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Proposal for a regulation addressing situations of instrumentalisation in the field of migration and asylum

Substitute impact assessment

STUDY

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Proposal for a regulation addressing situations of instrumentalisation in the field of migration and asylum

Substitute impact assessment

This substitute impact assessment of the European Commission's proposal for a regulation addressing situations of instrumentalisation in the field of migration and asylum was requested by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE) in the absence of a European Commission impact assessment accompanying the proposal. This substitute IA reviews the problem identified by the Commission and the objectives of the instrumentalisation proposal. It studies the proposal's relationship with the EU Treaties, existing EU border, migration and asylum *acquis* and the legislative proposals in the 2016 common European asylum system (CEAS) reform and those under the 2020 new pact on migration and asylum. The assessment identifies and analyses the main expected impacts of the proposal, notably the fundamental rights, societal, economic and territorial impacts, as well as those relating to EU external relations. It includes an examination of the effectiveness and efficiency of the proposal's derogations to EU asylum, border and returns standards, and its compatibility with the EU general principles of subsidiarity, proportionality and the rule of law. Attention is also paid to how the monitoring and evaluation of the proposal may be ensured.

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Executive summary

Background

The proposal for a regulation addressing situations of instrumentalisation in the field of migration and asylum (*instrumentalisation proposal*) was put forward by the European Commission in December 2021. It is based largely on the European Commission's proposal for a Council decision on provisional emergency measures for the benefit of Latvia, Lithuania and Poland, which was meant to help the three EU Member States address the increase in unauthorised border crossings by third-country nationals (TCNs) allegedly 'encouraged or facilitated' by the Belarusian regime. These emergency measures were never formally approved by the Council.

The concurrent proposal for a regulation amending Regulation (EU) 2016/399 on a Union Code (Schengen Borders Code, SBC) on the rules governing the movement of persons across borders (*SBC proposal*) contains the definition of 'instrumentalisation of migrants' and measures relating to border controls and surveillance to be applied during such events. However, the instrumentalisation proposal would introduce permanently available derogations from existing EU asylum and returns legal standards and those envisaged in pending legislative proposals, in particular the 2020 asylum procedures regulation (APR) proposal, the 2016 Reception Conditions Directive recast (rRCD) and the 2018 Returns Directive recast (rRD).

As the instrumentalisation proposal was not accompanied by an impact assessment, as has been the case for several proposals in the field of migration and asylum in recent years, in breach of the Better Regulation Guidelines and the Interinstitutional Agreement on Better Law-Making, the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE) asked the European Parliamentary Research Service (EPRS) to carry out a substitute impact assessment (IA).

Scope of the study

This substitute IA seeks to provide a rigorous *ex-ante* assessment of the instrumentalisation proposal and its main impacts, notably fundamental rights, economic, territorial and foreign affairs impacts, so as to inform the work of the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE). The present substitute IA follows the key principles and questions outlined in Chapter IV of the Commission's Better Regulation Guidelines, and makes use of relevant tools included in the Better Regulation Toolbox. Given that the present IA has been conducted after the proposal has been already presented by the Commission, it does not consider alternative options but examines the proposal and its impacts against the baseline only. The baseline for this study is dynamic as it comprises both the existing EU legislation on migration, asylum and returns but also pending proposals in the same fields.

The IA provides a comprehensive mapping of the scope, relations and interconnections between the instrumentalisation proposal and other relevant existing pieces of EU asylum, borders and migration law, as well as other legislative proposals currently pending or under interinstitutional negotiations under the 2016 common European asylum system (CEAS) reform and the Commission's 2020 new pact on migration and asylum. Particular attention is given to its relationship with the 2020 crisis and force majeure proposal.

Methodology

The IA is first informed by desk research of primary and secondary sources relating to the instrumentalisation proposal. These include academic research, evidence gathered by relevant international organisations and civil society actors, and key legal standards in the case law from the Court of Justice of the EU (CJEU), and the European Court of Human Rights (ECtHR), as well as other regional and international organisations such as the Council of Europe and the United Nations.

The assessment is informed by a case-study approach covering six selected EU Member States, and their external relations with the neighbouring states, in particular: Lithuania–Belarus; Poland–Belarus; Greece–Turkey; Bulgaria–Turkey; Spain–Morocco, and Italy–Tunisia (See Annex III: Case studies). In addition, the research has been combined with a set of semi-structured interviews with key EU institutions, including the European Commission, the External Action Service, EU agencies (European Union Asylum Agency (EUAA), the EU Fundamental Rights Agency (FRA) and the European Border and Coast Guard (Frontex)), selected EU Member States' permanent representations and national ministries, international organisations, civil society actors and academics. Furthermore, a closed-door hybrid stakeholders' workshop was organised to allow a broad consultation process with EU and national civil society actors, legal practitioners and human rights institutions on the key issues and impacts of the instrumentalisation proposal.

Key findings

Definition of problem, baseline and drivers

The IA finds that the problem identified by the Commission, i.e. 'the instrumentalisation of migration', lacks conceptual clarity and legal precision (Section 2). The framing of human beings as 'irregular migratory flows', and migration as 'hybrid threat' or a 'hybrid attack', nurtures conceptual unclarity and dehumanises the people at issue in the Commission proposal. It casts refugees, asylum seekers and TCNs in defence, military and insecurity terms that are incompatible with international and European human rights and rule of law standards.

There is a fundamental disconnection and incoherence between the main problem identified by the proposal, which is inherently rooted in foreign affairs and external relations policy, and the proposed policy solutions to derogate from key standards and TCNs' rights as envisaged by EU migration and asylum policy. As recognised in its Explanatory Memorandum, the proposal carries an implicit foreign affairs objective. However, the proposal fails to identify how the behaviours of third states and a problem rooted in foreign policy and with clear geopolitical ramifications can be addressed with derogations to the EU asylum and migration framework.

This IA concludes that the Commission has failed to identify relevant issues or problems, such as the existing implementation gap and systematic violation of EU border, asylum and return legal standards, and the misuse of the state of emergency on grounds of national security and public order by several EU Member States. Further, it disregards ongoing threats and risks to the rule of law as enshrined in Article 2 TEU in some of these same countries. The assessment finds that this challenge has materialised in a pan-European and systematic phenomenon of expedited expulsions taking the form of pushbacks, progressive development of border fences, instances of disproportionate use of force and illegal detention practices across EU external borders.

EU Member States have made increasing use of 'maintenance of law and order' arguments and declared emergencies resulting in their non-compliance with their obligations under the EU Treaties and European asylum and migration law. Crucially, the implementation of these national policies has attributed an increasing role to military and quasi-military actors with limited accountability regimes. The misuse of public order and security grounds has been reiterated on several occasions by CJEU case law.

The IA identifies two drivers behind the problem at stake: first, 'reverse externalisation' resulting from increasing conditionality and issue-linkage giving preference to migration management, asylum containment and readmission in EU external policy, which has empowered third-country governments to use the 'migration management' agenda as political strategies in their relations with the EU; and second, the lack of effective and genuine legal pathways and access to asylum for TCNs in the EU, which must be additional to the obligation to uphold the right to asylum for individuals spontaneously arriving at external borders.

The objectives of the proposal

With regard to its objectives 'to support the Member State facing a situation of instrumentalisation by specific emergency procedures and support and solidarity measures' (Section 3), the proposal does not provide any evidence on how the derogations are relevant, or how they might help to support and create stability across relevant EU Member States by relieving their workload and administrative responsibilities. In fact, the envisaged border and emergency procedures can be expected to require in practice more effort, time and resources by these same Member States and particularly specific regional and localised areas across EU external borders (see Section 5.3. of the IA on territorial impacts). Moreover, despite claiming the protection of fundamental rights as one of its objectives, it fails to include an assessment of how key rights, including absolute ones accepting no derogation in times of declared emergencies, might be affected by the envisaged exceptions (see Section 5.1. on fundamental rights impacts).

The IA also finds that the instrumentalisation proposal comes with an implicit external relations objective of influencing the conduct of third countries' authorities and asylum seekers. The proposal indirectly pursues another non-expressly mentioned objective of disincentivising TCNs from travelling to the EU by applying stricter procedures and envisaging fewer rights, even though the IA highlights that there is no evidence of the effectiveness of such an approach and that it is incompatible with absolute human rights.

Legal assessment of the proposal

Section 4 includes the legal analysis of the instrumentalisation proposal. It concludes that its extensive links with the 2016 CEAS reform proposals and the 2020 new pact on migration and asylum create a situation of 'hyper-complexity' jeopardising legal certainty and transparency. Specifically, one of the main issues relates to the insufficient clarity characterising the relationship between the proposal and the 2020 crisis and force majeure regulation proposal, possible overlaps between the definitions of 'instrumentalisation' and 'crisis', and potential simultaneous application by Member States. The IA identifies the risk that this embedded lack of clarity may run the risk that some EU Member States may engage in automatic refusals of entry without applying the safeguards envisaged in the Schengen Borders Code (SBC), upholding the *non-refoulement* principle and key guarantees envisaged by the recast Returns Directive proposal (rRD), such as those ensuring special reception and procedural needs of specific groups of TCNs such as minors and their families. The proposal additionally nurtures an increasing blurring of EU Treaty-based boundaries between the EU border (Schengen) and asylum *acquis*, which leads to legal incoherence.

Crucially, the instrumentalisation proposal raises serious EU rule of law issues. The IA finds that the proposal does not comply with primary EU law – which cannot be affected by secondary legislation – and can therefore be considered to raise constitutionality issues in the EU legal system. In particular, the proposal runs against the harmonisation objective of the CEAS and its common nature under Article 78 of the Treaty on the Functioning of the EU (TFEU). It can also be expected to infringe key EU rule of law principles, such as effective judicial protection and effective remedies (Articles 2 and 19(1) of the Treaty on European Union (TEU), and Article 47 of the Charter of Fundamental Rights of the European Union (CFREU). The proposal also interferes negatively with the essence of the EU fundamental right to asylum enshrined in Article 18 CFREU.

