refer to the first crisis scenario provided by Article 1(4)(a) of the Regulation, to distinguish from the notion of crisis, which under the final instrument refers to both mass arrivals and instrumentalisation.

the mass arrivals. These arrivals can occur at any of the country's borders, land, air or sea, and also include people disembarked after search and rescue (SAR) operations.<sup>16</sup>

The number of arrivals is to be assessed based on their scale and nature, evaluated against, inter alia, the Member State's population, GDP and geographical specificities, notably the size of its territory. This part of the definition is somewhat unclear as there is no numerical indication as to when arrivals are to be considered "mass" arrivals. Recital 4 highlights that this is different from a situation of migratory pressure as foreseen under the RAMM, during which the scale of arrivals does not reach the level of mass arrivals, indicating that mass arrivals requires a higher albeit unspecified threshold.

There is also limited detail on what is to be examined when assessing the "nature" of arrivals. This could refer to whether the arrivals are through visa-free regimes or with a visa, or irregular arrivals according to the Member States.<sup>17</sup> Recital 3 refers alternately to the scale and the "composition" of the arrivals, but this does not aid in clarifying the meaning.

Finally, the arrivals must be of such a scale and nature that they render a *well-prepared* (emphasis added) Member State's asylum, reception (including child protection services), or return system non-functional. These are presented as alternative rather than cumulative categories, so it would suffice that one of these three "systems" is so affected for a Member State to argue they are faced with mass arrivals.

#### Implementation considerations

The insertion of "well-prepared" which was not in the original proposal is a useful addition, given that it reinforces the need for Member States to ensure that their systems are functioning, including in terms of preparedness. Having to demonstrate that they were well-prepared but their system was nevertheless severely affected may limit the misuse of the special regimes as well as contributing to ensuring functioning asylum systems. As the assessment of preparedness will likely rely on information collected through the Annual Migration and Asylum Report (Article 9 RAMM), it should be noted that its potential for positive impact will depend on which information – and from which sources – is considered to this end.<sup>18</sup> ECRE argues that "well-preparedness" should be defined as an asylum system that generally functions in compliance with the all elements of the CEAS which should render it robust enough to deal with an exceptional situation. A system where there are significant,

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<sup>16</sup> The finalised instrument no longer stipulates that the people are to be disembarked on the Member State's territory to be considered among the number of arrivals. This could have consequences regarding arrangements such as the Italian-Albanian deal which foresees that people may be directly disembarked in Albania by the Italian coastguard, as such disembarkations would then also be taken into account when evaluating the scale of the arrivals.

<sup>17</sup> If the crisis regime were to be imposed only in situations of irregular entry, given the derogations attached to the regime and the consequences on inter alia the right to liberty and access to asylum, the conformity of the application of such a regime would need to be examined in light of Article 31 on the Convention on the Status of Refugees 1951. See notably UNHCR, *Article 31 of the 1951 Convention relating to the Status of Refugees: Non-Penalization, Detention and Protection*, October 2001, available at: <https://bit.ly/3xQZFcG>, particularly pp. 9-10.

<sup>18</sup> See ECRE, *ECRE Comments on the Regulation of the European Parliament and of the Council on asylum and migration management, amending Regulations (EU) 2021/1147 and (EU) 2021/1060 and repealing Regulation (EU) No 604/2013*, May 2024, available at: <https://bit.ly/3wqZPqW>, p.9.



long-standing or regularly occurring implementation gaps – concerning any area of the asylum acquis – is not a well-prepared system ready to deal with a crisis.

The Member State's system(s) must be rendered non-functional to the extent that would entail serious consequences for the functioning of the CEAS as a whole, a concept which is not further defined in the operational part of the regulation. It is unclear how this could occur especially for smaller countries. For example, given its share of EU asylum decision making (around one-third of decisions), a crisis affecting Germany would affect the functioning of the CEAS far more than a crisis affecting Malta, for instance. Even when there have been particularly grave issues, leading to the Commission suspending transfers to Greece,<sup>19</sup> for example, due to systemic failures in its asylum system, this did not have serious consequences for the entirety of the CEAS: other Member States simply had to adapt – and still do as there have been almost no transfers to Greece in over 10 years. Article 13(1), providing for derogations from the standard RAMM regime for cases of mass arrivals, does not provide further clarification about which situation could fall within this category. The simple numerical element does not seem sufficient, as it is further linked to “a serious risk of serious deficiencies in the treatment of applicants”.

The definition specifies that the asylum, reception or return system becoming non-functional because of the mass arrivals can occur at the local or regional level. When reporting from the trilogues, the Parliament's rapporteur on the Crisis Regulation, MEP Juan Fernando Lopez Aguilar, highlighted that this was ensure it could cover situations such as in the arrivals in the Canary Islands in Spain. Thus, per this definition, it could be that the reception system broadly works in the country, and is non-functioning only in a specific part of the country due to mass arrivals. However, it would still need to entail serious consequences for the functioning of the entire CEAS, which is a high threshold to be met if it is strictly applied, particularly if the arrivals are localised.

Several elements of the definition are vague and prone to politicised interpretations, including the “nature of arrivals”, “well-prepared”, rendering a system “non-functional”, and “serious consequences”. Even though the general definition seems to revolve around numbers, as it is based on the concept of “mass arrivals”, there are no quantifiable indicators or proposed threshold on which to base the assessment. Arrivals registered as “irregular” represent only a small proportion of total immigration to the EU, with “legal” migration making up most of yearly immigration (the terms are used advisedly as it is not illegal to cross a border to seek protection). For example, in 2022, according to Commission data, there were 3,445,630 legal migration arrivals, as opposed to just 331,433 “irregular” arrivals (making up for less than 10% of total arrivals).<sup>20</sup>

It is thus difficult to envisage a scenario where irregular border crossing would be particularly large in scale, sudden, unforeseeable and unmanageable. The Explanatory Memorandum prefacing the instrument regularly refers to events of 2015 as a “refugee crisis” for which Member States would have needed such a regime, but without explaining how the increase in applications that year would fulfil this definition for individual Member States. Furthermore, the

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<sup>19</sup> See: European Commission, Questions & Answers: Recommendation on the conditions for resuming Dublin transfers of asylum seekers to Greece, available at: <https://bit.ly/3UL8ooz>.

<sup>20</sup> European Commission, ‘Statistics on migration to Europe’, available at: <https://bit.ly/3lLksAG>.

recitals provide little further guidance, pointing to a broad interpretation of the concepts at hand. Thus, it is unclear how the Commission will conduct the assessment and contribute to a delineated concept, which can be evaluated against objective criteria. Without this clarity it will not be possible to ensure that these remain exceptional measures, not to be used at will whenever Member States face an increase in applications which could in fact be managed, especially if asylum systems are robust.

The final text of the Crisis Regulation no longer refers to “an imminent risk of crisis”, in contrast the initial Commission proposal. This is an important positive change, as including the mere “risk” of a crisis would have added to the uncertainty.

#### *What constitutes instrumentalisation?*

Article 1(4)(b) lays down the definition of the other crisis scenario, instrumentalisation, largely taken from the amended Schengen Borders Code (SBC) proposal of 2021, Article 1(1), albeit with a few changes.

Instrumentalisation occurs when the third country or hostile non-state actor “encourages or facilitates the movement of third country nationals or stateless persons to the external borders or to a Member State”. Recital 19 specifies that although it is not an external border, instrumentalisation can occur at the green line in Cyprus.

In the final text of the Crisis Regulation, instrumentalisation may be carried out by a third country (i.e. a non-EU Member State) or by a “hostile non-state actor”. The latter is a major addition to the original definition put forward by the Commission, which had been prompted by the 2021 crisis with Belarus and thus focused on the actions of states.

The inclusion of non-state actors was a contentious topic because it significantly broadens the scope of the concept to potentially cover almost all situations at the EU’s borders. This resulted in the insertion of the qualifying term “hostile” as a compromise between the Council position, which referred to non-state actors in general, and the European Parliament’s.<sup>21</sup> Article 1 does not further explain how to assess if a non-state actor is “hostile”. Moreover, Recitals 15 and 16 only exclude certain situations involving non-state actors – organised crime, particularly smuggling, and humanitarian assistance – on the basis that they would not fulfil a further criterion, that of the “aim to destabilise the Union or a Member State”.

Contrary to the initial definition in the SBC proposal, the final text no longer specifies that the actor must “actively” encourage or facilitate, which would have slightly restricted the definition by requiring some positive action. The preamble does not define the concepts of “encouraging” or “facilitating”. This is particularly problematic as these terms are broad: for example, encouraging could cover a multitude of actions, creating a further risk of overuse of the supposedly “exceptional regimes” foreseen in the Regulation.

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<sup>21</sup> It should be recalled that the European Parliament adopted a negotiating position on the Crisis and force majeure proposal without merging in the content of the instrumentalisation proposal, and never adopted a position on the latter; thus, it did not have a formal negotiating position on this point, but several MEPs amongst the shadows were critical of extending instrumentalisation to non-state actors.

Finally, the third country or hostile non-state actor must act “with the aim of destabilising the Union or a Member State”, and these actions must be “liable to put at risk essential functions of a Member State, including the maintenance of law and order or the safeguard of its national security”. It is not required that the actions actually put at risk state functions, only that they are “liable” to do so, further broadening the already broad and unclear concept that is “to put at risk” essential state functions. The deletion of territorial integrity as an example of an essential state function is a welcome development, as insinuating that the arrival of migrants can be a threat to a country’s territorial integrity has no basis in law and contributes to a misleading narrative on arrivals as an “attack” on the EU and Member States.

In situations of instrumentalisation (in contrast to the other two situations), the derogations granted by a potential Council decision can only be applied against the people arriving who, first, are subject to instrumentalisation, and who, second, are apprehended or found in proximity of the external borders of the EU, are disembarked following a SAR operation, or have presented themselves at a border crossing point. If one of the two conditions is not fulfilled, the Member State may not apply the derogations in their case.

### Implementation considerations

ECRE is highly concerned about the impact of the codification in EU law of the damaging concept of ‘instrumentalisation’. Its introduction into law crystallises two risks: first, initially that temporary and exceptional measures become permanent law; second, that, at the same time, state practices of questionable legality, including those based on false concepts of refugees as a weapon, are legitimised through EU law.

In addition, ECRE is opposed in principle to responses based on expanding and normalising derogations 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. Expanding their use to the point of normalising derogations may signal the end of a common system, generating risks of arbitrariness, with Member States following different rules and opting in and out of the CEAS as they wish.<sup>22</sup> This will mean that standards of protection will continue to fall. Moreover, given the current climate of non-compliance by Member States and lack of enforcement measures taken by the Commission, a derogations regime such as the one introduced may serve to worsen the ongoing rule of law crisis.<sup>23</sup>

The definition is silent as to the number of people whose movement is encouraged or facilitated in situations of instrumentalisation, meaning that it can also cover situations where the numbers are very small. The Explanatory Memorandum refers to instrumentalisation by Belarus against Latvia, Lithuania and Poland at the end of 2021 where the number of third country nationals concerned were low compared to other situations at other EU external

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<sup>22</sup> ECRE, *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*, January 2022, available at: <https://bit.ly/3JZrDph>.

<sup>23</sup> ECRE, ‘Joint Statement: NGOs call on Member States: Agreeing on the Instrumentalisation Regulation will be the Final Blow to a COMMON European Asylum System (CEAS) in Europe’, 8 September 2022, available at: <https://bit.ly/3TMJ54h>.

borders,<sup>24</sup> albeit a significant increase from the usual numbers for the countries in question. Thus, there is a significant risk that, contrary to mass arrivals, instrumentalisation could be used to obtain derogations for situations concerning a very limited number of arrivals.

In this regard, it can be argued that, for the activation of the instrumentalisation regime to be in line with the proportionality principle, it would require a situation of a significant scale, given the severe effects the attached measures will have on fundamental rights. However, proportionality can be judged in different ways. States have argued and will argue for instance that the response is proportionate given the security risks – to be measured against the dimension or magnitude of the security risks rather than the number of people arriving.

### *National security in the asylum context*

As mentioned above, the definition of instrumentalisation includes that a third country or hostile non-state actor should represent constitute a risk to “essential functions of a Member State”. ECRE argues that, if the definition is applied strictly, in line with the principle of proportionality and given the significant impact on fundamental rights, the criteria to determine a situation of instrumentalisation exists will only be fulfilled in rare circumstances. These would have to involve an unexpected, very significant number of new arrivals within a particularly short timeframe such that essential state functions are threatened. This is all the more important given the frequent presentation of the arrival of refugees as a security threat, and the related tendency of states to misuse the excuse of national security to restrict the rights of people on the move.<sup>25</sup>

The allegation of threats to national security, notably in individual asylum cases, is regularly poorly, if at all, justified by the authorities through legal and factual reasoning. Moreover, in some countries, judicial remedies in cases related to national security assessments have been largely ineffective, with courts reluctant to examine the credibility of the national security allegation or the lawfulness of this classification.<sup>26</sup> The CJEU has in the context of both asylum and visa decision-making processes recalled that applicants against whom security grounds are argued retain their right to an effective remedy, which entails important procedural guarantees. Notably, the right of good administration includes an obligation for the administrative body to give the reasons for its decisions,<sup>27</sup> applicants must be given the opportunity to express their views on the information used against them,<sup>28</sup> and Article 47 of

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<sup>24</sup> Centre for European Policy Studies for the EPRS, *Proposal for a regulation addressing situations of instrumentalisation in the field of migration and asylum, substitute impact assessment*, October 2023, available at: <https://bit.ly/3TETrFe>, p. 13ff.

<sup>25</sup> Notably highlighted in CJEU, *M.A.*, C-72/22 PPU, 30 June 2022, available at: <https://bit.ly/48WvL3n>, notably para. 90.

<sup>26</sup> For a detailed overview of applicable standards deriving from EU and international law as interpreted by the CJEU and the ECtHR regarding effective remedies, access to classified information and security-related asylum cases, see Hungarian Helsinki Committee, *The right to know in the European Union: Comparative Study on Access to Classified Data in National Security Related Immigration Cases*, April 2024, available at: <https://bit.ly/3JyZsNS> and Hungarian Helsinki Committee and ECRE, *Effective remedies in national security-related asylum cases, with a particular focus on access to classified information*, May 2022, available at: <https://bit.ly/3U2ocmf>.

<sup>27</sup> CJEU, 4 November 2020, *R.N.N.S., K.A. v Minister van Buitenlandse Zaken*, Joined Cases C-225/19 and C-226/19, available at: <https://bit.ly/3UvImYt>, para. 34.

<sup>28</sup> CJEU, 22 September 2022, *GM v Országos Idegenrendészeti Főigazgatóság, Alkotmányvédelmi Hivatal, Terrorelhárítási Központ*, C-159/21, available at: <https://bit.ly/3Wec8RD>, para. 58.

the EU Charter entails that “judicial review of that decision cannot be limited to a formal examination of the grounds but must also cover the legality of that decision, taking into account all of the elements in the file, both factual and legal, on which the competent national authority based that decision.”<sup>29</sup>

#### *Exemptions for non-state actors*

According to the final text of the Regulation, certain non-state actors are presumed not to be engaging in instrumentalisation. This covers “situations in which non-state actors are involved in organised crime, in particular smuggling” and humanitarian assistance (Recitals (15) and (16)). However, although ECRE welcomes these exemptions – as the extension of the scope to smugglers would have led to most arrivals being possible cases of instrumentalisation - the phrasing is unclear. The recitals state these “should not be considered as instrumentalisation when there is no aim to destabilise the Union or a Member State”. ECRE recommends that this be interpreted as a strong presumption that these activities do not have such an aim, rather than requiring the non-state actor to prove the negative. It should be up to the Member State to explain how, in such a situation, there is an aim to destabilise the state or the Union.

In addition, there is no definition of humanitarian assistance provided in the text, which raises concerns given the wide understandings of the notion across the EU and the increasing trend of criminalisation of provision of assistance to people seeking asylum, including of SAR activities.<sup>30</sup> The text also does not explicitly include migrants themselves - despite them being disproportionately affected by the criminalisation of smuggling and solidarity - as part of this exemption. The Commission, when evaluating the existence of instrumentalisation, should thus interpret the notion of humanitarian assistance broadly and set a heightened standard of proof for the aim.

How the intention of a non-state actor (or state) is to be ascertained is not addressed in the regulation, yet it will prove a crucial element of the definition. In the example cited in the Memorandum, that of Belarus, or the most recent example used by the Commission and a Member State (Finland), that of Russia, neither of these countries has publicly admitted to facilitating the movement of third country nationals towards the EU nor have they stated that they aimed to destabilise the EU for any reason. Even if there were political statements to this effect, they would not necessarily reflect reality, and, depending on the authority issuing the statements, might not be considered reliable enough to be a faithful reflection of a government’s intentions. The risk is then that Member States will argue that many behaviours demonstrate an aim to destabilise the Union, such as enabling visa-free movement for third country nationals or refusing to cooperate on returns, a situation Member States highlight as a significant obstacle to effective return policies.

