

CONTAINING THE CRISIS THROUGH THE CONFINEMENT OF RIGHTS

Analysis of main criticalities emerging from the proposed Regulation and suggestions for a reform of the Common European Asylum System to guarantee the rights of migrants and international asylum seekers

Policy Note – July 2021

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Introduction

In its proposal Com(2020)613, the European Commission proposes the adoption of a Regulation to deal with situations of crisis and force majeure in the field of migration and asylum. The purpose of the Commission is to manage unpredictable events that may significantly affect migration management in the common European space and to avoid the implementation of ad hoc responses.

The regulation would apply in three circumstances: (i) situations of *crisis*, (ii) an imminent *risk* of such a situation and (iii) situations of *force majeure*. The proposal introduces derogations from the general system in these three circumstances, thus allowing Member States to extend the time limits for registering asylum applications, to expand the scope of application of border procedures for the examination of asylum applications and to increase the chances and duration of detention at the border.

In other words, if the proposal were accepted, situations of crisis would be managed mainly at the border thanks to an extension of the detention regime and the use of accelerated procedures for examining asylum applications, with a restriction of guarantees. A positive note is the possibility of granting "immediate protection" in certain circumstances, which should, in any case, take into consideration the causes of the failure to implement Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof.

The Temporary Protection Directive, though still in force, has never been implemented due to the impossibility of finding unanimous support in the European Council; despite that, the Directive details rights and guarantees for persons enjoying temporary protection and their cooperation obligations. In any case, the proposed Regulation establishes the same treatment for immediate protection holders as for subsidiary protection beneficiaries and it is therefore necessary to question the advisability of expanding subsidiary protection.

This ASGI document aims to highlight the main problems emerging from the proposed Regulation and, at the same time, provide suggestions for a reform of the Common European Asylum System that guarantees the rights of migrants and international protection seekers.

Generally speaking, ASGI believes that derogations in situations of crisis and force majeure should be excluded. These situations can already be managed with the ordinary tools provided for in Article 78(2) TFEU.

ASGI believes that the need to support a Member State in particular times of crisis can in no way be pursued by significantly reducing people's rights. Instead, border States have to be supported by strengthening the solidarity mechanisms among Member States and by improving the provisions already contained in the Asylum and Migration Management Regulation.

Measures to increase the duration of detention and asylum procedures seem inadequate to manage crisis situations. Such measures would increase the pressure at the borders. If the purpose of the proposal is to simplify procedures and enhance crisis management, provisions aimed at confining the crisis in border areas and extending the time limits for carrying out procedures and the duration of detention are absurd and unreasonable.

On the need for a Regulation to manage situations of crisis and force majeure

The European Union legal framework is already equipped with provisions that guarantee tools for responding to situations similar to a crisis. Indeed, Article 78(3) TFEU states that in an emergency situation characterised by a sudden inflow of third-country nationals "the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament".

In recent judgments¹ on the attempt by some Member States to avoid the obligations of solidarity in the reception of asylum seekers, the Court of Justice of the European Union set clear limits on the use by States of the concepts of emergency and safeguarding of security as derogation from Community rules. In particular, the Member States affected by these judgments relied on Article 72 TFEU, which establishes that the provisions relating to the area of freedom, security and justice shall not affect the exercise of the responsibilities incumbent on the Member States with regard to the maintenance of law and order and the safeguarding of internal security. In this regard, the Court clarified that national "emergency" measures must satisfy the requirements of proportionality, necessity and be compatible with fundamental rights. Reference to generic threats to security and law and order cannot therefore be invoked to derogate from the rules governing the system and the right to asylum.

With the proposed Regulation, the Commission appears to wish to go beyond this case-law by identifying non-mandatory parameters which impose heavy limitations on the right of asylum. The Commission itself will have to assess whether the requirements for the application of emergency provisions are met. The emerging legislation therefore leaves state governments a wide margin for discretion and unilateral decisions.

On the definition of "crisis", "risk of a crisis situation" and "force majeure"

Article 1 of the proposed Regulation describes a situation of crisis as an "an exceptional situation of mass influx of third-country nationals or stateless persons arriving irregularly in a Member State or disembarked on its territory following search and rescue operations being of such a scale, in proportion to the population and GDP of the Member State concerned, that it would render the Member State's asylum, reception or return system non-functional and which

¹ Decisions C-715/17, C-718/17 and C-719/17.

can have serious consequences for the functioning of the Common European Asylum System or the Common Framework as set out in the proposed Regulation on Asylum and Migration Management". The same article also establishes that "an imminent risk of such a situation" is also to be understood as a "situation of crisis".