The proposal is incompatible with the fair sharing of responsibility and solidarity principle envisaged in Article 80 TFEU, as it does not provide for the relocation of asylum seekers as part of the envisaged solidarity measures, and it still upholds the first irregular entry criterion under the EU Dublin Regulation. This can be expected to lead to unbalanced and unequal responsibilities among Member States that have external EU borders. Further, the proposal pursues a derogation-based understanding of the EU principle of solidarity that is incompatible with the Treaties, as EU primary

law subordinates and requires compliance of the 'solidarity principle' with the CFREU and Article 2 TEU values.

The presentation of the proposal by the Commission during the still ongoing negotiations between the Council and the Parliament on other related legislative files poses serious compatibility issues with Article 13(2) TEU (sincere and loyal cooperation between institutions), and the 2016 Interinstitutional Agreement on Better Law-Making.

Analysis of the impacts

Fundamental rights

The IA finds that the instrumentalisation proposal would have major negative impacts on key fundamental rights (Section 5.1.). Due to the extension of registration deadlines, the acceleration of procedures and the legal fiction of non-entry, the proposal would affect in particular the fundamental right to asylum and the principle of *non-refoulement*, the prohibition of collective expulsions and inhuman and degrading treatment. Limiting the geographical points where TCNs can lodge an asylum application, and requiring asylum seekers to walk for kilometres to reach these points, runs the risk of not being 'sufficient' and contrary to the call by the Court of Justice of the European Union (CJEU) for EU Member States to guarantee the very effectiveness of the right to asylum, and an 'effective, easy and rapid access' to asylum procedures. Furthermore, and problematically, the proposal does not envisage exempting the application of fast-track border procedures for unaccompanied minors under the age of 18, minors and their families, women, and other categories of people with 'specific reception needs' such as LGBTQIA+ individuals.

The analysis finds that recent jurisprudence by the European Court of Human Rights (ECtHR) has nurtured a misconception or misunderstanding by some EU Member States' authorities about the reach of their human rights obligations in expulsion procedures and their responsibility for actions outside their territories. However, the IA concludes that the *non-refoulement* principle is independent from the conduct of the person concerned. EU Member States must unequivocally uphold the right to asylum, ensure an individualised assessment so as to avoid arbitrariness in expulsion procedures, and make available genuine and effective access to means of legal travel and entry by TCNs. Furthermore, the EU legal system now provides an autonomous and higher level of fundamental rights safeguards when compared with those provided by the ECtHR in the cases related for instance to the right to asylum, border controls/surveillance under the SBC and detention.

The IA shows that the proposal negatively affects the right to liberty and security and the rights of individuals requiring specific reception and procedural needs. The analysis finds that the derogations envisaged may in fact lead to increasing detention, including de facto detention, of TCNs at the proximity of the border or at designated border crossing points (BCPs), including those with specific reception needs. The envisaged legal fiction of non-entry is however irrelevant, according to Luxembourg Court standards, as regards EU Member States' obligations under EU law and the CFREU.

As regards material reception conditions, the proposal would reduce these to 'basic needs' of the applicants, which raises incompatibility concerns with international socio-economic rights standards. It poses profound risks to individuals requiring specific reception needs such as minors and their families and women, and neglects those of LGBTQIA+ TCNs.

Centrally, the instrumentalisation proposal raises high risks to fundamental rights that are intimately related to, or are the foundations of, the EU rule of law. This is particularly true as regards first, the fundamental right to effective remedies (Article 19 TEU; Article 47 CFREU), which is instrumental to guaranteeing the very essence of previously mentioned absolute human rights, and which is still at stake under the proposal due to the envisaged non-suspensive effect of appeals. Second, it poses a

high risk for the freedom of association (Article 12 CFREU) and the rights of human rights defenders as a consequence of the proposal not prohibiting Member States from restricting access to only specific categories of civil society actors and constraining access by those providing legal assistance, search and rescue (SAR) at sea and human rights monitoring.

Economic costs and benefits

From economic and cost-benefit perspectives, as presented in Section 5.2., all EU Member States concerned are expected to experience an increase in costs generated by the implementation of the regulation in cases of 'instrumentalisation'. Possible benefits are difficult to assess and expected to be very limited in practice. With regard to costs, the instrumentalisation proposal is expected to increase reception costs and the use of *de jure/de facto* detention. However, costs may arise also due to increased border infrastructure, the necessary upgrade of reception facilities and the increased number of appeals.

With regard to benefits, it is acknowledged that any benefits may derive mainly from increased financial and operational support from the EU. This support may fully or partially mitigate the increase in costs in cases where Member States apply larger derogations during the implementation phases. Assuming that the EU support will be fully used by Member States, it could help to cover the quantifiable costs envisaged above only in three countries: Spain, Italy and Lithuania. However, the analysis underlines that it is challenging to ascertain (i) how this would happen while upholding the lawfulness of their actions, and (ii) to what extent these costs would be reduced in practice. For Greece, Poland and Bulgaria these benefits will not be sufficient to outweigh the quantifiable costs.

Territorial impacts

The IA has identified significant territorial impacts of the proposal in Section 5.3. The reference to territorial integrity in the instrumentalisation proposal seems largely unjustified from an international law perspective. The proposal is based on a one-size-fits-all approach that disregards regional and territorial specificities, particularly between land and sea external borders across the EU. In addition, the proposal is expected to increase territorial imbalances between EU Member States. It would lead to border hardening, a reduction in the number of open BCPs and the creation of border control bottlenecks, the unlawful confinement of TCNs near border areas where differentiated asylum and return standards would be applicable and, consequently, the multiplying of militarised 'anomalous zones' of migration and asylum management along EU external borders. This would unduly alter the uniform and consistent application of EU law within EU Member States' territory, generating an uneven distribution of outcomes and impacts also within Member States.

EU external relations

Regarding EU external relations, the instrumentalisation proposal is not expected to have significant geopolitical impacts on the actions of the third country accused of 'instrumentalising migrants' (see Section 5.4. of this IA). Nonetheless, the use of the notion of 'instrumentalisation' could have significant negative repercussions on the bilateral diplomatic relations between the EU and concerned third states and even escalate diplomatic tensions. It would undermine a foreign affairs approach and the emphasis on the need for constructive collaboration with countries. More broadly, the proposal could be perceived as a sign of backsliding and hypocrisy in the EU in the sphere of human rights and further harm the Union's credibility and global influence internationally.

Effectiveness and efficiency

The effectiveness of the measures proposed is highly questionable. The proposal cannot be expected to achieve its objectives in a manner which is in line with fundamental rights and the principle of proportionality (Section 6). Overall, the proposal has focused on the 'law in the books' but has failed to consider 'the law in practice'. Further, it shows an intrinsic inconsistency between

the identified problem and the proposed objective and course of action, and it is expected to have little to no effect on the conduct of third state authorities and the choices of TCNs. Crucially, the proposal has been found to unduly alter the hierarchical relationship between primary and secondary law in the EU legal system. As regards efficiency, all EU Member States concerned are expected to experience an increase in costs generated by the implementation of the regulation in cases of 'instrumentalisation'. Possible benefits are difficult to assess and expected to be very limited in practice. Assuming that financial and operational support will be implemented for Member States facing instrumentalisation, this would be sufficient to cover emerging costs for three out of six Member States included in the analysis.

Subsidiarity and proportionality

The legal bases of the instrumentalisation proposal are correctly identified (see Section 7). The subsidiarity assessment concluded that the problem identified is generally of Union relevance, yet it does not take into consideration the inherent specificities and geographies of EU external borders and regions. There are also key inconsistencies and overlaps with other pending legislative proposals and, overall, the nature of the envisaged derogations does not show clear EU added value.

The subsidiarity assessment concluded that the problem identified is generally of Union relevance, yet it does not take into consideration the inherent specificities and geographies of EU external borders and regions. The overall added value is even less clear. While CJEU case law has confirmed that Member States cannot derogate from the asylum and return *acquis* on general grounds under Article 72 TFEU without a case-by-case, evidence-based and individualised assessment, the inconsistencies and overlaps with other proposals and the nature of the envisaged derogations do not show a clear added value

The IA finds that the measures enshrined in the instrumentalisation proposal do not comply with the principle of proportionality. The proposed derogations are not justified by the scale of the problem, which according to the analysis in this IA does not necessarily entail large-scale entries of TCNs crossing the EU external borders. They are in direct opposition to the objectives of their legal bases, to one of the objectives of the proposal itself (i.e. 'to manage in an orderly, humane and dignified manner the arrival of persons having been instrumentalised by a third country, *with full respect for fundamental rights*') and have considerable negative impacts on fundamental rights, some of which are of an absolute nature. Additionally, flexibility is already available to EU Member States under the current *acquis* and some of the proposals undergoing interinstitutional negotiations, which questions the overall necessity of the proposal.

Monitoring and evaluation

The monitoring and evaluation of the instrumentalisation proposal, studied in Section 8, is mainly entrusted to the European Commission, with the support of the EU Migration Preparedness and Crisis Management Network. The possible deployment of EU agencies and the envisaged EU funding could also entail additional monitoring tools. The monitoring and evaluation is, however, very limited in scope and insufficient to track progress with the implementation of the proposal and the Member States' compliance with fundamental rights. The proposed monitoring and evaluation mechanisms should be complemented by the implementation of effective and obligatory independent monitoring mechanisms, and cover all border, asylum and return procedures in the context of both border controls and surveillance across all external borders in the Schengen area.