Since the introduction of the proposal – and even before – there have been many public allegations of instrumentalisation, signifying that Member States and potentially the EU institutions, view it as a common occurrence: Belarus with Lithuania, Latvia and Poland; Türkiye vis à vis Greece; Spain vis à vis Morocco; Russia vis-à-vis Finland. In the latter

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<sup>29</sup> CJEU, 4 November 2020, *R.N.N.S., K.A. v Minister van Buitenlandse Zaken*, Joined Cases C-225/19 and C-226/19, available at: <https://bit.ly/3UvImYt>, para. 48.

<sup>30</sup> See European Union Fundamental Rights Agency (FRA), *Criminalisation of migrants in an irregular situation and of persons engaging with them*, 27 March 2014, available at: <https://bit.ly/4axTkBt>.

example, the Finnish authorities decided to entirely shut down the border following just 900 people presenting themselves at the Finnish border in November 2023.<sup>31</sup>

Overall, the definition lacks legal precision; the constitutive elements of the definition are too broad and unclear, both as to their meaning and scope. It remains entirely unclear how they could be proven based on a scientific approach. There are no benchmarks provided, or specific evaluation criteria. All this in turn makes it particularly difficult to envisage a rigorous, evidence based and non-politicised assessment. The premise of the definition, that people arriving in a Member State or at the external borders of the EU inherently carry harmful potential and can put in peril essential state functions, has, as established by the CJEU,<sup>32</sup> no basis in law or reality and generally seeks to perpetuate false narratives, making the entire definition very difficult to implement.

#### *When can force majeure be invoked?*

Finally, and in contrast to the Commission's proposal, Article 1(5) of the finalised Crisis Regulation includes a definition of force majeure. The absence of a definition was widely criticised,<sup>33</sup> given the regime associated with it and its significant effects on fundamental rights. Previously, there was simply a recital referring to situations that arise "due to circumstances beyond the control of the Union and its Member States". Although ECRE welcomes the addition of a more detailed definition and that it is inserted into the operational provisions rather than the preamble, as was the case for the definitions of crisis/mass arrivals and instrumentalisation, many of its aspects remain unclear.

The definition can be broken down into three elements. First, at the heart of the definition of force majeure are "abnormal and unforeseeable circumstances outside a Member State's control". Second, the circumstances must be such that their consequences "could not have been avoided notwithstanding the exercise of all due care". Third, these circumstances must be so difficult to address for the Member State that they are prevented from complying with their obligations under the RAMM and APR. Two non-exhaustive examples are provided in the preamble, namely, pandemics and natural disasters.

With this definition, a state cannot invoke force majeure if it faces difficulties with applying the other relevant legal instruments, notably the recast Reception Conditions Directive (rRCD), the Qualification Regulation or the Screening Regulation. The absence of a reference to the Screening Regulation is of particular relevance, as the concepts at the heart of the Crisis Regulation are mainly centred around arrivals, and Screening is the first and main instrument to come into play. Similarly, in one of the examples provided in the preamble (i.e. pandemics), implementation of the Screening Regulation or rRCD would also be significantly affected. This definition does not pinpoint specific obligations under the RAMM and APR the Member State

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<sup>31</sup> See Jari Tanner for AP, 'Finland will close its entire border with Russia over migrant concerns', 28 November 2023, available at: <https://bit.ly/3vjul5o>. Please note that the number varied between sources, to up to 1,000 applicants in total.

<sup>32</sup> See CJEU, *European Commission v. Hungary*, C-808/18, 17 December 2020, available at: <https://bit.ly/3THn9JE>, notably paras 217-226; CJEU, *M.A.*, C-72/22 PPU, 30 June 2022, available at: <https://bit.ly/48WvL3n>, notably para. 90.

<sup>33</sup> 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/43mjR1y>.

is prevented from fulfilling in the context of force majeure. However, Article 3(6)(c) lists specific provisions that the Commission should examine when conducting its assessment as to the existence of a situation of force majeure, mainly Articles 27, 51(2) and 60(1) APR and Articles 39, 40, 41 and 46 RAMM, i.e. the ones from which derogations can be sought under this exceptional regime (see [Derogations](#)).

### Implementation considerations

As mentioned, the preamble (Recital 20) cites pandemics or natural disasters as examples of cases of force majeure. The Explanatory Memorandum by the Commission referred to the Covid-19 pandemic, as well as the situation between Greece and Türkiye in 2020 (which ECRE has argued is clearly not a case of force majeure, as it was both foreseeable and foreseen).<sup>34</sup> The Crisis and Force Majeure proposal was put forward one year before the Instrumentalisation proposal, with the concept of instrumentalisation broadened between the Council Decision and the legislative proposal in order to capture the situation between Greece and Türkiye.

The concept of force majeure exists in various fields of international public law as well as EU law. Thus, there is a high risk of diverging interpretations of the concept. ECRE has argued that its introduction into refugee law is in itself an inappropriate misuse of the concept, and one that generates significant risks for the global protection system as a whole. The concept was seized upon opportunistically by Member States when it became more widely discussed (in the context of contract law) during the pandemic. It is surprising that the EU Institutions' legal services have allowed its misapplication in the asylum context.

Nevertheless, inserting the concept into the CEAS does not suffice to ensure the legality of its use. Emergency measures are only admissible where they are justified within the parameters of applicable legal systems. Definitions of the concept of force majeure should thus take into consideration established usage and the jurisprudence of both the CJEU and the ECtHR, so as to prevent its misuse.<sup>35</sup>

The CJEU has never applied the force majeure to asylum, but has underlined in other cases that the force majeure concept “does not have the same scope in the various spheres of application of EU law, its meaning must be determined by reference to the legal context in which it is to operate”.<sup>36</sup> It has also provided a general definition, whereby force majeure must be understood “as referring to abnormal and unforeseeable circumstances which were outside the control of the party by whom it is pleaded and the consequences of which could not have been avoided in spite of the exercise of all due care”.<sup>37</sup> Furthermore, the Court places specific emphasis on the procedural aspect of applying the force majeure concept, asserting that it should be interpreted strictly, as it represents an exception to the rule.<sup>38</sup>

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<sup>34</sup> Ibid., p. 17.

<sup>35</sup> See notably ECRE, *Derogating from EU asylum law in the name of “emergencies”: the legal limits under the law*, June 2020, available at: <https://bit.ly/3vYyPii>.

<sup>36</sup> CJEU, 25 January 2017, *Tomas Vilkas*, C-640/15, available at: <https://bit.ly/3UtOQWO>, para. 54.

<sup>37</sup> CJEU, 28 April 2022, *C, CD v Syyttäjä*, C-804/21 PPU, available at: <https://bit.ly/3Ucp08q>, para. 44.

<sup>38</sup> CJEU, 28 April 2022, *C, CD v Syyttäjä*, C-804/21 PPU, available at: <https://bit.ly/3Ucp08q>, para. 45.

Article 15 of the European Convention on Human Rights (ECHR) regulates the possibility for states to derogate, “in exceptional circumstances (...) in a limited and supervised manner, from their obligations to secure certain rights and freedoms under the Convention”.<sup>39</sup> Article 15 ECHR only allows a Member State to derogate “in time of public war or other public emergency threatening the life of the nation”. The latter have been defined as “an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed”,<sup>40</sup> and must be so exceptional that “the normal measures or restrictions permitted by the Convention (...) are plainly inadequate”.<sup>41</sup> Although it is in principle up to the national authorities to determine the existence of such a situation under the Convention, their discretion is not unlimited.<sup>42</sup> Lastly, in addition to tightly circumscribing the possibility for states to derogate from the convention itself, the Convention highlights that a state may only do so “provided that such measures are not inconsistent with its other obligations under international law.” (Article 15(1) ECHR). This includes for example the 1951 Refugee Convention and the principle of non-refoulement, also contained in Article 3 ECHR, which is a non-derogable right even under the regime of Article 15.

The concerns are broadly the same for all three definitions: they are vague, and prone to political and non-neutral interpretation. There is thus a considerable risk that the definitions be misused and have severe detrimental effects on the rights of people on the move, given the regime attached to the concepts. Given that it will be up to the European Commission to implement the definitions by determining the existence of a situation of crisis or force majeure, it should take into account the following:

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<sup>39</sup> ECtHR, *Guide on Article 15 of the European Convention on Human Rights*, Updated 31 August 2022, available at: <https://bit.ly/49TPrWn>, para. 1.

<sup>40</sup> ECtHR, 1 July 1961, *Lawless v Ireland (No. 3)*, Application 332/57, available at: <https://bit.ly/3QlisDo>, para. 28.

<sup>41</sup> ECtHR, *Guide on Article 15 of the European Convention on Human Rights*, Updated 31 August 2022, available at: <https://bit.ly/49TPrWn>, para. 10.

<sup>42</sup> *Ibid.*, para. 14.



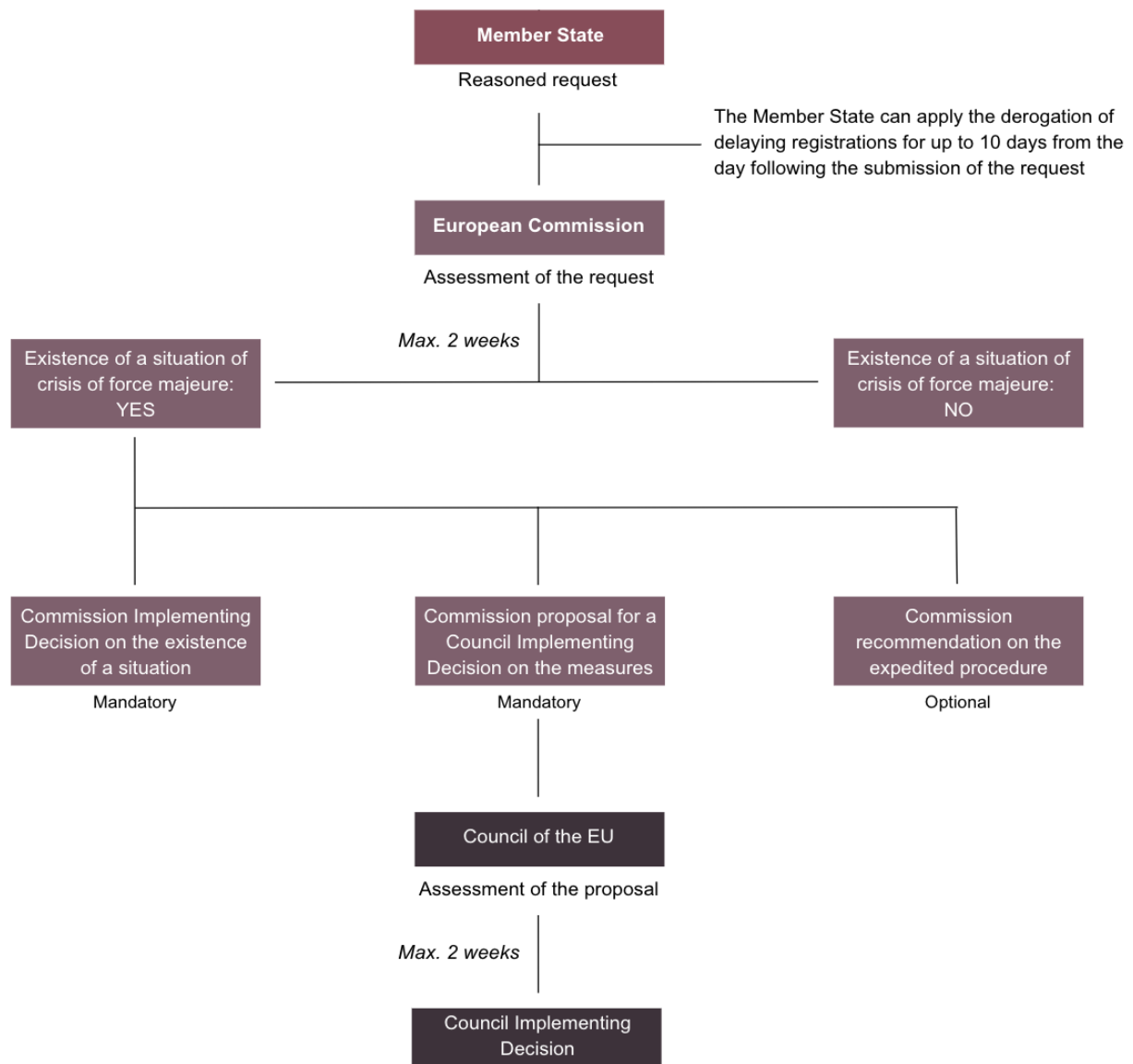
### **ECRE's recommendation on the application of the definitions of mass arrivals, instrumentalisation and force majeure**

- The implementation of these definitions should be constantly informed and guided by the principles of necessity and proportionality. Overall, it should be recalled that the Crisis Regulation is reserved for exceptional circumstances, which should be reflected in the practice regarding its use.
- The Commission should offer guidance and set clearly defined and detailed standards for all three definitions, to ensure appropriate information of Member States and harmonised implementation across the EU.
- The concepts should be defined and implemented based on a consistent, rigorous, evidence-based, and non-political assessment.
- In defining and implementing the concepts, the Commission should ensure minimal overlap between the three concepts, as there are different regimes attached to each.
- Regarding the definition of mass arrivals:
  - The assessment must be made against the standard of a well-prepared robust asylum system, which has capacity to manage usual asylum flows and which has foreseen and implemented, in its national framework, ways to temporarily enhance its capacities – for example, through the use of the expedited procedure or TPD where necessary - without immediately resorting to non-compliance with its obligations under EU and international law.
  - The concept of systems being rendered non-functional, and affecting the CEAS as a whole must be interpreted restrictively, based on previous experience of the EU where despite increased arrivals no systems were rendered entirely non-functional.
  - When assessing the scale of arrivals, the Commission should take into account the fact that most arrivals to Europe occur through legal migration pathways, and these should have very limited weight in the overall assessment of increased arrivals, as they are by essence not unpredictable, sudden or unmanageable.
- Regarding the definition of instrumentalisation:
  - The possibility of considering non-state actors as actors of instrumentalisation should be an exceptional circumstance. Moreover, the Commission should ensure that the concept of humanitarian assistance is understood uniformly by all Member States. People on the move should never be considered actors of instrumentalisation.
  - The concepts of 'encouraging' and 'facilitating' should be clearly defined by the Commission and understood as requiring positive action.
- Regarding the definition of force majeure:
  - The concept of force majeure should be interpreted restrictively, in line with international and EU law.

## Chapter II: Governance

The second chapter sets out how the three special regimes can be triggered and the scope of the extraordinary measures decided. In the preamble, Recital 25 specifies that a Member State may argue that they are simultaneously facing more than one of the two situations (crisis including instrumentalisation and/or force majeure) and thus may request – and may obtain –

authorisation to simultaneously apply extraordinary measures based on either ground, since they are “conceived as complementary”.  
 The following figure presents the governance structure to trigger the application of the Crisis regulation.



*Article 2: Reasoned request by a Member State*

If a Member State believes it is facing one or more of the situations it initiates the triggering of the Crisis Regulation, by sending the European Commission a reasoned request for extraordinary measures. This is in order to allow the Member State in question to balance “proper management” of the situation, including through derogations, “while ensuring that the applicants’ fundamental rights are respected” (Article 2(1)).

Article 2(2) sets out the required content of the reasoned request: the Member State must describe the exceptional situation and how it corresponds to the definition of crisis – mass arrivals, instrumentalisation and/or force majeure, and state the measures, including both solidarity and derogations, from which it wishes to benefit.

The provision specifies that for a Member State to argue a situation of mass arrivals, they must describe how such arrivals have rendered their system(s) non-functional; explain the measures they have already taken to address the situation; and demonstrate why their system cannot address the situation without resorting to the measures contained in the Regulation, even with a well-prepared system and the measures already taken.

For instrumentalisation, the Regulation puts the emphasis on justifying how the situation as described in Article 1 results in a risk to a state's essential function.

In the case of force majeure, there are no further details: Article 2(2)(iii) repeats the definition of Article 1, *inter alia* highlighting that the country should prove the consequences could not be avoided "notwithstanding the exercise of all due care".

### Implementation considerations

These requirements constitute a positive addition compared to the initial proposal which did not provide details on the content of the reasoned request and the assessment by the Commission (see Article 3). In particular for crisis situations, requiring that a Member State already seek to address the situation through measures that do not require an exceptional regime should limit over-use, especially if assessed rigorously.