The proposal does not, on the other hand, provide any definition of "force majeure", and simply refers, in recital 7, to the possibility that Member States may be faced with "abnormal and unforeseeable circumstances outside their control, the consequences of which could not have been avoided in spite of the exercise of all due care". In the explanatory part of the proposal, the Commission cites events such as the COVID-19 pandemic and the political crisis witnessed at the Greek-Turkish border in 2020.

Situations of force majeure could make it impossible to respect the time limits set by the proposed Regulation for carrying out the procedures for examining applications for international protection and by the proposed Regulation on Asylum and Migration Management. Therefore, to ensure the functioning of the common asylum system, longer time limits are envisaged for the registration of applications and for the procedural steps required for determining responsibility and transferring applicants to the responsible Member State.

Critical aspects associated with the definition of "crisis situation"

The porosity of the assumptions that would give rise to the definition of "crisis situation" is quite evident. The mere reference to the number of people arriving "in proportion to the population and GDP of the Member State concerned", without any other specification, makes the concept of "crisis" highly uncertain. Furthermore, the reference to an "imminent risk of such a situation" contained in Article 1, combined with the possibility for Member States to immediately apply the rules set out in the proposal even before an examination and authorisation procedure has been concluded in the European context, makes the use of the rules for the protection of foreign persons particularly dangerous (and even abusive).

Critical aspects associated with the definition of "force majeure"

The proposed legislation gives no indication as to a definition of major force. As has been seen, in the descriptive part the Commission refers by way of example to the COVID-19 pandemic and to the political crisis between Greece and Turkey in 2020.

For the definition of major force, ASGI believes it is necessary to strictly refer to the criteria developed by the Court of Justice of the European Union and adapt them to the specific context of migration and asylum.

Relevant procedures in situations of crisis

Where a State considers itself to be in a crisis situation (or at risk of a crisis situation), it shall submit a reasoned request to the Commission for the purpose of applying the procedures laid down in the proposed Regulation in respect of asylum crisis management, return crisis management and registering applications for international protection. The Commission shall examine the request within ten days and, if the request is approved, it shall authorise the application of the asylum crisis management procedure and the return crisis management procedure for a 6-month period, which may be extended to a maximum of one year. As for the registration deadline of applications for international protection, the Commission may authorize the application of derogatory rules for a maximum period of four weeks, which may be renewed up to 12 twelve weeks. Moreover, a Member State may decide to apply derogations from the provisions on the registration of applications for a period not exceeding 15 days even before the examination by the Commission has been concluded.

The Commission shall assess the reasoned request and determine whether the Member State is facing a situation of crisis on the basis substantiated information gathered by the Commission, EASO and Frontex. Given the nature of the actors involved in the assessment and the lack of clear criteria and independent monitoring mechanisms, there is a high risk that every situation in which the influx of migrants is slightly higher than average will be considered as a “crisis situation”.

1. Asylum crisis management procedure

The border procedure set out in the proposal for an Asylum Procedure Regulation² might be applied in crisis situations to all asylum seekers who are nationals or, in case of stateless persons, formerly habitual residents of a third country for which the proportion of first instance decisions granting international protection is 75% or lower.

The duration of the border procedure may be extended by an additional period not exceeding eight weeks, reaching a total of 20 weeks.

It must be underlined that, according to the proposed Asylum Procedures Regulation, third-country nationals would not be formally authorized to enter the territory during the examination of their applications for international protection under the border procedure.

² Modified proposal of the European Parliament and Council Regulation ruling the common procedure for asylum requests and di
REGOLAMENTO DEL PARLAMENTO EUROPEO E DEL CONSIGLIO che stabilisce una procedura comune di protezione internazionale nell'Unione e
abroga la direttiva 2013/32/U, Bruxelles, 23.9.2020 COM(2020) 611 final 2016/0224 (COD).

Third-country nationals would therefore be limited in or deprived of their personal freedom. The same rule would apply to accompanied minors over 12 years old.

Main critical issues

The aforementioned derogations would allow an almost generalised use of border procedures for the examination of applications for international protection. These procedures are known to offer limited safeguards and their weaknesses were already highlighted elsewhere³.