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Abbreviations

AMIF	Asylum, Migration and Integration Fund
APD	Asylum Procedures Directive
APR	Proposal for an asylum procedures regulation
BCP	Border crossing point
BMVI	Border Management and Visa Instrument
BRG	Better Regulation Guidelines
CEAS	Common European asylum system
CEPS	Centre for European Policy Studies
CFREU	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
COM	European Commission
CPR	Common Provisions Regulation
DG HOME	Directorate-General for Migration and Home Affairs, European Commission
EASO	European Asylum Support Office
EEAS	External European Action Service
ECHR	European Convention on Human Rights
ECRE	European Council on Refugees and Exiles
ECtHR	European Court of Human Rights
EP	European Parliament
EPRS	European Parliament Research Service
EU	European Union
EUAA	European Union Asylum Agency
Eurodac	European Asylum Dactyloscopy Database
Europol	European Union Agency for Law Enforcement Cooperation
eu-LISA	European Union Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice
FRA	Fundamental Rights Agency of the European Union
FRO	Fundamental Rights Officer
Frontex	European Border and Coast Guard Agency
GDP	Global Detention Project

IA	Impact assessment
ICMPD	International Centre for Migration Policy Development
IMM	Independent monitoring mechanism
IOM	International Organisation for Migration
ISF	Internal Security Fund
JHA	Justice and home affairs
LIBE	Committee on Civil Liberties, Justice and Home Affairs
LGBTQIA+	Lesbian, gay, bisexual, transgender, queer (or sometimes questioning), intersex, asexual, and others
MEP	Member of the European Parliament
MFF	Multiannual financial framework
NATO	North Atlantic Treaty Organisation
PICUM	Platform for International Cooperation on Undocumented Migrants
RAMM	Regulation on Asylum and Migration Management
RSA	Refugee Support Aegean
RCD	Reception Conditions Directive
RD	Return Directive
rRCD	Proposal for Reception Conditions Directive recast
rRD	Proposal for Return Directive recast
SAR	Search and rescue
SBC	Schengen Borders Code
SEMM	Schengen evaluation and monitoring mechanism
TCN	Third-country national
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UNHCR	United Nations High Commissioner for Refugees

1. Introduction

In the second half of 2021, Latvia, Lithuania and Poland reported an increase in the number of third-country nationals crossing the EU external borders from Belarus. The European Border and Coast Guard agency (Frontex) estimated that there were 8 000 unauthorised border crossings at the Eastern external borders in 2021[1]. The European Union (EU) and national authorities felt this was a deliberate strategy on the part of Belarus President Alexandr Lukashenko's regime[2]. This strategy was said to consist of facilitating the visa acquisition process and travel for persons from countries like Afghanistan, Iraq, Syria and Yemen, and encouraging or forcing them to attempt to irregularly enter the territory of the Eastern EU Member States[3].

The events at the EU external borders with Belarus triggered an immediate political response at the EU level. On 1 December 2021, the European Commission proposed a Council Decision on Provisional Emergency Measures for the Benefit of Latvia, Lithuania and Poland[4]. This Decision would have authorised the three Member States to adopt 'extraordinary measures' at their borders with Belarus under Article 78(3) Treaty on the Functioning of the European Union (TFEU). While this Council Decision was never formally approved by EU Member States at the Council level, the Commission simultaneously put forward two related legislative proposals which would introduce the concept of 'instrumentalisation of migrants' in EU law:

First, a proposal for a 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 borders (*SBC* proposal)[5]; and second, a proposal for a regulation of the European Parliament and of the Council addressing situations of instrumentalisation in the field of migration and asylum (*instrumentalisation proposal*)[6]. The latter proposal was presented by the Commission without an accompanying impact assessment.

Under the Better Regulation Guidelines (BRG)[7] and the 2016 Interinstitutional Agreement between the European Parliament, the Council of the EU and the European Commission on Better Law-

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1 Frontex (2021), 'Migratory situation November: The highest number of detections in November since 2015'. 15 December 2021. https://frontex.europa.eu/media-centre/news/news-release/migratory-situation-november-the-highest-number-of-detections-in-november-since-2015-Vn2CSr

2 For an analysis of EU responses see S. Carrera (2021), 'Walling off responsibility? The pushbacks at EU External borders with Belarus', CEPS Policy Insight, Brussels.

3 M. del Monte and K. Luyten (2021), 'Emergency measures on migration: Article 78(3) TFEU'. EPRS Briefing, December 2021. https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/698851/EPRS_BRI(2021)698851_EN.pdf ; BBC (2021), 'Belarus border crisis: How are migrants getting there?' 26 November 2021. https://www.bbc.com/news/59233244

4 European Commission, Proposal for a Council Decision on provisional emergency measures for the benefit of Latvia, Lithuania and Poland. COM(2021) 752 final, 1 December 2021. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2021%3A752%3AFIN (not adopted)

5 European Commission, Regulation Amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders. COM(2021) 891 final, 14 December 2021. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52021PC0891

6 European Commission, Proposal for a Regulation Addressing Situations of Instrumentalisation in the Field of Migration and Asylum. COM/2021/890 final, 14 December 2021, p. 2. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2021%3A890%3AFIN

7 European Commission, Staff Working Document: Better regulation guidelines. SWD(2021) 305 final. Brussels, 3.11.2021. https://commission.europa.eu/system/files/2011-11/swd2021_305_en.pdf

Making[8], the Commission is required to carry out impact assessments (IAs) of its legislative and non-legislative initiatives, delegated acts and implementing measures with expected significant economic or social impacts. Despite this, the instrumentalisation proposal and other recent proposals released by the Commission in the area of migration and asylum have not been accompanied by an IA. When it comes to the instrumentalisation proposal, the Commission failed to provide a justification as to why it deemed that an IA was not necessary. The lack of an IA creates significant problems of accountability and transparency, and has led the European Parliament to carry out Substitute IAs for several proposals, i.e. the proposals under the New Pact on Migration and Asylum[9], the Return Directive recast (rRD)[10] and currently the instrumentalisation proposal.

1.1. Objective and scope of the study

The overall objective of this Substitute IA is to provide a rigorous *ex-ante* assessment of the instrumentalisation proposal and its impacts. The IA was requested by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE Committee) to inform its consideration of the Instrumentalisation proposal. The present IA was carried out between May and September 2023.

It must be noted that, in regular circumstances, *ex-ante* IAs are carried out before legislative proposals are adopted by the Commission. For the instrumentalisation proposal, the analysis has been carried out after the proposal was already on the table and as negotiations were ongoing in the Council. Because of this, the Substitute IA does not consider alternative options but only examines the existing proposal and its impacts *vis-á-vis* the status quo. As per the LIBE Committee request, the scope of this Substitute IA is limited to the original proposal presented by the Commission in December 2021 and does not examine the Council's Presidency compromise text addressing situations of crisis, instrumentalisation and *force majeure* in the field of migration and asylum of 14 June 2023[11].

The present Substitute IA follows the key principles and questions outlined in Chapter IV of the Commission's Better Regulation Guidelines[12] and makes use of relevant tools included in the Better Regulation Toolbox[13]. The key questions raised by the LIBE Committee and answered in this IA are the following:

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8 Interinstitutional Agreement between the European Parliament, the Council of the EU and the European Commission on Better Law-Making. Interinstitutional Agreement of 13 April 2016 on Better Law-Making. OJ L 123/1. 12 5 2016. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016Q0512(01)

9 European Commission, New Pact on Migration and Asylum. https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/promoting-our-european-way-life/new-pact-migration-and-asylum_en#documents

10 European Commission, Proposal for a Directive on common standards and procedures in Member States for returning illegally staying third-country nationals (recast) A contribution from the European Commission to the Leaders' meeting in Salzburg on 19-20 September 2018. COM/2018/634 final. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52018PC0634

11 Council of the EU, Proposal for a Regulation addressing situations of crisis, instrumentalisation and *force majeure* in the field of migration and asylum. 10463/23. Brussels, 14 June 2023.

12 European Commission, Staff Working Document: Better Regulation Guidelines. SWD(2021) 305 final. Brussels, 3.11.2021. https://commission.europa.eu/system/files/2021-11/swd2021_305_en.pdf

13 European Commission, 'Better regulation' toolbox – November 2021 edition. https://commission.europa.eu/system/files/2023-02/br_toolbox-nov_2021_en.pdf

1. What is the problem and why is it a problem?
   - What is the problem that the proposal aims to address (scope, scale, drivers and consequences) and how likely is it that the problem will persist in the absence of (further) EU policy intervention?
   - To what extent is the problem adequately defined and adequately substantiated by the Commission?
   - To what extent is the problem addressed / not addressed by the current framework for EU migration and asylum law, the New Pact proposals and Schengen Borders Code?
2. Why should the EU act?
   - Does the Commission proposal respect the principles of subsidiarity and proportionality?
   - What is the added value of the proposal compared to the current situation (status quo) and taking into account the state of the negotiations on the proposals of the pact?
   - Is the choice made in terms of legal instrument and of framing the EU intervention appropriate and proportionate to the identified objective?
3. What should be achieved?
   - To what extent is the objective relevant in relation to the problem identified?
4. Legal analysis of the proposal against the baseline and interaction with relevant proposals under the New Pact of Migration and Asylum and other relevant EU laws and policies:
   - What will be the likely impact on the harmonisation of the asylum *acquis* at EU level and respect for EU law more generally by introducing a permanent mechanism that enables derogations from EU law on a temporary basis? Are the proposed derogations in compliance with EU law in general?
   - How does the proposal interact with the changes proposed under the relevant proposals of the New Pact on Migration and Asylum, in particular the proposed crisis and force majeure regulation:
     - Does the Commission proposal offer sufficient clarity on how its application relates to a potential cumulative/additional application of the Crisis Regulation? More specifically, is the proposal sufficiently clear on whether or not the Crisis Regulation can be imposed right after the application of the Instrumentalisation Regulation or vice-versa and, if so, on how such instances should be handled in practice? What is the practical impact of such a potential cumulative application, and is it proportionate?
     - In which ways is a situation of instrumentalisation different from other situations, which under the current EU law are qualified as crisis?
     - How do the support and solidarity measures in this proposal compare and relate to the solidarity measures proposed in other instruments within the New Pact on Migration and Asylum? Are the differences in the proposed solidarity measures in this proposal compared to others - for example the lack of explicit mention of