Similarly, the requirements that Member States demonstrate that their systems were well-prepared in the case of crisis and that they exercised due care in the case of force majeure, should be interpreted strictly and with reference to the obligations set out in the CEAS as a whole. Otherwise, there is a strong risk that Member States invoke the special regimes instead of addressing existing shortcomings affecting their national asylum and reception systems, effectively avoiding tackling their lack of preparedness and proper contingency planning, and leading to self-created crises.

The wording of this provision remains vague, however, with Member States only required to provide "a description" of all these elements. A definition of the concept of well-preparedness is not provided for in the Regulation, but can be found in Recital 8 of RAMM,<sup>43</sup> which defines it as the necessary capacity in terms of "human, material and financial resources and infrastructure to effectively implement asylum and migration management policies". Additionally, it can be inferred from Article 9 of RAMM<sup>44</sup> that the Annual Asylum and Migration Report will constitute the main source of information for the assessment of Member States' preparedness. Given that no numerical threshold is provided it will be particularly important that the European Commission requires that the reasoned requests contain thorough, detailed analysis and robust data. In particular, it is key to look at all areas of national asylum systems, including reception conditions and access to asylum procedures, and to ensure that said

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<sup>43</sup> "In order to ensure that their asylum, reception and migration systems are well prepared and that each part of those systems has sufficient capacity, Member States should have the necessary human, material and financial resources and infrastructure to effectively implement asylum and migration management policies, and allocate the necessary staff to their competent authorities for the implementation of this Regulation. The Member States should also ensure appropriate coordination between the relevant national authorities as well as with the national authorities of the other Member States."

<sup>44</sup> See ECRE, ECRE Comments on the Regulation of the European Parliament and of the Council on asylum and migration management, amending Regulations (EU) 2021/1147 and (EU) 2021/1060 and repealing Regulation (EU) No 604/2013, May 2024, available at: <https://bit.ly/3wqZPqW>, p. 9.

analysis is based on information collected from a broad range of sources, including the EUAA, FRA, national and international organisations.

There is even less onus on the Member States when it comes to requesting extraordinary measures, as a Member State only need to list the solidarity and/or derogation measures “that it considers necessary”. In order for these extraordinary legal regimes to appropriately fulfil their purpose, this should be interpreted by the European Commission as requiring that the Member State justify how the measures it is requesting will address each element of the crisis or instrumentalisation situation it has previously described. This will help to ensure that only the necessary measures are applied, for the shortest time necessary as required by Article 1(2) and (3) of the Regulation. According to Article 2(2)(b), the Member State can specify which type of solidarity measure it considers necessary: the choice of some and not others should also be duly justified based on the situation described.

Finally, Article 2(2)(d) specifies that in case the Member State is requesting permission to apply the border procedure to all arrivals subject to instrumentalisation, it must in its reasoned request specify which special guarantee it intends to apply for specific categories of applicants (see *Border procedure – vulnerable applicants*).

### *Article 3: Commission implementing decision establishing a situation of crisis or force majeure*

Once the reasoned request has been prepared by the Member State, it is assessed by the European Commission, which has sole authority to determine whether a situation of mass arrivals, instrumentalisation or force majeure exists. This assessment must take place “expeditiously”, in close cooperation with the Member State (Article 3(1)). Thus, the Commission must be able to ask for further information and the Member State should cooperate in providing this information immediately, given the short timelines faced by the Commission.

The European Commission shall, for its assessment, consult with relevant EU agencies and international organisations: UNHCR and IOM are explicitly mentioned (Article 3(1)). The amount of information the European Parliament is to receive is unclear: Article 3(3) only requires that the Commission “immediately” notifies the European Parliament, the Council and the Member States that it is undertaking such an assessment. ECRE argues that in order for it to be able to effectively exercise oversight over the Commission as foreseen by the treaties,<sup>45</sup> the European Parliament should immediately have access to a copy of the reasoned request.

### *Assessment of instrumentalisation*

The Commission’s assessment of instrumentalisation specifically is broken down in more detail in Article 3(4), which sets out the minimum elements that have to be part of the evaluation. In addition to the elements in the definition as presented in Article 1, and recalled in Article 3(6), the provision specifies that the Commission should examine whether there has been “an unexpected significant increase in the caseload of applications for international protection at the external borders or in the Member State concerned compared to the average

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<sup>45</sup> Article 17(8) TEU.

number of applications”. However, this is not further explained, and a number of factors could significantly affect this evaluation. For example, the outcome of the assessment will vary depending on whether it considers applications made or applications lodged; on whether it uses data available through Eurostat or that published at the national level; and on which period of time is taken into account in evaluating the increase. Furthermore, there is no threshold set for quantifying a “significant” increase.

Given the increasing use of advanced surveillance and monitoring tools, it is also difficult to envisage how an increase could be truly “unexpected” by a Member State to such a degree that it would jeopardise the state’s functions. Lastly, although it should be the case in practice to respect the principles of necessity and proportionality, the definition of instrumentalisation does not refer to increased arrivals per se but rather to the manner of their arrival, i.e. through manipulation by an external actor with a specific aim. Additionally, while the definition provided in Article 1 regarding a situation of instrumentalisation refers to the conduct of a third country or a hostile non-state actor that “encourages or facilitates the movement of third-country nationals or stateless persons to the external borders or to a Member State”, Article 3(4)(a) requires the Commission only to assess “whether a third country or a hostile non-state actor is facilitating the movement of third-country nationals or stateless persons into the Union”.

Regarding proof of the aim to destabilise the Union or a Member State, the Regulation specifically states that the Commission assesses whether the Member State has proven the intention of the third country or hostile non-state actor, whereas for the other aspects of the assessment, the Commission seems to have more freedom regarding its sources and be able to do more proactive research.

Although this is not mentioned regarding the reasoned request or in the definitions, Article 3(4)(d) provides that the Commission shall assess whether the instrumentalisation situation could be addressed through the EU Migration Toolbox, foreseen in the RAMM.<sup>46</sup> Article 3(7) then requires that the European Commission, if it determines that there is a situation of instrumentalisation, to justify why it cannot be addressed through the toolbox. This Article serves as a form of safeguard, albeit a weak one.

Recital (28) foresees that when assessing the existence of a situation of instrumentalisation, it is relevant to consider “whether the European Council has acknowledged that the Union or one or more of its Member States are facing a situation of instrumentalisation of migrants”. This element is questionable firstly from a governance perspective.

The Regulation itself allocates specific powers to the Commission, which is tasked with carrying out an independent and rigorous assessment as to whether one of three exceptional situations is occurring. In order to meet its objectives, the Commission’s assessment should be rigorous and devoid of political considerations. Including the European Council’s assessment as a factor goes against the fundamental principles of the functioning of EU

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<sup>46</sup> Article 6(3) of RAMM introduces an “EU Migration Support Toolbox”, that would be offered to Member States in fulfilling their obligations. The Toolbox comprises various elements: (a) support from relevant EU Agencies; (b) support provided through EU funds; (c) derogations as foreseen in the Crisis and Force Majeure Regulation;<sup>46</sup> (d) the activation of the Union Civil Protection Mechanism; (e) measures to facilitate return and reintegration activities; (f) strengthened actions in the external dimension of migration; (g) enhanced diplomatic and political outreach; (h) coordinated communication strategies; (i) support to migration policies in third countries; (k) promotion of legal migration and well-managed mobility.

institutions, chiefly the independence of the Commission when carrying out its responsibilities (Article 17(3) TFEU). From the perspective of institutional competences, the European Council's role is to "define the general political directions and priorities" of the EU (Article 15(1) TFEU). The fact that the Council's declaration of a situation of instrumentalisation should be a relevant consideration appears to go beyond the scope of its powers as assigned by the Treaty, and overlap with competences of the Council of the European Union. Taking into account both these aspects, the provision is in line with two general trends regarding European asylum and migration policy, that is, the increasingly politicised role of the European Commission, and the incursion of Heads of Government and State into the technical aspects of law making and implementation. This is particularly concerning in this context, as Member States already have a political and practical interest in declaring themselves to face a situation of instrumentalisation, and will likely exert pressure in this sense on the Commission, which only risks being exacerbated by requesting to take the European Council's views into consideration in view of the decision.

#### *Assessment of situations of crisis and force majeure*

For its assessment of the existence of a situation of crisis or force majeure, according to Article 3(5) the European Commission is to take into account the information provided by the Member State in its reasoned requests, as well as information provided by Member States in the context of the European Annual Asylum and Migration Report foreseen by Article 9 RAMM.<sup>47</sup> Recital 27 moreover mentions information gathered through the EUAA and Frontex Regulations, and again highlights that to conduct the assessment, the European Commission should consult relevant EU agencies, in particular the EUAA, Frontex and FRA, and international organisations, especially UNHCR and IOM, but also other relevant organisations.

The Commission assesses the reasoned request, benchmarking the information contained therein against that of the same Member State in the two months prior and the overall situation of the Union (Article 3(5)). The fact that the Commission assesses the situation against only the preceding two months raises concerns: arrivals, applications and so on vary throughout the year based on a number of external factors, including the situation in countries of origin, residence and transit, the weather, repressive policies by countries of transit, activities of smugglers and many other factors. Thus, it could be that the situation in a Member State is significantly different from that of two months prior without it having anything to do with a situation that fits the definitions of crisis or force majeure. Benchmarking against only the last two months also risks encouraging Member States to seek extraordinary measures under the Crisis regulation following rapid fluctuations that last just one or two months, for which such measures are unlikely to meet the requirements of necessity and proportionality and might even contribute to worsening the situation.

Per Article 3(8), the European Commission must conduct its assessment and adopt a Commission Implementing Decision on the existence or not of a situation of crisis or force majeure within a maximum of 2 weeks. The Commission then adopts an implementing decision determining whether the requesting Member State is in a situation of crisis or force

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<sup>47</sup> See *ECRE Comments on the Regulation of the European Parliament and of the Council on asylum and migration management, amending Regulations (EU) 2021/1147 and (EU) 2021/1060 and repealing Regulation (EU) No 604/2013*, May 2024, available at: <https://bit.ly/3wqZPqW>, Article 9.

majeure, that it will then transmit to the Council and European Parliament. If the Commission considers one of the two situations is at play, it submits a proposal for a Council Implementing Decision. In such cases, the Commission may, but has no obligation to, adopt a Recommendation on applying the expedited asylum procedure to certain categories of applicants (Article 3(2)).

### Implementation considerations

ECRE cautiously welcomes the strengthened role of the Commission in the final text as compared to various earlier versions. It is particularly important that Member States do not have both the roles of reporting a situation crisis or force majeure and then deciding on whether or not it exists. Member States have a political and practical interest in declaring themselves to be in a situation of crisis or force majeure. Depending on the situation, they might benefit from significant derogations and enhanced solidarity, whilst being exempted from solidarity contributions. In any case, this will likely lead to tension between Member States because some Member States will feel they deserve such derogations because their responsibilities are greater, whilst others will be frustrated by the perception that not all are held to the same standards in terms of legal obligations and implementation.

ECRE has long argued that monitoring Member States' implementation of the CEAS and ensuring compliance should be a higher priority for the Commission.<sup>48</sup> However, an enhanced role of the Commission is not without risks. ECRE is concerned that, in recent years, the Commission has focused on certain aspects of the CEAS at the expense of others, and the reforms themselves could be seen as an example, with an emphasis on certain elements – returns, borders, restrictions on movement – rather than other elements, such as improving access to the procedure (and to territory) and to reception conditions, or tackling weaknesses in status determination. The Commission has also sought to respond to the pressures of Member States, with many of the proposals justified through reference to their interests. It has also been argued that the reforms prioritise the interests of certain Member States over those of others, for instance with strong emphasis on tackling “secondary” movement.

In this context, there are risks that the neutrality and objectivity of assessments of the situations facing Member States may be comprised. Thus, the enhanced role of the Commission should be balanced as much as possible with the consultation of EU agencies, in particular the EUAA and FRA, and relevant stakeholders, including UNHCR and IOM but also national asylum organisations who have a particular expertise which will be key to understanding the necessary complex situations at the heart of these extraordinary regimes.

It should also be noted that the Commission has limited tools for assessing the Member States' capacity and the situation on the ground, yet when it comes to actual data, the provision relies mostly on information provided by the Member State, either through the reasoned request directly, or indirectly, through the information Member States provide in the context of the RAMM, EUAA and Frontex Regulations. This may not allow the Commission to conduct a comprehensive assessment, as the Member States have a vested interest in the situation being recognised as a situation of crisis or force majeure. Therefore, it should prioritise reports

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<sup>48</sup> See *inter alia* ECRE, *Making the CEAS work, starting today*, October 2019, available at: <https://bit.ly/4clE9MK>.

by UNHCR and other expert and competent organisations, particularly at the national level, regarding the asylum and reception systems in the concerned Member State.

The Commission's assessment of the existence of a situation of crisis or force majeure must also be made in accordance with the basic principles set out in Article 1, i.e. necessity, proportionality, efficiency and always taking into account the impact on fundamental rights. Thus, the assessment of the existence of the situations must already take into account the principles of necessity and proportionality: the Commission can only rule that such a situation exists if it is so serious that it warrants the measures provided in the attached regimes, which, given the significant impact those measures will have on fundamental rights, is a high threshold to meet.

A further consideration on the assessment can be made. The Regulation as a whole does not appear to envisage a situation in which the Commission might recognise a situation of crisis and/or force majeure, while the Council decides the situation is not serious enough to warrant the extraordinary measures foreseen, despite these being two different decisions adopted by two separate institutions. This will likely result in further politicisation of the process, which could lead to opposite results. On one hand, the Commission might refrain from declaring one Member State as facing one of the crisis situations due to opposition from the others, which could in turn lead to the country affected to resort to further non-compliance with existing rules. On the other, countries could ally and pressure the Commission to recognise various exceptional situations at a time, leading to further de-harmonisation of the *acquis*.

*Article 4: Commission proposal and Council implementing decision authorising derogations and establishing solidarity measures*

Having established the existence of a situation of crisis or force majeure, the European Commission must simultaneously put forward a proposal for a Council implementing decision, which will set out the solidarity measures and/ or derogations to be authorised in this situation. The Commission must also inform the European Parliament of its proposal (Article 4(1)).

When it considers it appropriate, the European Commission may at the same time as it adopts a proposal for a Council implementing decision, adopt a recommendation on application of expedited procedure (Article 4(4)).

Article 4(2) recalls that the proposal must respect the principles of necessity and proportionality when laying out the derogations the Member State should be authorised to apply. The Commission may suggest only a solidarity response plan only derogations, or both, but this does not, at least abstractly, limit the Council in its final decision. When the Commission has established a situation of instrumentalisation, the proposal must specifically identify the third country nationals or stateless persons subject to that situation. Given the impact on fundamental rights, this identification should be evidence based, with a high level of detail to be exactly implemented, and foresee an individual assessment.

Specific requirements are set out for the draft solidarity plan. Article 4(2) foresees that the concerned Member State should be consulted, and it may request that relocations be the primary or only solidarity measure. However, the European Commission cannot draft the solidarity response plan in a way that would prevent Member States from choosing between different types of solidarity measures, as guaranteed for them by Article 57(4) RAMM. This is



reinforced by Recital 29: the Commission proposal should contain a draft solidarity response plan, “recognising that the various types of solidarity are of equal value, and respecting the full discretion of Member States in choosing the solidarity measures”.

The provision states that whether the concerned Member State is already benefitting from solidarity measures under the RAMM is relevant to the proposal. The draft solidarity response plan includes the number of relocation contributions needed, and when necessary the other relevant solidarity measures needed to address the situation. The solidarity measures should in priority be taken from the already available pledges from the solidarity pool established by the RAMM, on which Recital (30) highlights the Member State in crisis has priority of use, and the draft solidarity response plan should specifically indicate how much is to be taken; it is only when the available pledges are insufficient to cover the needs highlighted before that the draft response plan establishes the additional pledges needed. Lastly, the plan includes an indicative contribution of what constitutes the “fair share” of each Member State based on the distribution key of the RAMM.

Per Article 4(3), the Council has two weeks from receiving the proposal to assess and adopt a Council implementing decision, which can authorise the use of specific derogation measures and/or establish a solidarity response plan. If it does authorise derogations, the decision must include the grounds for the decision, as well as the start date and duration of the derogations (Article 4(5)). The decision must be in line with the principles of necessity and proportionality. If the decision includes a solidarity response plan, it shall include the same elements as required under Article 4(2) for the Commission proposal, i.e. the amount of relocations and potential other solidarity measures needed, the amount to be taken from existing pledges in the RAMM solidarity pool, subsidiarity the additional pledges needed if the solidarity pool is not sufficient, and the specific contribution of each Member State based on its fair share per the RAMM distribution key. Lastly, in case of instrumentalisation, the decision must identify the people subject to instrumentalisation (Article 4(5)(c)), as the measures, in particular the authorised derogations, may only be applied with respect to those persons, as foreseen in the definition of instrumentalisation in Article 1.