Furthermore, extending the application of these procedures would cause an expansion of border detention, which would also affect accompanied minors over 12 years old.

It is however understood that by virtue of the jurisdictional competence under the ECHR and national constitutions, any limitation or extension of measures restricting personal freedom must provide for the intervention of an independent and impartial judge and a freely-chosen lawyer or, failing this, a lawyer appointed by the court.

2. Border procedure for carrying out return in situations of crisis

The duration of the border procedure⁴ could be extended by an additional period of eight weeks, hence to a period not exceeding twenty weeks. In case of detention, the maximum duration of deprivation of liberty for third-country citizens under this procedure would also be extended to twenty weeks.

New cases are introduced in which, unless proven otherwise, the risk of absconding is presumed. Article 6 of the proposal for a recast Return Directive includes “at least” 16 “objective criteria” to be used by Member States to assess the risk of absconding, which is to be determined on the basis of an “overall assessment of the specific circumstances of each individual case”. For four of these criteria, the proposal provides for a presumption of the risk of absconding. According to the Crisis Regulation proposal, a fifth reason could bring to a presumption of the risk of absconding, namely where there is an “explicit expression of the intention of non-compliance with a return decision adopted under this directive” or when a person “manifestly and persistently continues not to fulfil the obligation to cooperate, referred to in Article 7” of the proposal for a recast Return Directive.

³ See ASGI: [Le criticità alla luce del contesto italiano](#) (January 2021), and [Proposta di regolamento sugli accertamenti nei confronti di cittadini di Paesi Terzi, Osservazioni e proposte](#) (March 2021).

⁴ Art. 41bis og the proposal COM(2020) 611.

Main critical issues

The presumption of a risk of absconding not only shifts the burden of proof on the individual, but it also means that, for example, failure to comply with an existing entry ban could result in individuals being penalized for fleeing their country of origin due to persecution in the event of a change of circumstances in their country of origin.

Furthermore, the extension of the time frame of the border procedure would bring to an extended use of detention, with all the evident consequences in terms of human rights violations. In this respect, it is necessary to recall that, in border states where measures of border detention are used extensively, the conditions of detention are often extremely degraded and far below the minimum standards required⁵.

3. Registration of applications for international protection in situations of crisis

In situations of crisis – but not of an imminent risk of crisis – Member States could delay the registration of asylum applications for a period of four weeks.

Main critical issues

Apart from the fact that the rights of asylum seekers should not be affected by a delayed registration, there is a risk that this proposal may hamper their access to their rights. The delayed registration could create a barrier for asylum seekers that have to prove their status to have access to their rights: the right to hospitality, protection from push-backs and other rights connected to the status of asylum seeker would be impeded.

A reading of the proposal also seems to show that minors are not excluded from this derogation from the ordinary time limits for the registration of asylum applications, although this is declared in the premise of the proposal itself.

⁵ For further information: [HUDOC EXEC](#); Border Crimilnogies, blog "[The European Approach to Hotspots in Greek Islands](#)", April 2, 2021.

Relevant procedures in situations of force majeure

The proposal for a Regulation provides for three different cases in which Member States can apply the concept of force majeure: where for reasons of a situation of force majeure a Member State is unable to respect the time limits for the registration of applications for international protection; where for reasons of a situation of force majeure a Member State is unable to respect the time limits for carrying out the procedures for determining the Member State responsible for examining an application for international protection; where for reasons of a situation of force majeure a Member State is unable to fulfil its obligations to implement solidarity measures.

In such cases, Member States notify the situation to the Commission and, in some cases, to other Member States, and they can benefit from an extension of procedural deadlines. Member States are also in charge of establishing and communicating the termination of the situation of force majeure.

Main critical issues

This unilateral approach risks to result in a Member State invoking a situation of force majeure even in circumstances that are not exceptional or unforeseeable, merely to derogate from its obligations, and in the legal instrument of force majeure being used for a longer period than necessary.

Immediate protection

Article 10 provides for the granting of immediate protection status to displaced persons who, in their country of origin, are facing an exceptionally high risk of being subject to indiscriminate violence, in a situation of armed conflict, and who are unable to return to that third country. The need to apply this Article and the precise group of people concerned is to be determined by the Commission in an implementing act.