relocation measures and the lack of a right of the Commission to assess which solidarity measures would be most appropriate - justified?
   - other relevant EU law and policies, such as the proposed revision of the Schengen Borders Code;
   - the operational framework provided by other EU actors (e.g. EASO, Frontex).
5. What are the main expected impacts of the proposal once it is triggered, and notably the fundamental rights, social, economic, territorial impacts, as well as impacts on EU external relations?
   - What is the expected impact in practice on the legal status of individuals who are subjected to the emergency asylum management procedure?
   - What is the expected impact in practice of the proposal on the management of borders, availability of structures and staff, material reception conditions, asylum procedures, time spent in detention, detention conditions and return procedures?
   - What are the expected costs and benefits that the proposal would entail, and would the benefits outweigh the costs?
6. Effectiveness and efficiency
   - Would the proposal effectively and efficiently address the problem identified and achieve its stated objective (address situations of instrumentalisation of migrants) in a proportionate way?
   - Would derogations from asylum, reception and return standards be more effective than foreign affairs and diplomatic avenues?
7. How will the monitoring and evaluation of the implementation of the proposal be ensured?

1.2. Methodological approach

The Substitute IA is informed by desk research of relevant primary and secondary sources related to the instrumentalisation proposal. This includes an analysis of existing academic research, evidence gathered by relevant international organisations and civil society actors, and key legal standards in the case-law from the Court of Justice of the EU (CJEU), and the European Court of Human Rights (ECtHR), as well as other regional and international bodies such as the Council of Europe and the United Nations. The Substitute IA also takes into account key findings from previous European Parliament studies and IAs[14].

This Substitute IA aims to provide a comprehensive mapping of the relations and interconnections between the instrumentalisation proposal and other relevant existing pieces of EU law, as well as legislative proposals currently under interinstitutional negotiations under the 2016 CEAS Reform and the Commission's 2020 New Pact on Migration and Asylum (See *Section 1.3* for an overview of the two proposed reforms). It examines the instruments from which the instrumentalisation proposal would allow derogations, namely the 2016 Asylum Procedures Regulation (APR)

[14] K. Eisele and W. Van Ballengooij (2020), Asylum procedure at the border. European Implementation Assessment commissioned by the EPRS. https://www.europarl.europa.eu/RegData/etudes/STUD/2020/654201/EPRS_STU(2020)654201_EN.pdf

E. Brouwer et al. (2021), The European Commission's legislative Proposals in the New Pact on Migration and Asylum. https://www.europarl.europa.eu/RegData/etudes/STUD/2021/697130/IPOL_STU(2021)697130_EN.pdf

G. Cornelisse and G. Campesi (2021), The European Commission's New Pact on Migration and Asylum. Horizontal Substitute impact assessment. EPRS. https://www.europarl.europa.eu/RegData/etudes/STUD/2021/694210/EPRS_STU(2021)694210_EN.pdf

proposal[15], the amended 2020 APR proposal[16], the 2016 Reception Conditions Directive recast proposal (rRCD)[17], and the Returns Directive recast proposal (rRD)[18] and the possible overlaps or simultaneous application with the 2020 crisis and force majeure regulation proposal[19].

The methodology is informed by a case study approach covering six selected EU Member States, and their external relations with the neighbouring countries, in particular: Lithuania–Belarus; Poland–Belarus; Greece–Turkey; Bulgaria–Turkey; Spain–Morocco, and Italy–Tunisia. The country case studies have been selected in order to assess the key issues and lessons learned from national policies that have been applied in situations which have been officially described by national governments as related to neighbouring non-EU governments allegedly playing a role in facilitating and/or coercing TCN mobility towards EU external borders for political purposes, and/or cases of declared 'state of emergency' based on migration / asylum-related grounds. The selection of the particular EU Member States was aimed at ensuring a geographical balance of countries and regions across the Union, as well as different types of land and sea external borders.

In choosing the EU Member States the aim was to inform whether the assumptions behind the Commission's proposed concept of 'instrumentalisation of migrants', and the provisions included in the proposal, reflect and are in fact relevant to past or existing policies of different EU Member States that have EU external borders in the Schengen area. Qualitative analysis of these case studies is crucial if generalisations across relevant EU Member States are to be avoided, and context-specific considerations are to be taken into account. The findings of the case studies are presented in *Annex III* to the IA and inform the assessment of fundamental rights, societal, economic, territorial and external relations impacts.

The research has been combined with a set of 22 semi-structured interviews with key EU actors, including the European Commission, the External Action Service, EU agencies (The European Union Agency for Asylum (EUAA), the EU Agency for Fundamental Rights (FRA) and the European Border and Coast Guard (Frontex)), selected Member States' Permanent Representations, national ministries, border control practitioners, international organisations, civil society actors and academics (See *Annex I* for a full list). The aim of the interviews was to shed light on the key issues at stake behind the proposal, how these different actors understand the problem identified by the Commission, the proposed logic of intervention and the expected impacts of the proposal. Furthermore, a closed-door hybrid stakeholders' workshop was organised to allow a broad consultation process. The workshop brought together EU and national civil society actors and human rights institutions to examine the proposal's definition, objectives as well as its impacts, and

[15] European Commission, Proposal for a Regulation establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU. COM(2016) 467 final. 13.7.2016. https://www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/com/2016/0467/COM_COM(2016)0467_EN.pdf

[16] European Commission, Amended Proposal for a Regulation establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, COM(2020) 611 final. https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A52020PC0611

[17] European Commission, Proposal for a Directive laying down standards for the reception of applicants for international protection (recast), COM(2016) 465, 13 July 2016. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016PC0465&from=EN

[18] European Commission, Proposal for a Directive on common standards and procedures in Member States for returning illegally staying third-country nationals (recast), COM(2018) 634 final. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52018PC0634

[19] European Commission, Proposal for a Regulation addressing situations of crisis and force majeure in the field of migration and asylum. COM/2020/613 final. 23.9.2020. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2020%3A613%3AFIN

to fill any potential knowledge gaps of the research based on their practical and on-the-ground evidence.

Concerning the limitations of this study, it is necessary to highlight the heterogenous availability of data among the different Member States under examination. The limited timeline available for this IA affected the scope of research, as well as the data gathering process. Some gaps were filled in through the interviews and existing qualitative sources such as previous EPRS IAs, reports from international institutions, EU agencies, civil society and media sources[20]. *Annex II* notes on calculations provides a comprehensive overview of the specific limitations and uncertainties in the quantification of different costs and benefits and sources used.

1.3. Overview of the legal and policy context

1.3.1. Existing secondary law

The relevant instruments of secondary EU law currently in force are the following: first, Directive 2013/32/EU on common procedures for granting and withdrawing international protection (recast) (Asylum Procedures Directive, APD) of 26 June 2013[21]; second, Directive 2013/33/EU laying down standards for the reception of applicants for international protection (recast) (Reception Conditions Directive, RCD) of 26 June 2013[22]; and third, Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals (Return Directive, RD) of 16 December 2008[23]. They set, respectively, common EU standards for asylum procedures and reception conditions that Member States must provide to applicants of international protection, and the standards and safeguards applicable in the context of return procedures.

1.3.2. New proposals: 2016 CEAS Reform and the 2020 Migration and Asylum Pact

The instrumentalisation proposal was presented by the Commission while the European Parliament and the Council were discussing and negotiating a series of previous legislative proposals from 2016 and 2020. In 2016, two packages of proposals were launched. Among others, they included:

- Proposal for a Regulation establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU (APR)[24]; and

[20] In cases where public statistical data was lacking, freedom of information requests were issued to EU Member States levels. In a few cases, this proved effective despite the time limitations.

[21] Directive 2013/32/EU of 26 June 2013 on common procedures for granting and withdrawing international protection (recast). OJ L 180, 29.6.2013, p. 60–95 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32013L0032&qid=1688566610712

[22] Directive 2013/33/EU of 26 June 2013 laying down standards for the reception of applicants for international protection (recast). OJ L 180, 29.6.2013, p. 96–116. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32013L0033&qid=1688566741055

[23] Directive 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals. OJ L 348, 24.12.2008, p. 98–107. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32008L0115&qid=1688566809666

[24] European Commission, Proposal for a Regulation establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU. COM(2016) 467 final. 13.7.2016. https://www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/com/2016/0467/COM_COM(2016)0467_EN.pdf

- Proposal recasting the Reception Conditions Directive (rRCD)[25].

Respectively, these were set to replace the APD and RCD currently in force. In addition to these proposals, the Commission also proposed a recast of the Return Directive to replace the 2008 Return Directive in 2018[26]. Following the lack of progress on the 2016 CEAS Reform, in 2020, the Commission put forward five legislative proposals under the 'New Pact on Migration and Asylum'. These included:

- A proposal for a new Regulation on Asylum and Migration Management (RAMM)[27];
- An amended proposal revising the Asylum Procedures Regulation (amended APR)[28];
- An amended proposal revising the Eurodac Regulation[29];
- A proposal for a new Screening Regulation[30]; and
- A proposal for a new crisis and *force majeure* Regulation[31].