The Council must then “immediately” communicate the Council implementing decision to both the Commission and the European Parliament (Article 4(5)).

#### *Article 5: Duration, and Article 6: Monitoring*

Article 5 sets out the maximum duration of the extraordinary measures foreseen by this Regulation. In principle, per Article 5(1), derogations and solidarity measures can be authorised for a maximum of 3 months initially, and, unless they have been repealed in the meantime, extended for a maximum of 3 months. However, an extension can only be decided if the Commission has explicitly confirmed that the situation requiring the extraordinary measures persists. The Commission does so by proposing the adoption of a new Council implementing decision (Article 6(3)). After these 6 months, per Article 5(2), the concerned Member State may request another extension. In this case, the Commission may – but is not obligated to – submit a proposal for a new Council implementing decision that would either amend or extend the decided measures for maximum 3 months, which can again, upon confirmation by the Commission of the persistence of the situation, be extended by maximum 3 months. Article 5(3) confirms this by capping the maximum total duration of application of all

the measures at 12 months. They should not be applied longer than the duration of the situation of crisis or force majeure.

On the side of the Member State, Article 5(3) reinforces that it should not apply the derogations “longer than what is strictly necessary”, in any case within the parameters of the Council implementing decision.

Lastly, it should be noted that Article 10(4) sets out a shorter time limits for the delayed registrations derogation in some cases (see [Article 10](#)).

These are the maximum time limits: Article 6(1) entrusts the European Commission and Council with constantly monitoring whether the situation justifying the measures continues to exist. Per Article 6(3), when the Commission considers the situation no longer exists, it must propose a repeal of the Council implementing decision. Moreover, per Article 6(2), the Commission is tasked with particular monitoring of compliance with fundamental rights and humanitarian standards. In this context, it can ask the EUAA to initiate a monitoring exercise, and the Agency must comply with the request, per Article 15(2) EUAA regulation.

### Implementation considerations

In practice, it is likely that Member States might seek to request being recognised under consecutive or overlapping crisis situations – looking, for example, at the situation at the EU Eastern Borders - to extend the application of the extraordinary regimes beyond the established time limits. Based on this Article, ECRE argues that a Member State should not be able to benefit from further extraordinary measures after 12 months using the same set of initial circumstances, even if they are qualified in another way (e.g. originally as mass arrivals and then as instrumentalisation). A Member State not being able to fulfil its obligations in the case of a situation lasting more than 12 months implies that the circumstances are not actually the issue, but rather that the Member State is ill-prepared in the long term and should thus be supported to build resilient and durable capacity in the asylum system, rather than being granted derogations.

The monitoring and evaluation are largely left to the Commission. On the face of it, the fact that the measures are authorised and extended by three months rather than the six months in the original proposal, may help limit their use to what is strictly necessary and proportional. In practice, ensuring this happens will depend on rigorous, continuous assessment by the Commission, in order to ensure that, even with the initial derogatory and solidarity measures, the situation is still such that it requires the exceptional derogations foreseen by the Regulation.

As discussed in relation to Article 3 and the initial assessment, the Commission’s monitoring and re-assessment may be too limited in scope, given that the data referred to by the Regulation is all supposed to come from the Member States, which in turn have an interest in the measures being renewed. The risk then is that the Commission is not able to provide a comprehensive, neutral assessment of the situation at hand when it assesses the persistence of situations of crisis and/or force majeure. This will also render monitoring of the compliance with fundamental rights particularly difficult, especially in the absence of independent monitoring mechanisms.

In order to mitigate these risks, the European Commission should once again consult all relevant stakeholders, both at the EU at the national level, including civil society actors, independent national human rights mechanisms such as Ombudspersons, to gain a comprehensive picture of the situation. The Commission should also take into account however the discrepancies in independence, scope and effectiveness of current national monitoring mechanisms,<sup>49</sup> which should be strengthened in view of their expanded functions under certain Pact instruments. The efficiency of this assessment also depends on a clear and restrictive interpretation of the definitions of Article 1, to avoid overuse or unduly extension of the measures, which allow a Member State to not fulfil the obligations foreseen by the Pact. As regards the fundamental rights compliance monitoring, the European Commission should seize the opportunity offered by the Regulation and make use of the activities of the EUAA on the matter. Moreover, the Commission should complement its research with the information to be gained by the other monitoring mechanisms foreseen by the Pact, mainly for the Screening Regulation, the APR and the SBC, although their impact may be limited given their restricted scope<sup>50</sup> especially regarding border surveillance practices in the case of Screening, and risks of lack of independence.

**ECRE's recommendations on the application of the governance structure for the exceptional regimes of crisis and force majeure**

Given the unclarity of the definitions and the grave consequences of the regimes attached, the assessments and decisions taken by the Commission and the Council will be of crucial importance to avoid very real risks of unjustified and excessive restrictions of fundamental rights. In addition to the recommendations already formulated regarding the definitions, the following elements should be considered:

- Member States should first and foremost apply the flexibility of the general framework, and take additional measures permitted within the general framework, before resorting to the Crisis regulation. The European Commission should rigorously assess that the Member State has exercised all due care and proactively attempted to resolve the situation within the general framework before sending a reasoned request based on this regulation.
- Member State reasoned requests should be comprehensive, grounded in evidence, demonstrate precisely how the situation meets the definition, and why the additional measures taken do not suffice to resolve the situation durably. Although the Commission should make full use of the Member State's obligation to cooperate and request additional information as needed, given the short timeframe and the amount of other evidence the Commission needs to assess, it should also directly reject requests that are not sufficient comprehensive and grounded in proof.
- Copies of the reasoned request and the Commission proposal for a Council Implementing Decision should be sent to the European Parliament immediately upon issuance, while the assessments are taking place.

<sup>49</sup> For an updated overview on the requirements of a robust monitoring mechanism, see FRA, *Establishing national independent mechanisms to monitor fundamental rights compliance at the EU external borders*, 14 October 2022, available at: <https://bit.ly/496ktK2>.

<sup>50</sup> See *ECRE Comments on the Regulation of the European Parliament and of the Council introducing the screening of third-country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817*.

- The European Council acknowledging a situation of instrumentalisation should not affect the Commission's assessment of the situation: this has no basis in the governance structure, and goes against the prescribed roles of the institutions and fundamental principles of the functioning of EU institutions per the TFEU, chiefly the independence of the Commission.
- To conduct a thorough, comprehensive and impartial assessment, the Commission should gather additional information than that of the Member State from a broad variety of sources, including EU agencies (EUAA, FRA), international organisations, but also national asylum organisations, who have a particular expertise that will be key to understanding the national context, which inevitably plays a crucial role with how the extraordinary situations are handled.
- The Commission proposal and Council implementing decision must restrictively identify the people subject to instrumentalisation, using an evidence-based approach, with exact descriptions of the groups being instrumentalised, and foreseeing an individual assessment of the criteria.
- When drafting its proposal on measures to be authorised, the European Commission should carefully consider the Member State's EU and international law (non-)compliance record, as the derogations will place the Member State at an even higher risk of violation of fundamental rights. This also includes a particular assessment of the country's vulnerability identification mechanism, given that many derogations provide specific arrangements for vulnerable groups, and thus their identification is critical.
- Potential derogations authorised should strictly comply with the principles of necessity and proportionality, and should be assessed against these principles both individually, in silo, and against the background of the other measures requested and the measures that the Member State could independently take based on other instruments, notably the SBC.
- The European Commission should continually assess the situation in order to have up to date thorough analysis for the proposal to either repeal, amend or extend the measures, and should no longer recognise the situation as persistent as soon as it does not meet the high threshold required, including because of the measures authorised until then. This assessment should become more and more stringent with each renewal, as, the longer the situation lasts, the more likely it is the circumstances are not actually the issue, but rather that the Member State is ill-prepared on the long term and should thus be supported in resilient and durable capacity building, rather than granted derogations.
- The European Commission should prioritise its mission of monitoring fundamental rights and humanitarian standards, consulting with all relevant stakeholders, both at the EU and the national level, including civil society actors, independent national human rights mechanisms, to gain a comprehensive picture of the situation, and make use of EUAA expertise and experience through operations and the new monitoring mechanism.

### Article 7: EU Solidarity coordinator

The EU Solidarity Coordinator established by the RAMM<sup>51</sup> also plays a role in Crisis. Specifically, their additional duties consist of supporting relocations and promoting “a culture of preparedness, cooperation and resilience among Member States”, inter alia by encouraging sharing of best practices. When relocations are foreseen by the Council implementing decision, the Solidarity Coordinator is to prepare a fortnightly bulletin on the implementation of the relocation mechanism, to be communicated to the Council and the European Parliament.

### Chapter III: Solidarity measures applicable in a situation of crisis

Member States facing a situation of crisis, i.e. crisis – mass arrivals or instrumentalisation, but not those facing a situation of force majeure, may have access to solidarity measures to alleviate the pressure and resolve the crisis.<sup>52</sup> The comments on these measures should be read in conjunction with the ECRE Comments on the RAMM which include extensive analysis of the proposed solidarity mechanisms. Here, only the differences compared to the general regime of the RAMM will be expanded upon.

In the Crisis Regulation, there are various solidarity measures available to a Member State facing a crisis situation (hereafter “benefitting Member State”).

- According to Recital 30, the benefitting Member State has “priority to use the unallocated solidarity pledges or those that have not been implemented yet and that are available”;
- The benefitting Member State may then use the contributions laid out in the Council implementing decision (Article 8);
- Finally, after these measures have been applied, responsibility offsets (assumption of responsibility for applicants sur place) become mandatory (Article 9).

A Member State is not precluded from benefiting from solidarity measures under the Crisis Regulation even if it has not made use of the other elements of the Permanent EU Migration Toolbox of Article 6(3) RAMM.

Finally, it should be noted that the derogations foreseen in the Crisis Regulation are included in the toolbox as a form of support to Member States in fulfilling their obligations, a construction which further entrenches the idea of adaptable responsibility based on derogations.<sup>53</sup>

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<sup>51</sup> See *ECRE Comments on the Regulation of the European Parliament and of the Council on asylum and migration management, amending Regulations (EU) 2021/1147 and (EU) 2021/1060 and repealing Regulation (EU) No 604/2013*, May 2024, available at: <https://bit.ly/3wqZPqW>.

<sup>52</sup> There has been some debate on whether solidarity also applies in situations of instrumentalisation, however the text seems clear that it does. Article 8(1) states that “a Member State facing a situation of crisis may request...” solidarity contributions. Article 1(1) on definitions makes it clear that crisis includes instrumentalisation: Article 1(1), this regulation “addresses situations of crisis, including instrumentalisation, ...” and Article 1(4) “a situation of crisis means: (a) [mass arrivals] (b) [instrumentalisation]”. Throughout the Regulation, whether in Preamble or the Articles, a differentiation is made between situations that apply to just one of the two crisis situations (crisis – mass arrivals and instrumentalisation). On solidarity the reference is to crisis situations, rather than specifying only mass arrivals.

<sup>53</sup> See *ECRE Comments on the Regulation of the European Parliament and of the Council on asylum and migration management, amending Regulations (EU) 2021/1147 and (EU) 2021/1060 and repealing Regulation (EU) No 604/2013*, May 2024, available at: <https://bit.ly/3wqZPqW>.

### *Article 8: Solidarity and support measures in a situation of crisis*

When requesting specific measures, per Article 8(1), Member States can ask for all three types of solidarity: relocations, financial contributions, and, upon consent from the benefitting Member State, alternative solidarity measures.

Relocations can be either of asylum applicants, or – in certain circumstances –beneficiaries of international protection (BIP). In the latter case, there must be a bilateral agreement between the benefitting state and the destination state, and the relocations can only concern BIPs who were granted protection within the three years prior to the Council implementing act establishing the Solidarity Pool.<sup>54</sup>

Per Article 8(2) and Recital 37, when implementing relocations, the Member States must give “primary consideration” to relocation of vulnerable persons, especially but not limited to those with special reception needs. However, the concept of primary consideration is not further defined.. Overall, the scope of possible relocations is reduced compared to the initial Commission proposal, which also included irregular migrants, and return sponsorship transfers of irregularly staying third-country nationals or stateless persons.

In the context of the Crisis Regulation, solidarity as financial contributions should be aimed at “actions that are relevant to address the situation of crisis in the Member State concerned or in relevant third countries, in full respect of human rights”. The provision does not exclude any of the types of projects foreseen in the RAMM, which range from support in reception to pre-departure reintegration border management and operational support.

#### Implementation considerations

Although actions in third countries remain a possibility , where a Member State is facing a situation of mass arrivals or instrumentalisation it seems unlikely that such actions would rarely actually address the situation faced by the Member State and would thus not be considered as valid. Measures aimed at preventing onward movement from third countries involve risks of human rights violations, including regarding the principle of *non-refoulement*, and might also not meet the requirements set out by Article 8(2)(b). Similarly, supporting border management projects might serve to extend the duration of the crisis and/or push people to another external border, in addition to raising significant human rights concerns given the experience of recent years,<sup>55</sup> rather than contribute to solving the situation. On the other hand, projects focused on increasing reception capacity (outside of detention) and support asylum decision making could more obviously serve to alleviate the situation.

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<sup>54</sup> See *ECRE Comments on the Regulation of the European Parliament and of the Council on asylum and migration management, amending Regulations (EU) 2021/1147 and (EU) 2021/1060 and repealing Regulation (EU) No 604/2013*, May 2024, available at: <https://bit.ly/3wqZPqW>.

<sup>55</sup> See, amongst many others: European Parliament, ‘Frontex: MEPs refuse to discharge EU border agency over its management in 2020’, 18 October 2022, available at: <https://bit.ly/3Q1P719>; Council of Europe, ‘Anti-torture committee calls on European governments to put an end to pushbacks and prevent ill-treatment of foreign nationals at borders’, 30 March 2023, available at: <https://bit.ly/3XPnmuG>; EMN Belgium, ‘There were 346.004 illegal pushbacks of people migrating to Europe in 2023 according to human rights organisation 11.11.11’, 2024, available at: <https://bit.ly/4cepRNY>; 11.11.11, *Pushback report 2023, 2024*, available at: <https://bit.ly/3x8xDZz>.

Alternative solidarity measures are primarily capacity support measures. According to the RAMM, they must “be based on a specific request of the benefitting Member State” (Article 65 RAMM). In the case of Crisis, as with financial contributions, they are to be limited to those “specifically needed to address the situation of crisis”. Thus, although they are defined very broadly in the RAMM, as they can occur in the fields of “migration, reception, asylum, return and reintegration and border management, focusing on operational support, capacity building, services, staff support, facilities and technical equipment” (Article 56(2)(c) RAMM), their connection to solutions for the situation of crisis at hand should be assessed restrictively.

Finally, given that both the Member State can request EUAA assistance and the EUAA can offer it on its own initiative (Article 17(2) Crisis Regulation), and that these projects should only complement Union actions, these should in many cases not be prioritised, as given its expertise the EUAA will likely be in a much better position to intervene.

#### *Article 9: Responsibility offsets*

Article 9 allows for responsibility offsets in a crisis situation. Offsets were not part of the Pact proposals, but added by the Council, initially in the RAMM proposal,<sup>56</sup> and then carried over into the Crisis Regulation. As per the RAMM definition, responsibility offsets are the assumption of responsibility for an applicant's place. The Member State where the applicant is present which assumes responsibility would not otherwise be responsible for examining the application. It operates as a form of solidarity as the Member States contributing to the Solidarity Pool take responsibility for examining the international protection applications of people for whom a benefitting Member State has been determined as responsible.

Per Article 9(1), offsets cannot be combined with the removal of responsibility as a derogation from the RAMM rules provided by Article 13 of the Crisis Regulation. Moreover, if the Crisis Regulation is activated at the same time as the Temporary Protection Directive (TPD), and Member States when activating the TPD have chosen not to apply the responsibility rules in that context, mandatory offsets under this Article may not apply. This would also mean that, should the TPD be activated after a crisis situation has been established and the TPD responsibility rules are not included, then any mandatory offsets applied in the crisis situation would have to cease immediately.