During the period of application determined by the implementing act, Member States may suspend the examination of applications for international protection and grant immediate protection to those persons who meet the respective criteria. This suspension period can extend to a maximum of one year upon which the resumption of the examination of the asylum application needs to take place. This will ensure the required protection for the persons concerned while alleviating the pressure on the Member State to examine a large amount of asylum applications all at once. Persons granted immediate protection remain applicants for international protection at the same time, but should enjoy the set of economic and social rights that are applicable to subsidiary protection beneficiaries.

Recommendations

ASGI believes that the implementation of the proposed Regulation, as it currently stands, would imply a severe violation of the rights of third country nationals and asylum seekers. It is therefore necessary that its content be radically changed in line with the following recommendations:


- a) **clearly define the concept of "crisis situation"** so as to avoid the dangers inherent in the current definition, which is extremely ambiguous. Instead, clear, specific and relevant indicators should be adopted;
- b) **remove** the provisions which allow for an extension of the entry ban and of the use of detention following the declaration of a crisis situation. In particular:
 - I. remove the provisions of **Article 4(1)(a) of the proposal** regarding the extension of the border procedure to nationals or habitual residents of countries for which the proportion of decisions granting international protection Union-wide is 75% or lower. There is a risk that the right to asylum enshrined in Article 18 of the Charter of Fundamental Rights of the European Union will be completely circumvented. Moreover, this is an irrational limit, which risks leaving to the side cases in which sudden changes in the geopolitical situation of a country have prompted people to flee. The circumstances that may have seemed less well-founded a year ago may suddenly change and lead people deserving of protection to flee their country. Moreover, the extension of border procedures, instead of having an easing effect on the procedure itself, would lead to lengthening of procedures restricting

personal freedom or free movement as shown, in recent years, in Italy, Greece and Malta;

- II. remove the provisions of **Article 6** regarding the extension of the time limit for registering asylum applications because this derogation from the ordinary time limits could lead to asylum seekers being exposed to serious violations of their rights, including the right to non-refoulement, to dignified reception conditions and other rights attached to the asylum seeker status. Moreover, this derogation does not appear to be adequate for the purpose of simplifying the management of the procedures for access to and recognition of international protection. On the contrary, as was observed at the Greek-Turkish border in 2020, this derogation risks exacerbating the difficult situations faced by asylum seekers. Finally, this provision risks prolonging the detention period or the restrictions on personal liberty and free movement.
- c) provide **support to a Member State after its declaration of a crisis situation** in order to strengthen its reception system and adapt it to temporary needs. In particular, provide that other Member States may activate solidarity mechanisms in the form of:
 - I. **logistical or economic assistance** in order to strengthen the reception system of the Member State faced with a situation of crisis;
 - II. **reception** of a certain percentage of the persons arriving on their territory through either relocation mechanisms or family reunification or the exercise of the right to labour mobility;
 - d) in view of strengthening responsibility-sharing instruments, **take into account the decisions and needs of third country nationals and asylum seekers** entering the territory of the Union so that they are not exposed to the risks associated with unauthorised movement between EU countries. In particular:
 - I. by favouring their **reunification with family members** present in another Member State rather than their compulsory relocation;
 - II. by facilitating the **voluntary relocation** of third country nationals to those Member States where they can justifiably claim not to place an excessive burden on the public finances through the use of their own resources or the opportunity of paid employment.
 - e) **delete the reference in Article 1(2)(B)** of the proposal and all that follows from it, since under no circumstances an imminent risk of crisis can be considered as a crisis situation.
 - f) consider that issuing an immediate protection status, as defined in Article 10 of the proposal, may allow for easier crisis management by relieving the country of first entry. However, this requires that the application of Article 10 be an automatic consequence

of the crisis declaration. We argue that the following detailed statement should be added to the proposal:

- I. establish that, in such cases, **mobility between Member States** is always possible in order to allow reunification with family members present in another Member State;
- II. establish that, in such cases, mobility between Member States is always possible for third country nationals in those Member States where they can justifiably claim not to place an excessive burden on the public finances, either through the use of their own resources or by guaranteeing the opportunity of paid employment;
- III. in the event of effective mobility to a Member State, guarantee the possibility of access to the asylum procedure in the Member State of destination or, in any case, the possibility of receiving a single work permit if there are personal or family guarantees that lead to the presumption that the person will not place an excessive burden on the public finances or has secured paid employment.

A vertical red bar is positioned to the left of the concluding paragraph.

In conclusion, it is reiterated that the effects of a crisis declaration should in no way lead to derogations from the ordinary procedures that would profoundly affect the rights of third country nationals and asylum seekers.