As of July 2023, with the exception of the EUAA Regulation[32], which was also part of the 2016 CEAS Reform and turned the European Asylum Support Office (EASO) into the new European Union Asylum Agency (EUAA), none of the legislative proposals have been adopted by the EU co-legislators. Some EU Member States have insisted on the 'package approach' rather than an individual adoption of each proposal[33]. In September 2022, the European Parliament and the rotating presidencies of the Council signed a Joint Roadmap, declaring their commitment to finalise

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25 European Commission, Proposal for a Directive laying down standards for the reception of applicants for international protection (recast), COM(2016) 465, 13 July 2016. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016PC0465&from=EN

26 European Commission, Proposal for a Directive on common standards and procedures in Member States for returning illegally staying third-country nationals (recast) A contribution from the European Commission to the Leaders' meeting in Salzburg on 19-20 September 2018. COM/2018/634 final. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52018PC0634

27 European Commission, Proposal for a Regulation on Asylum and Migration Management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund] (Text with EEA relevance) {SWD(2020) 207 final}, COM(2020) 610 final. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2020%3A610%3AFIN

28 European Commission, Amended Proposal for a Regulation establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, COM(2020) 611 final. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2020%3A611%3AFIN

29 European Commission, Amended Proposal for a Regulation on the establishment of 'Eurodac' for the comparison of biometric data for the effective application of Regulation (EU) XXX/XXX [Regulation on Asylum and Migration Management] and of Regulation (EU) XXX/XXX [Resettlement Regulation], for identifying an illegally staying third-country national or stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes and amending Regulations (EU) 2018/1240 and (EU) 2019/818, COM(2020) 614 final. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2020%3A614%3AFIN

30 European Commission, Proposal for a Regulation introducing a 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, COM(2020) 612 final. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2020%3A612%3AFIN

31 European Commission, Proposal for a Regulation addressing situations of crisis and force majeure in the field of migration and asylum (Text with EEA relevance), COM(2020) 613 final. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2020%3A613%3AFIN These were also accompanied by four non-legislative documents: A Recommendation on a Migration Preparedness and Crisis Blueprint; A Recommendation on Legal pathways to protection in the EU; A Recommendation on Search and Rescue Operations by private vessels; Guidance on the scope of the Facilitators Directive.

32 Its adoption included exceptions subject to temporary non-application of the monitoring role of EU asylum standards in EU Member States. See Recital 68 and Article 73, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32021R2303

33 Council of the European Union, Reform of the Common European Asylum System and Resettlement, Progress Report, 6600/19. https://data.consilium.europa.eu/doc/document/ST-6600-2019-INIT/en/pdf

the negotiations of the pending CEAS and the pact's legislative proposals by February 2024[34]. The Joint Roadmap takes forward the 'package approach' by emphasising the need to ensure that all of the Pact's legislative files are adopted 'so as to respect a strict balance between all components of the Pact'[35]. Crucially, the Joint Roadmap did not include the instrumentalisation proposal among the pending legislative initiatives covered by envisaged timeline of negotiations[36].

Trialogues are currently taking place on the RAMM, the APR and the Screening Regulation proposal, and the Eurodac proposal[37]. The Council of the EU has, at the time of writing, not yet reached agreement among Member States on the proposal for the crisis and force majeure Regulation. Following the 14 June 2023 Council's Presidency compromise text of this initiative (mentioned above), the Council is currently aiming at merging the latter with the instrumentalisation proposal by enlarging its scope to address situations of instrumentalisation in addition to those of crisis and force majeure, and consequently scrapping a self-standing instrumentalisation proposal[38]. Until that agreement is reached, formal negotiations with the European Parliament cannot start. With the compromise text, the aim of the Council is to include 'instrumentalisation' under the material scope of the agreed joint roadmap with the Parliament in an *ad hoc* fashion[39].

1.3.3. EU's Strategic Compass on Security and Defence and 2022 NATO's Strategic Concept

The concept of 'instrumentalisation of migrants' has been included in a number of official EU policy documents in the sphere of foreign policy and defence. References to 'instrumentalisation' as a 'hybrid threat' can be found in the 'Strategic Compass for Security and Defence' endorsed by the Council of the EU in March 2022[40]. This document finds that 'the EU is surrounded by *instability* and

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[34] 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. https://www.europarl.europa.eu/resources/library/media/20220907RES39903/20220907RES39903.pdf

[35] The Joint Roadmap states that the European Parliament and the rotating presidencies of the Council 'agree that such an ambitious reform must be seen as a consistent set of texts to be examined in a comprehensive way'.

[36] See footnote1 of the Joint Roadmap which makes reference to the following open files: Regulation for Asylum and Migration Management, Regulation for Crisis and Force Majeure, Screening Regulation and Proposal amending several regulations to facilitate the Screening, Qualification Regulation, Reception Conditions Directive (Recast), Amended Asylum Procedures Regulation, Returns Directive (Recast), Amended EURODAC Regulation, Union Resettlement Framework.

[37] C. Dumbrava, K. Luyten and A. Orav (2023), EU pact on migration and asylum. State of play. European Parliament Research Service. June 2023. https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/739247/EPRS_BRI(2022)739247_EN.pdf

[38] Council of the EU, Proposal for a Regulation addressing situations of crisis, instrumentalisation and *force majeure* in the field of migration and asylum. 10463/23. Brussels, 14 June 2023. According to Agence Europe, the Council of the EU did not manage to reach an agreement between EU Member States during a meeting which took place on 26 July 2023. See Agence Europe (2023), *Negotiations between European Parliament and Council of the EU will resume in mid-September on key texts of 'Pact on Migration and Asylum*, 28 August 2023, Brussels.

[39] The merged Council of the EU compromise text has already raised profound concerns by civil society. Refer to the joint statement issued by more than 100 NGOs and civil society actors recommended Member States to reject the merging of the Crisis and Force Majeure proposal with the one on instrumentalisation, and the European Parliament to not accept the suggested integration and reject the notion of 'force majeure'. Joint Statement (2023), *NGOs call on Member States and European Parliament: Go no Lower: Reject the Use of Legal Loopholes in EU Asylum Law Reforms*, 18 July 2023. Available at: https://ecre.org/joint-statement-ngos-call-on-member-states-and-european-parliament-go-no-lower-reject-the-use-of-legal-loopholes-in-eu-asylum-law-reforms/

[40] Council of the EU, A Strategic Compass for Security and Defence - For a European Union that protects its citizens, values and interests and contributes to international peace and security. 7371/22. Brussels, 21 March 2022. https://data.consilium.europa.eu/doc/document/ST-7371-2022-INIT/en/pdf

conflicts and faces a war on its borders'. In this context, the 'instrumentalisation of migrants' is listed as one of the multiple threats to European security together with terrorism, violent extremism, organised crime, hybrid conflicts and cyberattacks, arms proliferation and the progressive weakening of the arms control architecture. Similarly, in February 2022 the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Commission contribution to European Defence, situations of 'instrumentalisation' are included as one of the main examples of the 'hybrid threats' faced by the EU[41].

EU Member States – particularly Spain[42] – also pushed for the inclusion of irregular migration as a security threat in the context of NATO. The 2022 NATO Strategic Concept states that 'authoritarian actors challenge our interest, values and democratic way of life', and they would do so 'through hybrid attacks, both directly and through proxies'[43]. The document specifically mentions the instrumentalisation of migrants as an example of these hybrid attacks alongside malicious activities in cyberspace and space, disinformation campaigns, the manipulation of energy supplies and economic coercion[44]. Forced displacement, human trafficking and irregular migration are also included in the trends '[posing] serious transnational humanitarian challenges' and '[undermining] human and state security'[45]. In light of this, NATO commits to invest in new technologies to preserve 'our interoperability and military edge'[46], 'invest in our ability to prepare for, deter, and defend against the coercive use of political, economic, energy, information and other hybrid tactics by states and non-state actors' and to 'maximise synergies with other relevant actors, such as the *European Union*' (emphasis added)[47].

[41] European Commission, Communication on The Commission contribution to European Defence. COM(2022) 60 final. 15.2.2022. https://commission.europa.eu/system/files/2022-02/com_2022_60_1_en_act_contribution_european_defence.pdf

[42] France24, 'Spain calls deadly migrant rush an 'attack' on its territory'. 25 June 2022. https://www.france24.com/en/africa/20220625-18-migrants-die-in-mass-attempt-to-enter-spain-s-enclave-melilla-in-marocco

[43] NATO, NATO 2022 Strategic Concept. 29 June 2022. Para 7. https://www.nato.int/nato_static_fl2014/assets/pdf/2022/6/pdf/290622-strategic-concept.pdf

[44] Ibid.

[45] Ibid., para. 12.

[46] Ibid., para 24.

[47] Ibid., para. 27.

2. Definition of the problem, baseline and drivers

Key findings

- The problem identified by the Commission, i.e. 'the instrumentalisation of migration', lacks conceptual clarity and legal precision. The three constitutive elements of this concept – i.e. a third country actively encouraging or facilitating TCNs unauthorised entry; its intention to destabilise the Union or a Member State; and the extent to which these actions put at risk essential EU Member States functions and their territorial integrity, law and order and national security, are too broad and vague in scope and nature. These elements raise fundamental challenges for any objective, non-politicised and scientifically rigorous assessment.
- There is an intrinsic disconnection and incoherency between the main problem identified, which is rooted in foreign policy, and the proposed policy solutions and derogations to TCNs rights and safeguards under EU migration and asylum policy.
- The Commission fails to acknowledge the existing implementation gap and systematic violation of EU border, asylum and returns legal standards, rule of law backsliding and the misuse of the state of emergency and grounds of national security by some EU Member States.
- The IA has identified two main drivers behind the problem: first, 'reverse externalisation' resulting from the conditionality and issue-linkage in EU external migration policy, and third-countries being given incentives to politically use the migration portfolio to pursue their own foreign policy interests; and second, the lack of effective and genuine legal pathways for TCNs to reach EU's territory in authorised ways, including for asylum-seeking purposes.