#### *Activating responsibility offsets*

Per Article 9(1), when the additional relocation pledges do not meet the relocation needs identified in the Council implementing decision for the crisis situation (see Article 4), the other Member States must apply responsibility offsets, i.e. they must take responsibility for examining applications for which the benefitting Member State had been determined as responsible. These mandatory responsibility offsets should cover up to 100% of the relocation needs identified (as opposed to 60% in case of migratory pressure under the RAMM).

By derogation from Article 63(7) RAMM, this remains mandatory for states even when it brings them above their “fair share”. The procedure and limitations of scope identified in the RAMM apply (Article 63(6), (8) and (9) RAMM): notably, it must concern applications that are still within the transfer time limit, the applicant must be neither an unaccompanied child, a resettled

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<sup>56</sup> Thus, for a detailed analysis of the concept, see ECRE comments on RAMM.

or admitted person, a BIP, nor have absconded. Significantly, it can however concern applicants whose application has been rejected by a final decision in the benefitting Member State, and who then become subsequent applicants in the second Member State. If responsibility offsets are still insufficient to fulfil the needs, the High Level EU Solidarity Forum must be reconvened urgently (Article 9(2)).

Article 9(3) also allows the benefitting Member State to request that other Member States use responsibility offsets rather than relocations, under the procedure foreseen by Article 69 RAMM.

If a Member State has become responsible for applications above its fair share, whether it be through application of these offsets or through the Article 13 derogations, Article 9(4) allows them to deduct this additional contribution from future solidarity contributions. They can be deducted either from solidarity contributions under upcoming annual cycles of the RAMM, within 5 years, or under Council implementing decisions for crisis situation, again within 5 years, counting from the cessation date of the Council implementing decision that led to contributions beyond its fair share. To do so, they should notify the European Commission of the exact number of applications it has contributed above its fair share, and how much it intends to deduct (Article 9(5)). This is then checked and confirmed by the European Commission through an implementing act that formally authorise the Member State to do so.

#### Implementation considerations

Although solidarity measures, including the responsibility offsets, are valuable tools for responding to crisis situations, they add another layer of complexity to an already multi-layered and complex solidarity mechanism established by the RAMM. As well as the standard rules, the solidarity mechanism also includes adaptation scenarios where a Member State needs increased solidarity and/or exemptions from contributing..

Conflicts may arise, given that fulfilling the needs of the benefitting Member State under the Crisis Regulation may prevent the EU from fulfilling those of Member States under migratory pressure or that consider themselves migratory pressure per the RAMM. In this context, Article 9(6) Crisis Regulation requires another meeting of the High Level EU Solidarity Forum. Moreover, per Article 9(7), if the application of the measures under the Crisis Regulation leads another Member State into migratory pressure or to face a “significant migratory situation” , they can then request solidarity measures or a reduction up to 100% of solidarity contributions under the RAMM or Crisis Regulation. According to Article 9(7), a Member State taking responsibility above its fair share is a factor the Commission should take into account when the same Member State sends a reasoned request based on this Regulation. Thus, invoking solidarity under the Crisis Regulation may lead to a series of chain reactions.

#### The limited role of responsibility offsets

As responsibility offsets are advantageous to Member States and applicants alike, it is unfortunate that they are a secondary form of solidarity in the Crisis Regulation as well as in the RAMM.

They enter into play only if the other forms of solidarity do not suffice, serving as a guarantee for the benefitting Member State that a lack of pledges will not prevent it from benefiting from some form of relief in terms of applications. According to Recital 30, the Member State facing



a situation of crisis has “priority to use the unallocated solidarity pledges or those that have not been implemented yet and that are available”. It will then use the contributions laid out in the Council implementing decision. It is only then that responsibility offsets become mandatory.

Thus, the effectiveness of responsibility offsets may be reduced by the fact that they are a last resort solidarity measure. Member States must first utilise all the pledges of the Solidarity Pool. However, pledges are just that, pledges, and previous experience demonstrates that EU Member States usually do not fulfil them.<sup>57</sup> Nonetheless, neither the Crisis Regulation nor the RAMM refers to actual relocations. In addition, when they are used, offsets can only fill the gap between the pledges and the needs identified rather than also covering unfulfilled pledges.

Cleverly chosen solidarity measures will be one of the key solutions to help a Member State rapidly manage a situation of crisis, while maintaining compliance with fundamental rights. In this respect the following recommendations are important.

**ECRE’s recommendations on the use of the solidarity measures in the context of crisis and force majeure**

- Member States ensure that pledges are actually delivered, which has been shown to not be the case in practice.
- The Commission must ensure that pledges are not left unfulfilled, as this will only mean illusory relief for benefitting Member States and will also prevent responsibility offsets from coming into play as needed.
- High priority should be given to relocations because they – along with responsibility offsets – are the most efficient solidarity measures for overburdened Member States.
- Member State should give priority to vulnerable people, as well as respecting family links that are not strictly covered by the rules on responsibility contained in the RAMM.
- The EUAA, should take an active role in the facilitate of relocations based on its previous experience.
- The EUAA should make full use of its right to propose assistance for Member States facing crisis and force majeure situations.
- The Commission and the Council should closely assess financial support and alternative solidarity measures pledged in order to ensure a direct connected to durably resolving the Member State’s lack of capacity in facing extraordinary situation. This will have the added value of using a crisis to improve the asylum and reception systems.
- The Commission and Council must also assess the possible implications for other Member States of solidarity measures linked to limiting access to asylum or to restricting rights of applicants, such as border closures or expanded use of detention

<sup>57</sup> See notably ECRE, Joint Statement, ‘Seven priorities to expand resettlement and safe pathways to Europe’, September 2023, available at: <https://bit.ly/3TqwiAD>, and ECRE, *Solidarity: the eternal problem*, January 2023, available at: <https://bit.ly/3Vq738y>. In 2022, the EU Member States had pledges to resettle over 20,000 refugees, but only 16,695 were ultimately admitted, leaving thousands of people in limbo; in 2023, according to the UNHCR [resettlement data finder](#), approx. 12,567 people were resettled to the EU out of a 16,000 pledge; similarly, although approx. 8,000 pledges were received under the Solidarity Declaration of June 2022, as of November just over 100 persons had effectively been relocated.

and other last resort measures. An important to risk to consider is that of displacing the crisis to another EU border.

#### Chapter IV: Derogations

At the heart of the Crisis Regulation is the creation of derogatory regimes, allowing Member States to depart from EU standards regarding asylum in the three situations described as mass arrivals, instrumentalisation and force majeure. The derogations available for each special regime vary slightly and in each case the Member State can choose to request permission to apply one or more of the permissible derogations. The Member States operating one or more of the special regimes may thus be derogating in different ways from the standard rules set out in the RAMM and APR.

The table below provides an overview of the derogation available for each of the three special regimes. The text that follows examines each of the derogations in turn.

Derogations authorised by type of scenario			
Measures available – to be requested or proposed	Crisis - Mass arrivals	Crisis – Instrumentalisation	Force majeure
Derogations from the APR			
Extended registration deadline (up to 4 weeks)	Yes	Yes	Yes
Prolongation of the border procedure (to 18 weeks)	Yes	Yes	Yes
Exemption from applying the border procedure to certain applicants	Yes	No	Yes
Restriction of the scope of the border procedure	Yes (mandatory only for 5% recognition rate or below)	No	No
Expansion of the scope of the border procedure	Yes (mandatory for up to 50% recognition rate)	Yes (up to 100% recognition rate)	No
Derogations from the RAMM			
Extension of time limits for transfer requests, replies and completion	Yes	No	Yes
Lifting of responsibility for certain applications	Yes	No	No

While the Crisis Regulation provides for derogations from the new APR and RAMM, in contrast to the Commission proposal on instrumentalisation, it does not foresee any derogations from the rRCD. Recital 10 also confirms the full applicability of a number of other instruments, namely the Screening Regulation, the Eurodac Regulation, the Anti-Trafficking Directive, and the Qualification Regulation.

ECRE strongly advocated in favour of the deletion of derogations from the rRCD,<sup>58</sup> as such measures are incompatible with human dignity and added little value to the flexibility already foreseen by the rRCD itself in duly justified cases. Recital 9 explicitly emphasises that there can be no derogations from the “rules and guarantees” of the rRCD, including regarding material reception conditions. It is up to the Member State to increase its staffing and material resources to comply with its obligations under the rRCD. Recital 8 also recalls that the standards of the rRCD fully apply in a situation of crisis or force majeure as soon as an application for international protection is made – implementation of the rRCD should not be affected by the potential derogation of delaying registrations (see *Extended registration period*), particularly when it comes to detention of asylum applicants.

Recital (11) highlights, however, that implementation of the Crisis Regulation does not render impossible the adoption of other measures on the basis of Article 78(3) TFEU, which enables the Council, following a proposal from the Commission, to adopt provisional measures for the benefit of specific Member States in case “an emergency situation characterised by a sudden inflow of nationals of third countries”. The text underlines that the basis for derogation in an emergency situation continues to apply, meaning that derogations to more instruments can be introduced on a case-by-case basis as is currently possible, albeit strongly circumscribed by the CJEU.<sup>59</sup> ECRE argued against the introduction of derogations in secondary legislation on the basis that the provisions in Article 78(3) are already sufficient.

### Implementation considerations

ECRE believes that an approach based on introducing a list of permissible derogations from standard rules raises rule of law concerns, including in relation to compliance with primary legislation. The approach is contrary to the harmonisation objective of the CEAS under Article 78 TFEU.<sup>60</sup> By allowing states to derogate from the standards rules in different ways in three different special regimes, the new rules constitute a significant departure from a common system, and add additional layers of complexity, including regarding monitoring and enforcement.

It should be recalled that in case of instrumentalisation, any authorised derogation may only be applied with regard to the persons who have been specifically identified by the Council implementing decision, and not to all people applying for asylum in the Member State (Article (4)(b)). It will be important to monitor the application in practice of this safeguard.

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<sup>58</sup> See *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*, December 2021, available at: <https://bit.ly/31ZVJpY> ; *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*, January 2022, available at: <https://bit.ly/3TErXzw>.

<sup>59</sup> ECRE/ELENA, *Derogating from EU Asylum Law in the Name of “Emergencies”: the Legal Limits Under EU Law*, June 2020, available at: <https://bit.ly/49LK5MG>.

<sup>60</sup> See CEPS, *Proposal for a regulation addressing situations of instrumentalisation in the field of migration and asylum – Substitute Impact Assessment*, October 2023, available at: <https://bit.ly/4cDYIK3>, p. III; ECRE/ELENA, *Derogating from EU Asylum Law in the Name of “Emergencies”: The Legal Limits under EU Law*, June 2020, available at: <https://bit.ly/49LK5MG>.

## *Article 10: Registration of applications for international protection in situations crisis, of force majeure*

### *Registration derogation*

The first derogation, available in all three situations, is the possibility for the Member State to delay registration of asylum applications up to four weeks from the day the application was made (Article 10(1)). This derogation can apply to the registration of any application made during the application of the derogation. The preamble justifies this derogation by the fact that the Member State may “need time to reorganise its resources and increase its capacity”.

This is major derogation from Article 27 APR, which foresees that registration should take place within 5 days from the making of the application, extended to 15 days in case of a “disproportionate number” of applications at the same time.<sup>61</sup> ECRE argued that the APR already offers sufficient flexibility in the time limit to register applications, by granting Member States up to an additional 10 days.<sup>62</sup>

### *Prioritisation*

In applying this derogation, the Member State must – it is a “shall” clause – prioritise the registration of applications made by children and their families, as well as persons with special reception needs, as defined under the rRCD (Article 10(2)). It should be noted that this concerns all children, and not only those under 12 as under Article 11(7). It should be noted that people with special procedural needs are not mentioned here and thus there is no obligation to prioritise their applications.<sup>63</sup> Per Article 10(3), Member States also have the option of prioritising registration of applications likely to be well-founded.

Article 10(7) states that the delay in registration does not relieve the Member State of its obligations under Article 15(1)(b) Eurodac Regulation, which requires that the Member State take the biometric data of all applicants aged 6 and older who do not fulfil the entry conditions of the Schengen Borders Code. This has to be done as soon as they make their application if they do so at the external border crossing points or in transit zones and the Member State must then communicate the data to Eurodac within 72 hours.

Article 10(5) requires that the Member State “duly inform” the affected people of the measure of delayed registration, the location of registration points, and the duration of the measure (see Article 15, *Specific provisions and guarantees*).

Article 10(4) foresees that in the situation of mass arrivals, the Member State can only benefit from this derogation during the time period set out by the initial Council implementing decision, i.e. maximum 3 months (excluding the potential application before authorisation, see below), and not during any subsequent extension as foreseen by Article 5 of the Regulation,

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<sup>61</sup> This already constitutes an increase compared to previous legislation: article 6 APD provided that registration should in principle occur within 3 days, or 10 days in case of a large number of simultaneous applications.

<sup>62</sup> This was notably highlighted by Belgium and Slovenia during the negotiations in the Council: Council of the EU, *Compilation of replies by Member States*, 9863/23, 26 July 2023, available at: <https://bit.ly/4a64tcw>.

<sup>63</sup> Special procedural needs should be met as soon as possible in order to ensure the overall fairness and efficiency of the procedure. For example, they might require two substantial interviews instead of one, or a medical examination, or being given extra time to provide medical evidence, etc, all of which will lengthen the duration of the procedure in itself: their registration should thus occur as soon as possible to avoid their procedure becoming unreasonably long.

establishing that the duration of the extraordinary regimes can be extended up to 12 months in total. In cases of instrumentalisation or force majeure, however, the measure can be applied for up to 12 months, subject to the reassessments described under Articles 5 and 6, Duration and monitoring. Nevertheless, given that delaying registrations is justified by reference to capacity, and that mass arrivals is the situation characterised by significant numbers of arrivals, it may prove difficult to justify the renewal of this derogation in cases of instrumentalisation and force majeure.

The wording of the final text makes it clear that the registration of an individual application cannot be delayed beyond 4 weeks, regardless of how long the general derogation is authorised. This is a useful clarification compared to the original proposal.

Per Article 10(6), the extension of the registration deadline is the only derogation that a Member State can apply as soon as it sends its reasoned request, whilst waiting for the European Commission and Council to make their assessments and adopt the relevant decisions, a form of anticipatory application. The Member State must inform the Commission of its anticipatory application of the derogation and justify its decision by “indicating the precise reasons for which immediate action is required”. It may then apply the derogation for a maximum of 10 days from the day following the reasoned request. If both the Commission and Council decisions have been adopted within these 10 days and accept the derogation, the Member State may then continue to apply it. If one or both the decisions has yet to be taken after 10 days, the Member State must stop applying the derogation.

In this context, it is useful to recall that both the Commission and the Council each have 2 weeks to conduct their assessments and adopt their proposals and decisions (Articles 2 and 3). Although the Member State is required to justify why it is taking immediate action, there is no oversight of the application. The Member State only needs to notify the Commission, which cannot challenge the Member State’s reasoning. Thus, and since this derogation is available in all three scenarios, there is a strong risk that Member States will automatically apply this derogation for 10 days, even if the Commission ultimately rules that there is no situation of crisis or force majeure, or if this specific derogation is not authorised by the Council decision because it is in fact not strictly necessary and proportional to their situation.

### Implementation considerations

#### *Justification of the registration derogation*

ECRE argues that the registration derogation will only very exceptionally be justifiable, given that it will be hard to demonstrate that it is necessary and proportionate given the risks it poses to the right to asylum as enshrined by Article 18 Charter. This point was raised by Austria during the negotiations on the basis that quicker rather than delayed registration was key to solving situations of crisis. Several Member States also highlighted the increased risk of onward movement generated by delaying registration,<sup>64</sup> which the Pact generally seeks to punish.<sup>65</sup> In practical terms, people who have made an asylum application would still have to

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<sup>64</sup> Council of the EU, *Compilation of replies by Member States*.

<sup>65</sup> See ECRE, *ECRE Comments on the Regulation of the European Parliament and of the Council on asylum and migration management, amending Regulations (EU) 2021/1147 and (EU) 2021/1060 and repealing Regulation (EU) No 604/2013*, May 2024, available at: <https://bit.ly/3wqZPqW>.

be granted access to reception conditions, and identification of vulnerabilities and age assessment would still have to be conducted – the state is not alleviated of these responsibilities. Given that some form of information gathering would have to take place in order to ensure access to reception, it may be that delaying registration results in an additional burden – rather than support – for Member States in crisis situations.