This section analyses and critically reflects on what is 'the problem' as defined by the European Commission in the Explanatory Memorandum of the instrumentalisation proposal. It assesses the problem that the proposal aims to address – scope, scale and drivers. The section further examines whether the problem is well defined and substantiated by the Commission. It also reviews how likely is the problem to persist in the absence of this legislative proposal, including to what extent it is already addressed or not by the current EU migration, borders and asylum law framework and other pending legislative proposals.

2.1. Review of the problem and baseline

The Explanatory Memorandum of the instrumentalisation proposal starts by identifying the main problem which is the 'instrumentalisation of migration and asylum'. This notion is understood by the proposal as 'the increasing role of State actors in artificially creating and facilitating irregular migration, using migratory flows as a tool for political purposes, to destabilise the European Union and its Member States'. A central feature is the role played by non-EU state actors in using 'migration and asylum' as a foreign affairs tool in their relations with the EU and its Member States. The actual legal definition of instrumentalisation can be found elsewhere, in the Commission legislative proposal reforming SBC[48] which conceptualises the 'instrumentalisation of migrants' as follows in Article 1(b)(27):

[48] European Commission, Proposal for a Regulation amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders (SBC Proposal) of 14 December 2021.

> '…a situation where a third country instigates *irregular migratory flows* into the Union by *actively encouraging or facilitating* the movement of third-country nationals to the external borders, onto or from within its territory and then onwards to those external borders, where such actions are *indicative of an intention* of a third country *to destabilise* the Union or a Member State, where the nature of such actions is liable *to put at risk essential State functions*, including its *territorial integrity*, the maintenance of *law and order* or the safeguard of its *national security*'. (Emphasis Added).

The Explanatory Memorandum identifies as the origins of this proposal 'the instrumentalisation of people by the Belarusian regime back in 2021, and the corresponding 2021 Commission proposal for a Council Decision on provisional emergency measures for the benefit of Latvia Lithuania and Poland.[49] The Explanatory Memorandum calls for a permanent EU legal framework by arguing that 'it cannot be excluded that others may attempt to conduct hybrid attacks on the Union that include the instrumentalisation of migrants'. It however fails to identify, contrary to the EU Better Regulation Guidelines, the actual drivers behind the identified problem.

Based on this, as the proposal argues, 'Member States should have the flexibility to act within a legal framework designed to address that particular situation and ensure that the rights of those falling victim to instrumentalisation are respected'. The proposal envisages what the Commission considers to be 'the *necessary legal tools* to face future instrumentalisation situations were they to arise', and 'to provide for *a stable and ready to use framework* to deal with any such situation in the future and thus render unnecessary to resort to *ad hoc* measures under Article 78(3) TFEU to address situations of instrumentalisation that fall under this proposal' (Emphasis added). The proposal converts the provisional or temporary model envisaged in the proposal Council Decision COM/2021/752 into a permanent toolbox in the hands of EU Member States to apply specific emergency asylum and returns procedures and to receive support and solidarity measures in these situations.

The proposal does not clearly or comprehensively articulate its relationship with the baseline, i.e. existing EU legislation in these same fields and all the pending legislative proposals. According to the Explanatory Memorandum, the Commission argues that the proposal 'complements' and 'reinforces' the legislative initiatives included in the 2020 Pact on Migration and Asylum, which 'form the basis of the future EU migration and asylum policy'. The Commission argues that the proposal is based on and 'consistent with' those in the Pact, and states that the proposal differs from those laid down in the Pact as follows: first, it aims at dealing with 'situations where the Union's integrity and security are *under attack*' (Emphasis added); and second, it seeks to cover situations which may not correspond with a sudden 'mass influx' as addressed in the 2020 Pact's crisis and *force majeure* regulation proposal. This underlines the foreseeability and non-large-scale nature of unauthorised entries by TCNs across EU external borders for situations falling under the proposed EU concept of 'instrumentalisation'. However, as the analysis provided in *Sections 2.2.3. and 4.2*. of this IA below show, the added value of the proposal in comparison to the baseline remains unproven and contested.

2.2. Critical reflection of the problems and their drivers

2.2.1. Concepts and their definition

The main problem outlined in the proposal – i.e. instrumentalisation – lacks conceptual clarity and precision. As *Section 4.2.2*. below shows in detail, this is first related to the inherent ambiguities characterising the definition of instrumentalisation *per se*. The three constitutive features of the

[49] European Commission, Proposal for a Council Decision on provisional emergency measures for the benefit of Latvia Lithuania and Poland, COM/2021/752 final of 1 December 2021.

proposed EU concept of 'instrumentalisation'– i.e. first, a third country actively encouraging / facilitating mobility; second, an 'intention' to destabilise the Union or a Member State; and third, a risk to 'essential State functions' – are too broad and vague in nature, and raise fundamental challenges for carrying out any objective, non-politicised and scientifically rigorous measurement (See *Section 4.2.2.* of this Substitute IA for a detailed examination)[50].

The framing of human beings as 'irregular migratory flows', and the latter as a 'hybrid threat'[51] or a 'hybrid attack'[52], nurtures conceptual unclarity of the main problem. The stakeholders' workshop, interviews conducted for the purpose of this Substitute IA and academic research have referred to how the 'hybrid threats and attacks' narrative is linked to the 'weaponisation of migration' metaphor[53], which casts refugees, asylum seekers and third-country nationals (TCNs) in defence, military and insecurity terms. TCNs are indirectly presented as 'weapons' threatening the territorial integrity and public order of EU Member States and the EU[54]. While the proposal refrains from using the notion of 'weaponisation' and does not directly frame TCNs as 'weapons', its numerous references to 'migration' as a 'hybrid threat and attack'[55] undoubtedly lead to a similar result. This is even more so when reading this proposal in combination with the 2022 EU's Strategic Compass on Security and Defence mentioned in *Section 1.3.3.* above[56].

Such an insecurity and defence-driven framing dehumanises both the people and the problem in question in the Commission proposal, which raises profound fundamental rights and rule of law impacts (Refer to *Section 5.1.* of this Substitute IA). The Explanatory Memorandum does not provide evidence on: First, why irregular external border crossings should be *in general* regarded or assumed to be 'a threat to the Member States and Union's integrity and security'; second, why human beings and asylum seekers are to be considered as 'hybrid threats' to the EU and/or relevant EU Member

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50 According to Forti 'This definition contains various unclear terms that may cause problems of regulatory uncertainty and, therefore, discrepancies in the implementation phase. More specifically, there are no valid instruments to assess the hostile intentions of a third country to destabilise the EU and its Member States. It is likewise not possible to unambiguously determine when a specific action could undermine vital state activities. Such a lack of legal clarity leaves room for political disputes over the opportunity to frame a specific situation at the borders within the migration instrumentalisation context'. M. Forti (2023), *Belarus-sponsored Migration Movements and the Response by Lithuania, Latvia and Poland: A Critical Appraisal*, European Papers, available at https://www.europeanpapers.eu/en/europeanforum/belarus-sponsored-migration-movements-and-response-by-lithuania-latvia-and-poland

51 Refer to Recital 2 of the proposal which refers to the 'hybrid threat' notion.

52 European Commission, Proposal for a Council Decision on provisional emergency measures for the benefit of Latvia, Lithuania and Poland, COM/2021/752 final, 1 December 2021, Brussels, stated that 'These actions constitute a hybrid attack that show a determined attempt to create *a continuing and protracted crisis* as part of a broader concerted effort to destabilise the European Union and undermining society and key institutions. These actions represent a *real threat and present danger to the Union's security*'. (Emphasis Added).

53 K. Greenhill (2010), *Weapons of Mass Migration: Forced Displacement, Coercion and Foreign Policy*, Ithaca: NY and London: Cornell University Press. Interview with academic; Interviews with civil society actors.

54 L. Marder (2018), Refugees are not weapons: The 'weapons of mass migration' metaphor and its implications, *International Studies Review* (20180 20 - something missing here?, pp. 576-588.

55 The proposal includes three express references to 'hybrid attack' on page 1 of the explanatory memorandum alone. It refers to a 'hybrid threat' in Recital 2 of the Preamble. It does not, however, provide a definition of what a 'hybrid threat or attack' are supposed to mean for its purposes.

56 However, and interestingly, the critical analysis of the derogations-based model enshrined in the proposal in *Section 4* shows that the Commission approach is one favouring an approach driven by what Bigo calls 'filtering, sorting out and policing' concerned with detaining and expelling TCNs, instead of one centred on 'the militarisation' of EU external border controls. Refer to D. Bigo (2014), 'The (in)securitization practices of the three universes of EU border control: Military/Navy – border guards/police – database analysts', *Security Dialogue*, Vol. 45(3), pp. 209-225.

States; and third, what effects the proposal could be expected to generally have on Member States' maintenance of public order and security[57].

In the same light, the proposal's use of categories such as 'irregular migration' hides that many TCNs may in fact qualify as asylum seekers and refugees in the EU. As underlined in the 2021 EPRS Horizontal Impact Assessment on the EU Pact on Migration and Asylum[58], the 2020 Commission Staff Working Document accompanying the Pact statement that the EU-wide first instance recognition rate fell to 30 % in 2019 needs to be treated with caution as it lacks accuracy. The 30% figure does not consider that the distinction between TCNs and asylum seekers is not so clear-cut in reality[59]. The figure does not include the number of TCNs who are granted 'humanitarian protection status' by EU Member States, nor the number of negative decisions that are positively challenged in appeal in second or higher instances[60]. Furthermore, these statistics ignore the persistent major divergencies across EU Member States regarding positive recognition rates in relation to the same nationalities of asylum seekers[61], as well as the structural obstacles that TCNs experience in having access to effective remedies in the EU, particularly in the context of border controls and surveillance activities[62]. This indicates that a large percentage of TCNs, who fall within circumstances officially framed as 'instrumentalisation', may be legitimately seeking asylum in the EU.

2.2.2. Scale and scope of the phenomenon

The proposal fails to provide evidence on the actual scale of the problem, in particular the exact numbers of TCNs attempting to enter the EU's territory irregularly in situations that have been, in the past, officially considered as instances of 'instrumentalisation' following the proposal's definition. Furthermore, and crucially, the Explanatory Memorandum does not take into account how many of these same individuals could be objectively linked or identified as dependent on a third state actors' intentional role, and how many of those persons do so without the aid of the third country concerned and should be therefore excluded from the personal scope of the proposal. As the case studies attached in *Annex III* of this Substitute IA show, the number of TCNs who have been caught by such a situation have been relatively low and variable in scale.

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57 As confirmed by the Court of Justice of the EU in its Case C-72/22 PPU, *M.A. v Lithuania* of 30 June 2022, the mere irregular mobility by asylum seekers does not constitute *per se* such a 'sufficiently serious threat' to public order/security', and its existence *must not be based on 'generalised assumptions or considerations*, but rather on 'account of *specific circumstances* which demonstrate that s/he is dangerous, in addition to being illegally present,' which require an individualised assessment. (Emphasis added).

58 EPRS (2021), Horizontal Impact Assessment, The European Commission's New Pact on Migration and Asylum, Brussels; on this finding see also European Parliament Study (2021), The European Commission's legislative Proposals in the New Pact on Migration and Asylum, Brussels, available at https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2021)697130

59 Interview with PICUM.

60 According to the EU Asylum Agency (EUAA) 2022 Asylum Report, 'The EU+ recognition rate of 34 % excludes authorisations to stay for humanitarian reasons. If such authorisations are included, the recognition rate for 2021 would be 40 %. This considerable difference is largely due to humanitarian status granted to Venezuelans in Spain, which represented more than two-fifths of all humanitarian permissions to stay in EU+ countries. Moreover, Afghans received one-seventh of all humanitarian permissions, most of which were issued by Germany and Switzerland.' Retrievable from Asylum Report 2022 (europa.eu)

61 The EUAA 2022 Asylum Report identifies large differences in national practices were seen in granting protection to the Top 10 citizenships of applicants, 'For example, the recognition rate for Syrians was at least 62 % in most countries that issued many decisions (more than 200), but it was only 36 % in Denmark. Overall, discrepancies in recognition rates were most apparent for applicants from Afghanistan, ranging from 11 % in Bulgaria to 99 % in Poland and Spain. Wide ranges also occurred for Iraqi applicants (from 0 % in Poland to 83 % in Italy) and Turks (from 16 % in France to 96 % in Switzerland)', p. 219.

62 UNGA, Report of the Special Rapporteur on the human rights of migrants. A/73/178. 26 July 2018. https://documentsdds-ny.un.org/doc/UNDOC/GEN/N18/228/98/PDF/N1822898.pdf?OpenElement

This has been the case for instance in Lithuania, where since the pushback policy was established on 2 August 2021 to 31 December 2021, 8 106 foreigners were not allowed to enter Lithuanian territory [63]. A similar picture emerges in the case of Spain, where about 8 000 TCNs were said to have attempted to cross irregularly from Morocco to Ceuta in 2021 through the border fence, and in Greece, where the government statistics refer to about 9 000 unauthorised entries back in March 2020 [64]. In Poland, an estimated total number of 33 781 unauthorised TCNs entries were prevented by the Polish authorities in 2021. Furthermore, as the case studies show, these official statistics do not provide a fully accurate picture and are characterised by methodological caveats. For instance, they tend to count the number of attempted or 'unauthorised entries', but not the actual people. This may lead in some instances to double or triple counting, thus artificially inflating the scale of the phenomenon. Nonetheless, what is clear is that the overall reported numbers cannot be considered as 'large' in scale.

According to 2022 Frontex Risk Analysis [65], the total number of regular border crossings in the EU during 2021 was about 115 million. If this figure is compared with the total number of unauthorised external border crossings that same year – about 200 000 – unauthorised border entries accounted for approximately an 0.05 and 0.77 % of all external border crossings in the EU that year. The proposal does not therefore justify why and to what extent unauthorised border crossings that are not 'large' in scale, or of a sudden or unforeseeable nature, can be in all cases presumed to affect EU Member States 'essential functions' and their capacity to faithfully implement and timely deliver current EU standards enshrined in the SBC, the Common European Asylum System (CEAS) and the EU Return Directive.

2.2.3. Lack of need of a new instrument to deal with a declared emergency

The proposal is not based on a 'evaluate first' assessment of the effectiveness of existing EU legal acts applicable to 'situations of emergency', nor does it properly justify the overall rationale and necessity to come forward with a new specific EU legal instrument dealing with situations labelled as 'instrumentalisation'. The Commission provides no evidence on why Member States would need additional derogations and an even larger degree of 'flexibility' to deal with these situations, in particular when compared to the exceptions or derogative grounds already envisaged in existing EU asylum law, or those advanced in the 2020 Pact's crisis and *force majeure* proposal [66].

As explained in *Section 4.2* of this study below, the answer to these questions becomes most pertinent in view of the unclear linkages and interactions between the *derogations in chain* model – derogations to existing and previously proposed derogations in existing EU law and other pending legislative proposals – advanced by this proposal, and those already advanced in the Commission's

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63 Refer to Poland, Lithuania and Latvia have already not let in 100 thousand people from Belarus. irregular migrants | State Border Guard Service under the Ministry of the Interior of the Republic of Lithuania (lrv.lt)

64 However, the actual number of third-country nationals who attempted to enter irregularly in these countries may be in fact smaller as the statistics count number of 'entries' and not actual 'persons', and therefore there may be double or triple counting depending on the number of entry attempts by the same persons.

65 Frontex Risk Analysis for 2022/2023, Warsaw, September 2022. According to the Risk Analysis, during 2021 there were an estimated 114 929 189 regular entries or 'passenger flow', and 200 101 irregular border crossings in the EU, with a total of 8 160 irregular border crossings in the so-called 'Eastern Borders', which encompass countries like Poland, Lithuania and Latvia.

66 Refer to *Section 4.2.* for a detailed examination. ECRE (2020), Derogating from EU Asylum Law in the Name of "Emergencies": The Legal Limits Under EU Law. https://ecre.org/wp-content/uploads/2020/06/LN_6-final.pdf In the CEAS see for instance the Asylum Procedures Directive 2013/32 (Recital 20 and Article 31.8.j), and the Reception Conditions Directive 2013/33 (Recital 19, Article 11.6). Importantly, the Commission previously confirmed before the Luxembourg Court that current EU asylum rules already allow Member States to opt for 'flexible solutions' in cases of 'emergency' to depart from applicable rules under the current EU law framework. CJEU, C-808/18 *Commission v Hungary*, 17 December 2020, para 137.

2020 Pact on Migration and Asylum, chiefly those stipulated in the crisis and *force majeure* proposal. In this regard, a EPRS Substitute IA of the Pact on Migration and Asylum concluded that there is no robust evidence substantiating the need to complement existing EU law instruments with new crisis management mechanisms, and instead underlined the increasing 'crisification of EU policy making' in these domains[67].

2.2.4. An indirect external relations objective

There is a fundamental disconnection and incoherency between the main problem envisaged to be addressed by this proposal – i.e. 'instrumentalisation' – and the set of proposed policy solutions. According to the Commission, the proposal does not pursue a foreign affairs or external relations objective[68]. However, this contradicts what it is expressly stated on page 5 of the Explanatory Memorandum which states that the application of the asylum border procedure to *all* the applicants without any distinction aims at limiting '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'[69]. Therefore, and clearly, this means that the proposal carries an implicit foreign affairs objective, which as studied in *Section 5.3.* implies crucial impacts on EU external relations and foreign policy objectives more generally.

The Explanatory Memorandum provides no evidence on how the proposed derogations to EU asylum and return procedures can be expected to address 'the identified problem', i.e. 'instrumentalisation of immigrants and asylum seekers'. How can a problem rooted in foreign policy and with clear geopolitical ramifications be addressed with derogations to the EU asylum and migration framework? In which specific ways could the behaviour or actions by relevant third countries be expected to be impacted or change in light of the proposed derogations? According to the Explanatory Memorandum, 'Looking ahead, it cannot be excluded that others may attempt to conduct *hybrid attacks* on the Union that include the instrumentalisation of migrants' (Emphasis added). However, as developed more in detail in *Section 3* of this study below, the proposal fails to provide evidence on how the proposed reform of EU asylum, returns and reception standards could actually prevent the main problem – i.e. instrumentalisation – from persisting in the future.

Furthermore, the proposal fails to provide evidence of how the expansion of border procedures and registration deadlines to *all* asylum seekers – including unaccompanied minors, children and families, the assessment of admissibility *and* merits of asylum applications in border procedures, the legal fiction of non-entry, and the preference to force voluntary returns, would work in practice and *support* Member States in performing their envisaged tasks. It is unclear how the envisaged derogations would lift responsibilities and workload by relevant EU Member States holding EU external borders when dealing with irregular entries of TCNs, and ensure 'stability' by relieving them from higher administrative burdens and costs. Recital 9 of the proposal expressly acknowledges that as a consequence of the proposed expansion of the border procedures 'the number of applicants under the border procedure will be higher than under normal circumstances'.

A deepening of the uneven sharing of responsibilities among EU Member States can be expected to emerge in light of the fact that the proposal does not envisage relocations of asylum seekers as one of the envisaged 'solidarity measures' under Article 5. Interviews have underlined that external

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[67] The EPRS Substitute IA emphasised that 'Rather, the approach followed seems to reflect what has been defined as the 'crisification of EU policy-making', whereby policy solutions are proposed without a thorough analysis of the underlying problem(s) to be addressed and existing policy tools', page 27; The EPRS IA made here reference to Rhinard, M. (2019) The Crisisification of Policy-making in the European Union. Journal of Common Market Studies, 57: pp. 616– 633.