### *Prioritisation*

In relation to the requirement to prioritise certain applicants, questions remain. First, beyond the basic point that prioritised applications will be considered before non-prioritised application, there is no other requirement for prioritisation. For example, it is not specified that shorter deadlines for registration of these applicants should be applied, which might be one element of prioritising – fastracking applications. Prioritisation is likely to be applied differently across the Member States. Second, there is no indication as to which authorities should carry out the assessments at this stage, both for special needs and well-founded applications. Border guards rarely have the appropriate training and expertise to do so; medical professionals would be best suited for assessing special needs, but applicants can rarely access them with ease at this stage of the procedure. The asylum authorities usually have staff trained to assess both of these grounds, but they are not responsible for receiving and registering applications in all the Member States. Finally, there is no information on how to establish that applications are well-founded in order to allow prioritisation.

### *Access to reception conditions*

Article 10(5) emphasises that this derogation should not impact applicants' rights with regard to the rRCD and the rest of the APR. Member States must “ensure that applicants are able to access and exercise their rights under those instruments in an effective manner as soon as they make an application”, regardless of when registration occurs in practice. Indeed, both the APR and rRCD clarify that a person holds the status of “applicant” from the moment they make an application, i.e. the moment that they express the intention to seek protection (Article 3 rRCD and 26(1) APR). Thus, *inter alia*, access to reception should be made available from the moment of the making of the application (Articles 3 and 19(1) rRCD), including access to material reception conditions. This provision is an important reminder given the acute issues in implementation of the current APD and RCD, including when it comes to timely access to reception conditions.<sup>66</sup> Although reception conditions should still be provided from the making of the application, given the practical obstacles that many applicants face in accessing reception conditions at the stage of making their application,<sup>67</sup> it can be foreseen that this derogation will exacerbate the existing challenge of unlawful delays in access to reception. It may also disproportionately affect applicants with special reception needs as a delay in access to reception has a greater impact on vulnerable applicants.

### *Procedural guarantees*

In contrast, a number of other rights and provisions only come into play at or after registration. Under Articles 9(2) and 15(2) APR, the provision of information, an important procedural guarantee, must occur as soon as possible, and at the latest upon registration of the application. The information to be provided includes that on the applicant's right to lodge an

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<sup>66</sup> ECRE for the EPRS, *Reception conditions across the EU*, November 2023, available at: <https://bit.ly/3TIUIEE>, p. 38ff.

<sup>67</sup> *Ibid.*.

individual application, their rights and obligations including under the RAMM and the consequences of not complying, up to withdrawal of the application, and crucially information on the right to request and enjoy free legal counselling.

In the rRCD, provision of information must occur “as soon as possible and no later than three days from the making of the application or within the timeframe for its registration in accordance with the [Asylum Procedures Regulation]” (Article 5 rRCD). Given this wording, the fact that Article 10 Crisis Regulation reiterates the importance of access to rights under the rRCD and notably that applicants should still be immediately able to access reception conditions, this provision should be understood as not being affected by the delayed registration foreseen by Article 10 Crisis: thus, information provision on reception should occur within 5 or maximum 15 days after the application has been made, i.e. the time limit foreseen for registration under the APR, regardless of the activation of delayed registration under Crisis.

#### *Right to work*

Another right affected is the right to work: Article 17(1) rRCD foresees that the maximum waiting time to be granted access to the labour market is calculated from the registration of the application, so it will be impacted by delayed registration under Crisis.

#### *Risk of violations pre-lodging*

Applicants are at a greater risk of a range of violations before their applications have been lodged. The derogation allowing a delay in registration creates risks in and of itself, however, these will be exacerbated if combined with a delay in the lodging of the application. According to the APR, the lodging of the application must occur within 21 days of registration, but this can be extended to 2 months in case of a disproportionate number of applications (Article 28(5) APR).

If the latter provision is in place in addition to the derogation, up to 3 months could pass between the making and the lodging of the application it before the determining authority. This is a significant increase in the length of proceedings, meaning a delay in effective access to the procedure. Moreover, the APR does not require that any particular documentation, notably to certify a person’s status, be given to applicants after the making of the application. Without documentation, they are at a greater risk of violations including summary removal from territory, collective expulsion, forced disappearance, kidnap and refoulement (Article 19 EU Charter).<sup>68</sup> There is evidence of widespread practices involving these and other violations, and of other forms of violence, including the extensive practices of “pushbacks” carried out at the EU’s borders.<sup>69</sup>

The first obligation to provide documentation is at the registration stage, where Member States must provide applicants with a temporary document, per Article 29(1) APR. Nonetheless, it is only following the lodging of the application, that applicants get more extensive documentation, which notably makes clear their status as asylum applicants, per Article 29(4)

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<sup>68</sup> See James Hathaway, “refugees are entitled to an expanding array of rights as their relationship with the asylum state deepens”: see ‘The Structure of Entitlement under the Refugee Convention’, in *The Rights of Refugees under International Law* (2<sup>nd</sup> edition, CUP | 2021), available at: <https://bit.ly/3WaA7RG>.

<sup>69</sup> More than 300,000 pushbacks were counted at Europe’s external borders in 2023 by the coalition of International Solidarity 11.11.11, see: 11.11.11, *Illegality without borders – Pushback report 2023*, available at: <https://bit.ly/4d59jbl>.

APR and which may be necessary in practice to access rights, even though the person is an “applicant” from the making of the application.

#### *Risks linked to denial of entry*

The registration derogation must also be read in combination with the changes introduced by the SBC amendments. First, Article 1(2) SBC amendments allows Member States to use unspecified “necessary measures” in response to a “large number” of migrants attempting to cross the external border in an unauthorised manner, *en masse* and using force.<sup>70</sup> The provisions draw on certain interpretations of the N.D. and N.T. case, where the ECtHR provided criteria for evaluation of similar situations.<sup>71</sup> Delayed registration could affect people who have already been subject to measures under this provision, which could have a cumulative negative impact.

Second, in cases of instrumentalisation specifically, Member States will be allowed to limit opening the hours of or even temporarily close some border crossing points, “where the circumstances so require”. In practice, this may constitute a significant restriction on the right to asylum because people will struggle to access a procedure when it requires them travelling large distances, potentially hundreds of kilometres, to reach a border crossing. The issue is addressed in more detail in ECRE’s comments on the SBC reforms. The combining of these measures with delayed registrations could also exacerbate the restrictions on the right to asylum and protection from refoulement, both guaranteed under primary EU law by Articles 18 and 19 Charter.

Finally, the screening process will also further delay access to the asylum procedure, in particular in crisis situations. Per Article 5 of the Screening Regulation, the screening procedure will *inter alia* apply to any person apprehended “in the context” of an unauthorised border crossing by air, sea or land, disembarked following a SAR operation, or who have made an application for international protection at external border crossing points or in transit zones, when they do not fulfil the SBC entry conditions (which is often the case of asylum applicants) regardless of whether they apply for international protection. The screening process can last up to 7 days when conducted at the borders (Article 8(3) Screening), but there is no sanction for non-compliance with this deadline,<sup>72</sup> which is particularly concerning in contexts of crisis and/or force majeure, where it is likely the Member States will not have sufficient resources to complete all the foreseen checks within the 7-day period and thus abuses are more likely.

Overall, delayed registrations carry a high risk of violations of the right to asylum, and of other rights of asylum applicants.

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<sup>70</sup> See *ECRE Comments on the Regulation of the European Parliament and of the Council amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across border*.

<sup>71</sup> The N.D. and N.T. approach has a specific scope of application and it does not negate Convention guarantees, including Article 3 ECHR. EU law also provides significant guarantees on access to asylum for third-country nationals at the EU external borders.

<sup>72</sup> See *ECRE Comments on the Regulation of the European Parliament and of the Council introducing the screening of third-country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817*.



### **Recommendations on the use of the derogation of delaying registrations**

- Member States should refrain from applying this provision as soon as they send their reasoned request and await the Commission and Council assessments, or at minimum not apply it to families with children and vulnerable groups.
- Authorisation of this derogation should be carefully examined, and should only be envisaged by the Commission and ultimately the Council after the Member State has used the flexibility of the APR and it has proven to be clearly insufficient.
- The Commission and ultimately the Council should also take into account the current situation of access to reception in the country. If a delay in registration is likely to exacerbate delays or denials of access to reception conditions, the proportionality of the derogation should be examined..
- This derogation should only be renewed in exceptional circumstances. Member States must ensure effective access to fair and efficient asylum procedures, regardless of the context of arrival of the applicant.
- Member States' obligation to prioritise certain applications should be monitored. Guidance at national and EU level on how to ensure prioritisation would be useful.
- Broader obligations in regard to all vulnerable people should be respected, Thus, expanding prioritisation could be considered in regard to other groups, including those with special procedural needs.
- In this context, prioritisation should be interpreted to mean that the standard APR deadlines should be respected.
- Personnel receiving applications must be trained on identification of vulnerable people. In general, given the current state of vulnerability identification across the EU, particular efforts must be made by all Member States,<sup>73</sup> with the help of the EUAA, before derogations such as delayed registrations can be authorised.
- Monitoring should take place to ensure that Member States are not unlawfully delaying access other rights foreseen under the APR, rRCD and RAMM if the delayed registration derogation is being applied.
- An assessment of the impact on all fundamental rights of applicants should be an integral part of the assessment when the registration derogation is requested. An adverse impact, notably on access to reception, but also in relation to other rights, should be considered in proportionality assessments.
- The impact on the functioning of the CEAS as a whole and on other Member States' asylum systems should also be part of the assessment of the proportionality of the registration derogation.

*Article 11: Measures applicable to the asylum border procedure in a situation of crisis of force majeure*

The Crisis Regulation foresees derogations from the APR that allow for the prolongation of and for the expanded use of the asylum border procedure.

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<sup>73</sup> See AIDA country reports, updated yearly, available at: <https://bit.ly/3o6UqgG>.

### *Prolongation of the border procedure*

In all three situations of mass arrivals, instrumentalisation and force majeure, per Article 11(1) Crisis Regulation, Member States may prolong the maximum duration of the border procedure from 12 weeks from registration (Article 52(2) APR) to 18 weeks from registration, thus an additional 6 weeks. This represents a significant increase compared to the previous legislation, as Article 43(2) Asylum Procedures Directive capped border procedures at maximum 4 weeks; it is also a significant change under the new rules, as it increases the procedure foreseen in the new APR's total length by one third. To these 18 weeks, should also be added the 7 days foreseen in screening process which precedes referral to the border procedure, and potentially time spent in a return border procedure.<sup>74</sup>

The extension to 18 weeks can only be applied to applications made during the period of the derogation, so necessarily after the Council implementing decision. Moreover, the 6-week extension foreseen by the Crisis Regulation cannot be used in addition to the extraordinary extension foreseen by Article 51(2) APR for RAMM responsibility determination purposes. Similarly, Article 11(11) specifies that in case the RAMM determination process takes longer than the maximum 18 weeks foreseen here, the process must be completed on the territory. If the asylum procedure has not been completed after 18 weeks, the applicants must be allowed to enter into the territory of the Member States.

### *Expansion of the scope of the border procedure*

One of the central pillars of the APR is the expanded use of the asylum border procedure compared to the APD.<sup>75</sup> Article 11(2)-(6) Crisis Regulation then further expands the use of the border procedure during the special regimes, setting out many different scenarios in which it may or must be used. According to the Preamble, the Member State should request one of the options "taking into account the composition of the flows and their diverse nature, depending on the precise situation of crisis". The options for expanded use of the asylum border procedure are as described below.

In the situation of force majeure, the Member State can request an exemption from the obligatory use of the border procedure for applications from people from a country of origin with a 20% or less recognition rate in the border procedure, so long as the force majeure situation cannot be resolved based on the contingency plan foreseen under the rRCD (Article 11(2) Crisis).

In case of the crisis situation of mass arrivals, there are three possible amendments to the scope of the border procedure. The first one is as for force majeure (Article 11(2)) – an exemption from the mandatory use of border procedure when the 20% criterion applies. The second, per Article 11(3), is a reduction in the threshold from 20% to a 5% or lower recognition rate, i.e. the mandatory use of the border procedure would apply for applicants from countries

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<sup>74</sup> See *ECRE Comments on the Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union*.

<sup>75</sup> For an in-depth discussion of the mandatory border procedures per the APR and their impact on fundamental rights, see , *ECRE Comments on the Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union*.

with a 5% (or lower) protection rate. The wording of this option is unclear: whereas Article 11(3) clearly indicates that the threshold must be decreased to 5%, Recital 46 is broader in its phrasing and could be understood as allowing Member States to lower the threshold to anything between 20% and 5%.<sup>76</sup> The third amendment in a crisis situation is that to the contrary, Member States may *increase* the threshold from 20% to 50%, meaning that they would render it mandatory to examine on the merits in a border procedure all applications by persons from a country of origin with up to a 50% protection rate.

In principle, per the APR, the protection rate is calculated based on Eurostat data for the previous year. However, in this situation where the threshold is raised, the Regulation also provides that this should be applied “taking into account the rapidly evolving protection needs that might arise in the country of origin as reflected in quarterly updates of Eurostat data”. It should be noted that situations in a country may evolve rapidly. If the event at the origin of the change in statistics is very recent, the recognition rate will be even more disparate than usual between Member States, depending on available information, caseloads, quality of procedures.<sup>77</sup>

Recital 47 of the Regulation clarifies that applications processed within the border procedure in this context “should not be considered as part of the adequate capacity pursuant to Article 47 or counted for the application of the annual cap pursuant to Article 50 APR”. It remains to be seen whether Member States at the external borders will try to make use of this derogation for other scopes – for example, increase the number of applications processed in the border procedure to increase the chances to benefit from the new cessation of responsibility clause introduced by Article 37 RAMM – or if they would consider it would not be worth requesting its application, due the increased administrative burden it would entail.

In situation of instrumentalisation, Article 11(6) enables the Member State to request to examine all applications in the border procedure, regardless of the recognition rate or any other factor. The only restriction is that for the instrumentalisation regime as a whole: this derogation cannot be applied to all arrivals, but only to those identified as being people subject to instrumentalisation and who have registered their application during the period of application of the derogation.

Even with this minor safeguard, this is a significant derogation which will have severe consequences for applicants. According to the Commission’s Explanatory Memorandum, this option is foreseen to “limit the possibility that the hostile third-country targets for instrumentalisation specific third-country nationals and stateless persons to whom the border procedure cannot be applied”. Once again, the identification of persons subject to instrumentalisation (see Article 3) will be crucial to avoid misuse of this option by Member States and the same concern arises: it is unclear how this actually assists the Member States involved.

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<sup>76</sup> See recital (46): ‘...it could be necessary to allow Member States to lower the threshold...In any event, the reduced threshold should not go below 5%’.

<sup>77</sup> ECRE, *Asylum statistics and the need for protection in Europe*, December 2022, available at: <https://bit.ly/3XNUnYm>.

## Implementation considerations

Depending on the choices of the Member States, the application of the border procedure derogations may lead to more or to less people having their asylum applications examined in a border procedure, therefore its impact is hard to predict.

### *Fundamental rights questions*

ECRE raised concerns about the provision including the fact that it is not clear how this measure would assist a country facing large-scale arrivals. The latter element should also be implemented with caution, given, as highlighted,

As detailed in the Comments on the APR, border procedures have a significant impact on fundamental rights. Border procedures in general entail at minimum important restrictions to the freedom of movement, and in many cases detention. Moreover, 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. These factors should be taken into account when assessing the proportionality of proposals to increase the use of the border procedure.

### *Impact on the responsibilities of the Member State*

Border procedures require significant efforts on the part of the Member States in term of resources and capacity, whereas in situations of crisis or force majeure, the country is working with limited resources compared to the situation it is facing.<sup>78</sup> It can then be questioned whether a prolongation and/ or expansion of the border procedure would be a feasible, adequate, necessary and proportionate measure to address the situation, as required by Articles 1, 3 and 4 of the Crisis Regulation,.

### *No exemptions for vulnerable applicants*

Similarly to the general regime under APR, the expanded use of border procedures as authorised by Article 11 do not contain general exemptions for vulnerable applicants.

In the case of instrumentalisation, where a Member State is authorised to channel all people arriving and considered to be instrumentalised into border procedures, Article 11(7) requires them to implement one of two options, intended as safeguards. Either Member States must wholly exempt from the border procedure children under 12 years old and their family members, as well as people with special reception and/or procedural needs; or at minimum, “cease to apply” the border procedure to them when it has “determined, on the basis of an individual assessment, that their applications are likely to be well-founded”.

It is notable that this exemption is narrower than the definition of vulnerable people across the Regulation, as it only applies to children under 12 years old rather than all children, which is the case in the rest of the Crisis Regulation.

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<sup>78</sup> This was highlighted by several Member States during the negotiations in Council. For example, Finland stated that extending the scope of the border procedure “would overburden the already overburdened system and be in contradiction with the idea behind the rules in the APR on adequate capacity and annual cap”. See also concerns of GR (overcrowding), and IT (additional burden on the reception system): Council of the EU, *Compilation of replies by Member States*.

Per Article 11(8), the Council implementing decision must specify which option the Member State is applying, based on the information provided by the Member State. Regarding the derogations in general, although the Member State's expressed needs are taken into account, the ultimate decision lies with the Commission for its proposal and finally with the Council for the implementing decision. However, in this specific instance, the wording of Recital 49 makes it clear that "the choice between those alternatives remains at the discretion of the Member State", and the Council implementing decision only reflects this choice rather than deciding on it.

Lastly, in all the other cases than the 100% border procedure due to instrumentalisation, Article 11(9) states that the concerned Member State "should not apply or should cease to apply" the derogation when there are medical reasons for not applying it, or when the "necessary support cannot be provided" to the applicant with special procedural/reception needs. This follows from CJEU caselaw, which established that the APD prevents automatic detention of an international protection applicant requiring special procedural guarantees, unless it is first established, following an individual assessment, that such detention does not deprive them of "adequate support" they're entitled to.<sup>79</sup> General provisions ensuring that special needs are taken into account by the authorities are not sufficient: legislation must foresee a specific examination of whether detention is compatible with the required 'adequate support' for each applicant. Moreover, the Member State's actual practice is decisive.<sup>80</sup>

As developed in the Comments on the APR, border procedures may be carried out in detention. They generally entail fewer procedural guarantees. As such, they are particularly ill-suited to the unique vulnerability of children, and are generally not able to guarantee the special protection and reception needs of vulnerable applicants. Thus, Article 11(9) should be strictly implemented and monitored, and border procedures should only be envisaged for vulnerable people where the state's capacity to provide adequate support is demonstrated.

This will be even more unlikely in times of crisis or force majeure, where the state's capacity is limited compared to the situation it is facing, and it has many priorities to manage. On the other hand, and given the moderate safeguards outlined by Article 11, efforts and resources should be focused on the identification of special needs as early as possible, to avoid unduly subjecting people to the border procedure without the adequate support. Member States should systematically and as early as possible after the application has been made, regardless of when registration occurs, assess whether an individual applicant is in need of special procedural or reception guarantees.

### *Guarantees*

Article 11(10) recalls that fundamental rights of asylum applicants must be respected even when applying the derogations to the border procedures, citing "the basic principles of the

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<sup>79</sup> CJEU, 17 December 2020, *European Commission v. Hungary*, C-808-18, available at: <https://bit.ly/3w7RSqf>, para. 192.

<sup>80</sup> In the case at hand (see paras 187 to 199), Hungarian legislation did include provisions requiring that the authorities take into account the specific needs of applicants in need of special procedural and reception guarantees, however before the Court Hungary acknowledged that almost all applicants in need of special procedural guarantees had nevertheless been made to stay in the transit zones, and the legislation did not provide for an examination of whether detention was compatible with the requirement of providing 'adequate support'. Thus, the Court concluded that Hungary had violated the Asylum Procedures Directive by applying this detention regime to all applicants without ensuring its alignment with their individual needs.

right to asylum and the respect of the principle of non-refoulement, as well as the guarantees foreseen in Chapter I and II” APR, specifically citing the right to an effective remedy. The APR guarantees also include legal counselling at all stages of the procedure, and free legal assistance and representation in appeal procedures. Quality legal assistance and representation is essential to ensure the both fairness and efficiency of the asylum process. Moreover, it should be noted that the principle of non-refoulement, inter alia through its connection to the prohibition of torture and inhuman or degrading treatment (Article 4 EU Charter) is an entirely non-derogable right, and thus applies in full and not only in its “basic principles”.

Among the guarantees of APR (and the rRCD) is UNHCR access to all asylum applicants. This is also mentioned in Recital (50), which recalled the necessity for UN agencies, UNHCR and relevant partners of Member States under national law, who are entrusted with tasks under the APR and rRCD, to have effective access to the border, and UNHCR to have access to all applicants. Article 11(10) also grants “organisations and persons permitted under national law to provide advice and counselling” “effective access to applicants” who are in detention facilities or at border crossing points.

It should be highlighted that this includes but is not limited to legal advice. Member States may only limit this guarantee when it is objectively necessary “for the security, public order or administrative management of a detention facility”, and in any case it cannot make access “severely restricted” or impossible. In general, given their impact on the fundamental rights of those detained, these rules must however comply with necessity and proportionality, and only in very rare circumstances could the administrative management of a facility require that access of organisations and advisors or counsellors be significantly restricted.

Border procedures entail restrictions on freedom of movement, and in many cases detention. They tend to imply a more restrictive approach to protection claims, leading to protection gaps, inter alia due to the unavailability or inadequacy of procedural guarantees. As most of the border procedure derogations lead to an expanded use of border procedure, Member States, the Commission and the Council should consider the following recommendations.

### **ECRE's recommendations regarding the derogations to the border procedure**

- Member States should choose the option of reducing the use of the border procedure in situations of crisis and force majeure, as this is more likely to support a continued functioning of their asylum system in challenging circumstances.
- When increasing the scope of the border procedure, use of quarterly updates should be limited given rapidly changing situations and preferably used only to exempt nationalities from the border procedure. .
- Expanding the duration and/or scope of border procedures should only be authorised in exceptional situations, based on rigorous necessity and proportionality assessments, and having ensured that the Member State has the capacity to manage the increased administrative burden entailed.
- Member States should exempt all vulnerable applicants, including children with their families, from border procedures particularly in cases of mass arrivals, instrumentalisation or force majeure, as these are generally not able to guarantee the special protection and reception needs of vulnerable applicants, and durable capacity to meet those needs is even more unlikely in cases of crisis or force majeure.
- Resources should focus on the identification of special needs as early as possible, to avoid unduly subjecting people to the border procedure without the adequate support.
- Member States must guarantee UNHCR and implementing partners, including civil society, access to applicants, including but limited to those providing legal advice.

*Article 12: Extension of time limits set out for take charge requests, take back notifications and transfers in a situation of crisis referred to in Article 1(4), point (a), or force majeure*

For situations of mass arrivals and in some situations of force majeure, the Crisis Regulation also foresees derogations from the “responsibility” rules in the RAMM. These do not apply in situations of instrumentalisation. Articles 12 and 13 set out derogations applicable in different situations, and in both cases tightly circumscribed.

#### *RAMM time limits derogations*

First, Article 12 provides for derogations from the time limits set out in the RAMM to send or respond to requests and notifications as well as to carry out and receive transfers, in cases of mass arrivals and force majeure. The derogations extend the time limits.

If these derogations are authorised, per Article 12(2), the affected Member State benefits from the extensions set out below. Recital (51) clarifies that if the derogation is authorised, all the extensions apply simultaneously; they are not to be individually authorised or denied in the Council implementing decision.

Derogations from RAMM time limits under the Crisis regulation			
	Starting point	Time limit under the RAMM	Time limit under Crisis
Submitting a take charge request	Registration of the application	2 months	4 months
Replying to a take charge request	Receipt of the request	1 month	2 months
Submitting a take back notification	Receipt of the Eurodac hit	2 weeks	1 month
Confirming receipt of a take back notification	Receipt of the notification	2 weeks	1 month
Carrying out a transfer	Acceptance of the request, confirmation of the notification or final decision on appeal	6 months	1 year

Per Article 12(3), if the affected Member State fails to comply with the extended time limits, it becomes responsible for examining the application, as is generally the case for missing time limits.

#### *RAMM removal of take back responsibilities*

An additional and potentially important change is that when these derogations are applied, the Member State is also temporarily relieved of its obligations to accept incoming transfers. Per Article 12(4), when a Member State is facing mass arrivals or force majeure and Article 12(1) is activated, the Member State is not expected to receive certain incoming transfers, unless due to individual circumstances, it specifically agreed that it will do so on a case by case basis.

This applies to take back transfers based on Eurodac hits and the new expanded take back criteria of resettled or admitted persons, but does not apply to take charge transfers. If the transfer does not occur within one year, even if this is due to the persistence of the crisis – mass arrivals situation or force majeure and the prolongation of these derogations (which can be extended for a maximum of 1 year), the affected Member State is definitively relieved of its obligation to take back, and responsibility is transferred to the Member State seeking to transfer the applicant.

Although it is not explicit in Article 12, Recital 52 states that this extension and potential transfer of responsibility is “without prejudice to the possibility to extend the time limits pursuant to Article 46(2) RAMM for carrying out a transfer”. This provision could cancel out the benefit to the affected Member State because Article 46(2) RAMM provides for the possibility to extend the time limit to 3 years if “the person concerned, or a family member that were to be transferred together with the person concerned, absconds, is physically resisting the transfer, is intentionally making himself or herself unfit for the transfer, or is not complying



with medical requirements for the transfer” Under the current Dublin rules, this is a ground frequently used by Member States to extend transfer time limits.<sup>81</sup>

Delaying a transfer up to one year will lead to uncertainty, stress and anxiety for asylum applicants awaiting transfers. These factors should be taken into account with regard to both outgoing and incoming transfers.

*Article 13: Derogations from the obligation to take back an applicant in a situation of extraordinary mass arrivals*

*Immediate cessation of take back responsibilities*

Article 13(1) foresees that an affected Member State can be immediately relieved of its obligation to take back in certain cases. Recital 53 states that such derogations should only be permitted “in those most exceptional circumstances”, described as when the mass arrivals is of “such extraordinary scale and intensity that it could create a serious risk of serious deficiencies in the treatment of applicants, thereby creating a serious risk that the Common European Asylum System is rendered non-functional”.

In this exceptional crisis – mass arrivals situation the Member State can be immediately relieved of its obligation to take back applicants for which it is designated as the responsible Member State on the basis of the registration of the application there (Article 16(2) RAMM) or when it is required to take back an applicant because they moved onwards during the responsibility determination process (Article 38(4) RAMM).

These derogations apply to applications registered in the affected Member State during a period defined in the Council implementing decision, only up to 4 months before the date of adoption of the Council implementing decision. According to Recital 53, this is to avoid additional pressure on the Member State in question.

Per Article 13(2), when the Member State was responsible under Article 16(2) RAMM, responsibility shifts to the Member State where the second application was registered. Similarly, per Article 13(3), when the Member State was responsible under Article 38(4) RAMM, the Member State where the second application was registered will be responsible for applying the procedure to determine which Member State should ultimately examine the application; when it cannot identify such a Member State, it shall become responsible also for examining the asylum application. However, this derogation from Article 38(4) RAMM cannot apply to take back notifications sent before the adoption of the Council implementing decision.

Implementation considerations

It is unclear when this derogation can be activated given that a crisis – mass arrivals situation already involves showing serious consequences for the functioning of CEAS, per the definition in Article 1(4)(a) Crisis Regulation. The additional requirements to meet the threshold for activation of the derogation are not set out, .

Nonetheless, this is one of the few measures providing tangible and immediate relief to the Member State in crisis. It could thus effectively aid in resolving the situation, while also taking

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<sup>81</sup> On Member State practices regarding the implementation of the concept of absconding, see AIDA country reports, updated yearly, available at: <https://bit.ly/3o6UqgG>.

into account the autonomy of asylum applicants by not forcibly transferring them back and potentially examining their application in the country they moved on to.

The derogations to the RAMM rules on responsibility, if used in an appropriate way, may be an avenue for more effective solidarity between Member States; however, they also risk being used to perpetuate uncertainty for asylum applicants.

**ECRE's recommendations regarding the use of the derogations to the RAMM**

- When a Member State is recognised as in crisis, and the temporary relief of responsibility of Article 12 is activated, other Member States should assess the situation and, when it is foreseeable that the transfer will not be able to take place, immediately make use of the discretionary clauses, to avoid making applicants wait in uncertainty and stress; waiting for the 1 year limit to elapse when it is clear the transfer cannot take place also goes against the very rationale of the responsibility rules which aim at efficient asylum in the EU as a whole.

*Combining special regimes*

The Crisis Regulation provides for several opportunities for Member States to apply special two or more of the special regimes at the same time, thus potentially allowing for a wider number of derogations to be in place at the same time. The exact parameters of the derogations depend on whether the Member State is said to be facing a situation of crisis – mass arrivals, crisis – instrumentalisation or force majeure. The following table recaps the derogations available per situation.

Derogations authorised by type of scenario			
Measure	Mass arrivals	Instrumentalisation	Force majeure
Derogations from the APR			
Extended registration	Yes	Yes	Yes
Prolongation of the border procedure	Yes	Yes	Yes
Exemption from applying the border procedure to certain applicants	Yes	No	Yes
Restriction of the scope of the border procedure	Yes (mandatory only for 5% recognition rate or below)	No	No
Expansion of the scope of the border procedure	Yes (mandatory for up to 50% recognition rate)	Yes (up to 100% recognition rate)	No
Derogations from the RAMM			
Extension of time limits for take charge and take back requests, replies and transfers	Yes	No	Yes
Removal of responsibility for certain applications	Yes	No	No

For instance, in a situation of instrumentalisation, a Member State could, after delaying the registration of asylum applications for 4 weeks, channel all arrivals considered to be subject to instrumentalisation into a border procedure lasting up to 18 weeks. In a situation of crisis – mass arrivals, in the most serious situation, a Member State could, after delaying the registration of asylum applications for 4 weeks, channel all arrivals from a country of origin with a recognition rate of 50% or lower (this was the case of 717,425 out of 1,130,255 applicants in the EU27 in 2023, i.e. 63% of applicants)<sup>82</sup> into a border procedure lasting up to 18 weeks, all the while benefiting from exemptions or extended time limits to send/respond to requests/notifications and transfers under the RAMM.

However, as seen under [Article 1](#), the Commission can consider that a Member State is facing several of these scenarios at the same time, and measures can be combined between the different regimes. Thus, a Member State considered to be facing instrumentalisation and crisis could request a general expansion of the scope of the border procedure to all applicants from a country of origin with a recognition rate of 50% or lower, and an additional expansion of the scope to all arrivals considered to be subject to instrumentalisation, all to be channelled in a border procedure lasting up to 18 weeks.

<sup>82</sup> Eurostat as of 25 April 2024, Asylum applicants by type, citizenship, age and sex - annual aggregated data (data last updated 18 April 2024) and First instance decisions on applications by type of decision, citizenship, age and sex - annual aggregated data (data last updated 24 April 2024).

### **ECRE's recommendations regarding the combination of derogations**

Commission and Council assessments will once again be key to ensure this system is used to efficiently solve situations or crisis/force majeure, and not misused for states to limit access to fundamental rights and evade their responsibilities. Thus:

- During the assessments, measures to be authorised should be looked at both in silo and combined with the rest of the derogations and other instruments available to the Member States, notably flexibility under the SBC, APR, RAMM.
- The measures must be strictly necessary, proportionate, and adequate to solve the situation faced by the Member State, and within the capacities of the Member State. Notably, Member States need to prove they have the absolute capacity to have many persons channelled into border procedures, in terms of reception/detention centres, staff, including vulnerability detection, legal counselling and medical staff, registrations and determining authority staff, judicial capacity to handle a potential significant increase in remedies.

## Chapter V: Expedited procedure

### *Article 14: Expedited procedure*

#### *Background*

Article 14 includes provisions for a new accelerated procedure, the expedited procedure. It was initially foreseen as the replacement for the Temporary Protection Directive (TPD), which, at the time of the Commission proposal, had yet to be activated close to 20 years after its adoption. Following the activation of TPD in 2022 and the positive evaluation of its benefits for both people in need of protection and Member States,<sup>83</sup> the Crisis Regulation no longer repeals the TPD but the expedited procedure is nonetheless maintained as a new, separate mechanism.

Given that the TPD is maintained, the expedited procedure is amended compared to the Commission proposal, which provided for a suspension of the examination of the cases and the granting of temporary “immediate protection”. In that scenario, people remained asylum applicants but enjoyed rights to the level of subsidiary protection holders on a temporary but immediate basis. The cases were to be assessed in a regular asylum procedure after the suspension of maximum one year, leaving people in relative uncertainty until that point. In the final Crisis Regulation text, the aim is instead to accelerate the asylum procedure, the result of which is then definitive – as for any other beneficiary of international protection. Despite NGO calls,<sup>84</sup> it does not however go as far as prima facie recognition as recommended by UNHCR,<sup>85</sup> an approach particularly suited to situations of large-scale arrivals of refugees.

<sup>83</sup> ECRE, Editorial: the TPD proved highly efficient in Ukraine response – Time to repeal it?, 13 January 2023, available at: <https://bit.ly/3GwSYgk>; ECRE, Joint Statement: Extend the current Temporary Protection regime for displacement from Ukraine until 2025, May 2023, available at: <https://bit.ly/43aUTRG>.

<sup>84</sup> 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/43mjR1y>, p. 23.

<sup>85</sup> UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, 2019, available at: <https://bit.ly/4agkPPH>, p. 203.

### *Scope of the expedited procedure*

Although Recital 54 only mentions situations of crisis, per Article 3(2), and in the absence of any restriction in Article 14 itself, the expedited procedure may be – it is not an obligation – recommended by the European Commission when it has received a reasoned request based on any of the three situations, mass arrivals, instrumentalisation, or force majeure. When considering whether to recommend the use of the expedited procedure, the Commission may, but is not obliged to, consult relevant EU agencies, UNHCR or other relevant organisations (Article 14(3)). Per Article 14(1), the Commission should consider adopting a recommendation when “objective circumstances suggest that applications for international protection from groups of applicants” either from a specific country of origin or only part of that country could be well-founded, based on the definition in the Qualification Regulation.

Contrary to other articles, Article 14 Crisis Regulation does not limit the application of the mechanism to applications made or registered within a certain time frame attached to the recommendation. The expedited procedure and materials for decision making provided by the Commission could thus be used for applicants having waited several months for an examination prior to the reasoned request of the Member State.

### *Process of activating the expedited procedure*

Per Article 14(1), if it issues a recommendation for use of the expedited procedure, the Commission should provide the Member States with “all relevant information” to facilitate the work of the national determining authorities, in particular allowing it to omit the personal interview because a positive decision can already be taken on the basis of the evidence available (Article 13(11)(a) APR). That could be a granting of either refugee status or subsidiary protection, as long as both statuses give access to equivalent rights and benefits per both EU and the Member State’s national law. The information should also cover prioritisation of the application because it is likely to be well-founded (Article 34(5)(a) APR).

It is not mandatory to follow this recommendation by the Commission. Article 14 does not explicitly state who of the Member State or its determining authorities, which should be impartial in its decision making,<sup>86</sup> decides whether or not to follow the recommendation. However, since Article 14(2) directly addresses determining authorities, and given their independence and expertise on the topic, it may be preferable for the decision to lie with the determining authorities rather than the political level.

Recital 56 recognises the potential exceptional need for an interview to clarify whether the person is a member of the group(s) designated for an expedited procedure or for assessing exclusion grounds. However, if it is established that the applicant is a threat to internal security, the expedited procedure should be discontinued for that applicant. As recalled by Recital 55, applicants must benefit from all the rights and guarantees of the APR, including the right to information and the right to an effective remedy, as well as receiving an asylum applicant document, as for all applicants, despite the shorter time frame (Recital (57)).

Article 14(2) specifies that determining authorities that do follow this recommendation should then omit the personal interview on the basis that a positive decision can already be taken,

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<sup>86</sup> Article 35(2) APR.

and prioritise the examination of the application as likely to be well-founded. To this end, examination of the merits must be concluded within four weeks of lodging of the application.

It should be recalled that this procedure applies in times of mass arrivals, instrumentalisation or force majeure, where registration may have been delayed. Thus, even without taking into account possible obstacles prior to making the application, this first instance decision would still occur at maximum between 3 and 5 months after the person has made their application for international protection (varying if lodging is delayed due to a “disproportionate amount of applications” per the APR).

### Implementation considerations

ECRE welcomes the introduction of the expedited procedure, and the fact that the definition has been broadened beyond situations of armed conflict (in the initial Commission proposal) to cover all grounds for international protection.

It is unclear though why it can only be for specific groups of applicants and not, in some cases, for an entire country of origin. The very high international protection rate for Syrian nationals over many years – over 84% 9 times in the last 10 years<sup>87</sup> – demonstrates that in some cases almost all nationals of a country have protection needs due to the dire situation in their country of origin, especially in cases of armed conflict.

It should be noted that the first condition, requiring equivalent rights and benefits for the two international protection statuses in the Member State, may de facto limit certain countries from applying this provision fully, as they can then only grant refugee protection through this mechanism because they do not offer equivalent rights for the two statuses. The condition is supposed to remove the unnecessary discrepancy of rights between the two statuses, but in practice it is likely some countries will argue this prevents them from applying the expedited procedure entirely.<sup>88</sup>

Given the overall reluctance to activate the TPD until 2022, and the fact that this mechanism is optional both for the Commission and the asylum authorities, it remains to be seen if it will be used as often as warranted by current international protection needs.<sup>89</sup> ECRE argues that activation of the TPD represented an unprecedented prompt and efficient response to the displacement of millions of people fleeing the war in Ukraine. This experience should be used as a positive example when responding to future crisis. The availability of the expedited procedure does not detract from the value of TPD, rather, it should be seen as a complementary tool which can be used in specific situations where there may be benefits to accelerating the procedure but where there are legal or political constraints rendering it more difficult or not appropriate to activate the TPD.

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<sup>87</sup> Data calculated based on Eurostat. Specifically, the protection rates between 2014 and 2022 were the following: 2014: 94.80%; 2015: 96.45%; 2016: 97.41%; 2017: 93.45%; 2018: 86.66%; 2019: 84.19%; 2020: 84.41%; 2021: 71.20%; 2022: 93.51%; 2023: 93.67%. In these protection rates, inadmissibility decisions are included: thus, the (low) percentage of negative decisions contain *inter alia* inadmissibility decisions for protection in another Member State and concern persons that have recognised protection needs.

<sup>88</sup> See for instance the response of Greece: Council of the EU, *Compilation of replies by Member States*, p.31.

<sup>89</sup> See ECRE, *Asylum statistics and the need for protection in Europe*, December 2022, available at: <https://bit.ly/3XNUnYm>; ECRE, *Asylum statistics in Europe: Factsheet*, June 2020, available at: <https://bit.ly/3XQUAKj>.

### **ECRE's recommendations regarding the expedited procedure**

- The European Commission should systematically examine the need to use the expedited procedure based on current protection trends.
- The Commission should also, when appropriate, designate large groups or entire nationalities as eligible for the expedited procedure, based on the protection needs evidenced by recent data.
- It should be up to the determining authorities in Member States to determine whether to take up the Commission recommendation, rather than a national political decision.
- Determining authorities should in principle welcome such recommendations from the Commission, given the significant impact it will have on lessening their caseload in full respect of the rights of asylum applicants.

## Chapter VI: Final provisions

### *Article 15: Specific provisions and guarantees*

Article 15 requires that Member States, when applying derogations justified by a situation of crisis (i.e. mass arrivals or instrumentalisation), “duly inform” third country nationals and stateless persons, in a language understood by them or that they are reasonably supposed to understand, of the measures in place, the duration of the measures, and the location of registration points for registering and lodging applications, including border crossing points.

### Implementation considerations

Apart from the content elements specified, the provision does not further detail what it means to “duly inform”. Moreover, there is no particular justification for Article 15 to not include force majeure situations. Article 10(5), which contains the same provisions regarding delayed registration, applies in all three situations, including force majeure. Similarly, Recital 40 states that Member States applying any of the measures should inform third country nationals and stateless persons at minimum of the measures applied and their duration, also taking into account the special procedural and reception needs which may require additional or different information, or for it to be delivered in a different manner, appropriate to their special needs.

In any case, the right to information remains a basic guarantee provided by the APR in its Article 9, which the Crisis Regulation does not authorise a derogation from. As recalled by recital (8), the rules and guarantees of the APR remain applicable to the people affected by this Regulation except when the Crisis Regulation explicitly foresees otherwise. Thus, Member States’ obligations regarding information cover all three situations of mass arrivals, instrumentalisation and force majeure, in a language the person understands or is reasonably supposed to, to be delivered in an appropriate manner based on the needs of the person, and must include information on all the measures applied, their duration, and the location of registration points so that the right to asylum remains effective.

Although the concept of “duly inform” is not broken down in detail in the Crisis regulation, references can be made to other Pact instruments on the matter, notably Article 8 APR but

also Article 20 RAMM.<sup>90</sup> This provision is all the more essential given the heightened complexity brought on by the Pact, particularly in situations where the Crisis regulation would be activated. However, already under the current rules proper implementation remains a significant challenge in many countries across the EU.<sup>91</sup>

For comments on the availability of registration points, especially at border crossings and their potential limitation, and the effectiveness of the right to asylum, see the ECRE Comments on the Schengen Borders Code amendments.

#### **ECRE's recommendations regarding the right to be informed**

The right to be informed is a basic guarantee of the CEAS.

- Member States should fully implement their obligation to duly inform applicants, which is all the more important in situations of crisis and force majeure, where exceptional measures.
- To implement this obligation, given the relative lack of detail in the regulation, Member States should refer to the more detailed provisions of the APR and RAMM.
- Member States must tailor information provision to vulnerable people, both in terms of content and manner of delivery of the information.
- Given its experience and expertise, the EUAA should proactively offer assistance particularly in this context.

#### *Article 16: Crisis preparedness*

Article 16(1) expands the national strategies foreseen by Article 7 RAMM to also include measures related to crisis, mainly:

- Preventive measures, aimed at ensuring each Member State is sufficiently prepared and at reducing the risk that situations of crisis occur;
- An analysis of the measures the Member State would need to adequately respond to and resolve a situation of crisis or force majeure, which must include measures related to protecting the rights of asylum applicants, beneficiaries of international and national protection.

Per Article 16(2), they may receive external input to set up these strategies by consulting the Commission, other EU bodies, offices and agencies, especially the EUAA, and regional/local authorities.

Article 16(3) requires that these be reviewed as necessary, and automatically within one year of the end of a situation of crisis.

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<sup>90</sup> The level of detail Article 20 RAMM constitutes a positive development, providing *inter alia* that: information “shall be provided in writing in a concise, transparent, intelligible and easily accessible form, using clear and plain language”; “The common information material shall also be available online, on an open and easily accessible platform for applicants for international protection”; “Where necessary for the applicant’s proper understanding, the information shall also be supplied orally”.

<sup>91</sup> See AIDA country reports, updated yearly, available at: <https://bit.ly/3o6UqgG>.



### *Article 17: Cooperation and assessment*

Per Article 17(2), the Member State facing a crisis, i.e. mass arrivals or instrumentalisation, can request assistance from other authorities that can at short notice increase the human resources of its responsible authorities, as well as request assistance from EUAA experts for the same reasons. There is no apparent reason to justify why this article excludes Member States facing a situation of force majeure from the benefit of this provision.

#### *The role of the Agencies and institutions*

In addition, as per Recital 61, a Member State may, request assistance from the relevant EU agencies, that is the EUAA, the FRA, Frontex and Europol, depending on their respective mandates. The EUAA, Frontex and Europol can also propose assistance on their own initiative. Given the situations covered by this Regulation, this would mainly come under the mandate of the EUAA. Given its expertise and experience in operations in Member States the EUAA should fully utilise its power of initiative in this respect.

Article 17(3) requires that the Commission, Council, European Parliament, relevant EU agencies and the affected Member State “closely cooperate and regularly inform each other on the implementation of the Council Implementing Decision”. However, no further details are provided as to the content and frequency of these updates. Yet, such updates will be particularly important to allow the European Parliament to play its scrutiny role over the Commission,<sup>92</sup> especially as it is largely absent from the authorisation procedure and crisis and force majeure regulatory framework as a whole.

#### *Data provision*

Article 17(4) specifies that the Member State must continue to report all relevant data as required under EU law, for instance under the Eurostat legislation, and including statistics relevant for the implementation of the Crisis Regulation. The same provision requires of the Member State that it give the Commission all the information it needs to carry out its reviews to establish where the situation of mass arrivals, instrumentalisation or force majeure still exists and whether it should recommend extending or repealing the Council implementing decision that authorises the measure. The European Commission may request any information on this basis and the Member State must comply. It will be crucial for the Commission to adequately use this provision, and regularly require detailed information, both statistical and substantial, including on the impact of the measures on the fundamental rights of the applicants, for the entire framework to comply with the principles of necessity and proportionality.

#### *UNHCR and independent organisations*

In parallel, the affected Member State must also “continue to cooperate closely” with UNHCR, but also with other organisations which, at the national level, have been entrusted with specific tasks under the APR and the rRCD, as well as this chapter of the Crisis regulation, which in this regard mainly provides for the right to information.

As the actors of the implementation of the CEAS on the ground, it is indeed crucial that the authorities cooperate and listen to such organisations when it comes to supporting applicants.

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<sup>92</sup> Article 17(8) TEU.

However, the regulation falls short of laying down an express obligation for Member States to fully allow UNHCR and relevant partner organisations to carry out their monitoring role regarding Member States' compliance with refugee and asylum seekers' rights. Moreover, the Regulation does not clarify what “continu[ing] to cooperate closely” entails, thus it remains unclear how this will be applied by Member States in manner that effectively respect the fundamental rights of applicants, especially when it concerns national organisations. Indeed, there have been examples of excessive restrictions on access of national NGOs using the pretext of the Covid19 pandemic for example.<sup>93</sup>

Lastly, Article 17(6) reiterates that the Council and the Commission must at all times, including when monitoring the implementation of the decision, ensure that the principles of necessity and proportionality. If this is not the case, the Commission in particular should immediately react as it has the power to suggest amending or repealing the decision (see [Article 6, Monitoring](#)).

**ECRE’s recommendations regarding cooperation between Member States, the Commission and EU agencies**

- Given its expertise and field expertise, particularly in working with Member State authorities, Member States should rapidly request assistance by the EUAA to ensure they are managing the situation in full compliance with human rights despite the additional challenges.
- The EUAA should immediately offer assistance to Member States on all issues that come under its mandate, and not limit itself to topics for which it currently has operational assistance in the EU.
- The EUAA should develop with and disseminate to Member State strong standards for application of the border procedure.
- Given the heightened risks with regard to fundamental rights, the FRA should also be called upon by Member States and/or offer support to ensure that the crises are resolved speedily, in full compliance with human rights obligations.
- The Commission must closely monitor the implementation of the decision and require all information necessary to do so in a comprehensive manner.
- Cooperation of Member States with UNHCR and national civil society organisations must be effective, allowing access to applicants including at the border, in border procedures and (de facto) detention.

*Article 18: Financial support and Article 19: Amendment to Regulation (EU) 2021/1147*

Article 18(1) allows Member States undertaking relocations as a solidarity measure to benefit from EU financial support from the AMIF Thematic Facility, in accordance with the rules set out by the AMIF Regulation concerning early integration, protection of vulnerable persons, facilitation of family reunification and “their acceptance by the receiving society” (Article 11(9) and measure 2(d) of Annex II of the AMIF Regulation). The article also specifically refers to regional and local authorities receiving support to implement early integration measures, in line with the AMIF Regulation, which further mentions national authorities, civil society

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<sup>93</sup> See AIDA country reports, Updates on the year 2020 and 2021, available at: <https://bit.ly/3o6UqgG>.

organisations, including refugee organisations and migrant-led organisations, and social partners.

To support the Member State affected by a situation of mass arrivals or instrumentalisation, Article 18(2) lays down the possibility for it to receive emergency assistance support under AMIF by the Commission, “including for the construction, maintenance and renovation of reception facilities required for the application of this Regulation” and following the standards set out by the Reception Conditions Directive. The legal basis of the provision is Article 31(1)(a) of the AMIF Regulation, which further specifies that emergency assistance can be used by the Commission to support “Member States’ reception and detention facilities, and (...) their asylum and migration management systems and procedures”. While the Regulation amends the AMIF Regulation to include a Member State affected by a situation of crisis in the scope of support the provision does not cover those affected by force majeure.

#### **ECRE’s recommendations on funding**

- The Commission should ensure that funding is used to resource integration and protection measures for vulnerable persons, and to construct or renovate regular reception centres.
- Funding should not be used to build additional detention capacity as it will not help avoid situations of crisis, in contrast to additional or improved reception capacities, which will improve the fundamental rights of asylum applicants, and allow the Member State more permanent reception capacity.

#### *Article 20: Entry into force*

Article 19 establishes that the Crisis regulation will enter into force on the twentieth day following its publication in the Official Journal of the European Union. It will enter into application two years later, on the first day of the twenty-fifth month following its entry into force. Per the current timeline, this means Member States will be able to avail themselves of the options contained in this Regulation from the late spring or summer of 2026.

However, as mentioned below, the notion in particular of instrumentalisation is already being wielded by Member States and the Commission,<sup>94</sup> which suggests they will seek to make full (mis)use of the framework foreseen in this regulation as soon as possible.

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<sup>94</sup> See for example European Commission, ‘Commission Johansson’s Speech at the European Parliament Plenary on developments at the EU external border between Finland and Russia’, 21 November 2023, available at: <https://bit.ly/3TniYBs>; European Commission ‘2021 State of the Union Address by President Von der Leyen’, 15 September 2021, available at: <https://bit.ly/3TkRoot>.



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