[68] Interview with DG Home Affairs of the European Commission.

[69] Explanatory memorandum, p. 5.

border management measures need to be accompanied by meaningful solidarity measures within the EU, including relocation[70]. The proposal would still operate under the first irregular entry criterion in determining responsibility for assessing asylum applications under the EU Dublin Regulation, which means higher responsibilities for EU Member States of first unauthorised entry and does not give any consideration to asylum seekers' preferences in their self-relocation across the EU[71].

2.2.5. Implementation gap and systematic violation of the law

As confirmed by previous EPRS Studies[72] and other key sources[73], a key problem characterising EU asylum policy is the wide-spread systematic non-implementation or application of – or lack of compliance with – EU border, asylum and returns law standards by several Member States with EU external borders. The proposal fails to address and consider this implementation gap which exists at times of ensuring and effectively enforcing a *coherent* application of the EU asylum and returns *acquis* by all EU Member States. This goes hand-in-hand with ongoing threats and risks to the rule of law as enshrined in Article 2 TEU in some of these same countries[74]. The failure by various EU Member States to comply with the rule of law in situations characterised as 'states of emergencies', 'instrumentalisation' and/or 'crisis' in the fields of migration and asylum, and the extent to which a larger degree 'flexibility' would further enlarge these issues, constitutes a key problem which is ignored by the proposal[75].

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70 Interview with UNHCR. Regarding UNHCR position refer to UN High Commissioner for Refugees (UNHCR), UNHCR's Recommendations for the Swedish and Spanish Presidencies of the Council of the European Union (EU), January 2023. This documents states that "Guiding principles when discussing relocation should include family unity regardless of the nature of the claim, effective links with a MS and the best interest of the child for unaccompanied children".

71 This contrasts with the political commitment included in the 2022 Declaration on a Voluntary Solidarity Mechanism where the participating Member States acknowledged 'the importance of ensuring that beneficiaries of international protection have access to legal mobility between Member States'. Available at https://home-affairs.ec.europa.eu/system/files/2023-05/Declaration_on_solidarity_en.pdf

72 EPRS Horizontal Substitute Impact Assessment (2021), The European Commission's New Pact on Migration and Asylum, Brussels; EPRS (2018), The Cost of Non-Europe in Asylum Policy, Brussels.

73 On the ongoing implementation challenges characterising EU asylum law and the Dublin Regulation refer to EUAA (2023), *Asylum Report 2023*, pp. 94-100. Available at Asylum Report 2023 (europa.eu) See also FRA (2023), *Asylum and migration: Progress achieved and remaining challenges – Overview 2015 – March 2023,* Final Bulletin. Available at Asylum and migration: Progress achieved and remaining challenges | European Union Agency for Fundamental Rights (europa.eu) According to Tsourdi (2021), EU asylum policy is characterised by an 'implementation gap' which means a' disjunction between 'the law on paper', i.e. to the asylum-related obligations that member states have undertaken according to EU law, and their realisation in practice'. L. Tsourdi (2021), Asylum in the EU: One of the Many Faces of Rule of Law Backsliding?, *European Constitutional Law Review*, pp. 471-497.

74 European Commission 2022 Rule of Law Report – the rule of law situation in the European Union, COM(2022) 500 final, 13.7.2023, Brussels. See for instance country chapter related to Poland https://commission.europa.eu/system/files/2022-07/48_1_194008_coun_chap_poland_en.pdf The systematic nature of these practices in some EU Member States has been confirmed by the European Court of Human Rights (ECtHR) case law. For instance, the Strasbourg Court identified the existence of 'a wider state policy' of not receiving asylum claims and engaging in unlawful expulsions of people having asked for asylum in Poland in the Case *M.K. and Others v. Poland*, Applications nos. 40503/17, 42902/17 and 43643/17, 14 December 2020; and in the 2021 Case *D.A. and Others v. Poland*, Application no. 51246/17, 8 July 2021.

75 According to the Commission 2014 Communication on 'A New EU Framework to Strengthen the Rule of Law', there are certain 'shared principles' which lie at the core of the rule of law as a 'common value' in the Union, and which include the principle of legality (a transparent, accountable and democratic process for enacting laws), prohibition of arbitrariness, independent courts, effective judicial review and the respect for fundamental rights. In its 2019 Communication 'Strengthening the rule of law within the Union A blueprint for action', the Commission added that 'Under the rule of law, all public powers always act within the constraints set out by law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts'.

The stakeholders' workshop, interviews, the case studies[76] and desk research have revealed that this challenge has materialised in a pan-European and systematic phenomenon in the context of border surveillance activities and expedited expulsions taking the form of *pushbacks*[77] – and in a context of progressive development of borders fences across EU external borders[78]. In some national instances, this has meant the disproportionate use of force and violence by national authorities, the outright suspension of the right to asylum as part of a declared state of emergency, and evading responsibilities on search and rescue (SAR) and disembarkation at sea (See *Sections 4 and 5* of this substitute Impact Assessment)[79]. As IOM Missing Migrants Project and some of the case studies of this Substitute IA show, these same policies have also led to TCNs, including minors, even losing their lives[80].

Furthermore, the case studies, the stakeholders' workshop and the interviews have confirmed a finding previously identified in the EPRS Horizontal Impact Assessment on the Pact on Migration and Asylum, according to which a key additional problem at stake is the widespread inadequate and non-uniform reception conditions standards across EU external border areas[81]. This is intimately related to the above-mentioned problem on the uneven implementation of CEAS standards across may EU external border areas and/or remote regions. The Explanatory Memorandum does not take into account how the proposal would address the existence of inadequate or poor reception conditions issues including during ordinary – non-emergency – times, and how the envisaged emergency procedures would actually ensure the adequacy and fundamental rights-compliance of these conditions. This is particularly crucial in light of the expected increased use of de facto

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[76] The following case studies make reference and provide evidence on the ongoing existence of illegal push backs at EU external borders: Bulgaria, Greece, Spain, Lithuania and Poland. In the case of Lithuania, pushbacks have been even recently enshrined and formalised in national law. See *Section 1.3.2* in Annex III of the case study on Lithuania.

[77] United Nations Special Rapporteur on the Human Rights of Migrants (2021), *Report on means to address the human rights impact of pushbacks of migrants on land and at sea*, A/HRC/47/30, 12 May 2021; See also Council of Europe Commissioner for Human Rights (2022), Recommendation, *Pushed beyond the Limits: Four Areas of Urgent Action to end Human Rights Violations at Europe's Borders*, Strasbourg.

[78] C. Dumbrava (2022), *Walls and fences at EU borders*, European Parliamentary Research Service (EPRS) Briefing, Brussels, available at https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/733692/EPRS_BRI(2022)733692_EN.pdf. See also EU Fundamental Rights Agency (FRA) (2020), *Migration: Fundamental Rights issues at Land Borders*, retrievable from https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-land-borders-report_en.pdf; and M. Akkerman (2019), *The Business of Building Walls*, Transnational Institute, available at https://www.tni.org/en/publication/the-business-of-building-walls

[79] Interview with Frontex Fundamental Rights Officers; Interview with the FRA; Interviews with ECRE and PICUM. Refer to the Danish Refugee Council (DRC) (2023), Protecting Rights at Borders Report, available at https://pro.drc.ngo/resources/documents/prab-reports/ , which documents the use of pushbacks as a systematically used tool for border management at many European external borders. The report provides an estimate of about 10 691 TCNs who have experienced pushbacks at EU external borders between January and April 2023 alone. According to the report, 'In the first quarter of 2023, at the Polish-Belarusian border, 5 462 people have been reported as being victims of pushbacks, but the real number remains unknown'; 'In Greece, 174 people have been reported to PRAB partners as victims of pushbacks but complete information on pushbacks via land and sea are missing, as border areas and border operations continue to be off limits for civil society organisations.'; and 'At Lithuania's border with Belarus, 785 persons were 'refused illegal entry into Lithuania' according to Government officials'.

[80] According to IOM since 2014 more than 28 000 third-country nationals have been recorded to have lost their lives in Europe. See https://missingmigrants.iom.int/ The case study on Poland explains that since 2021 an estimated 47 people have died while trying to cross the Polish-Belarussian border (*Section 2.1.*). See also *Section 3.1.* of the case study on Greece, and *Section 5.2.* of the case study on Spain.

[81] EPRS Horizontal Substitute Impact Assessment (2021), *The European Commission's New Pact on Migration and Asylum*, Brussels, pp. 30 and 31; see also ECRE (2021), *Reception, Detention and Restriction of Movement at EU External Borders*, E-Paper, available at https://qr.boell.org/sites/default/files/2022-02/ECRE_e-paper_2021_FINAL_rev.pdf ; and on inadequate and poor reception conditions see W. van Ballegooij and C. Navarra (2018), *The Cost of non-Europe in asylum policy*, EPRS, Brussels.

detention and limiting freedom of movement inherent to the border procedures proposed by the Commission (See *Section 5* of this Substitute IA).

2.2.6. Misusing state of emergency and national security

The case studies attached to this Substitute IA illustrate how the episodes in some EU Member States where 'instrumentalisation' has been invoked by national authorities have witnessed an escalation of emergency-led policies. Some of the selected EU Member States have declared 'states of exception' or 'state of emergency' which have substantially limited the rule of law, national checks and balances of the implementation of these policies, as well as the role played by civil society actors, the media and international human rights organisations such as UNHCR[82].

EU Member States have also made increasing use of Article 4 Treaty on European Union (TEU)[83] and Article 72 TFEU, which refer to the exercise of the responsibilities incumbent upon Member States with regard to 'the maintenance of law and order and the safeguarding of internal security', as justifications not to comply with their current obligations and legal responsibility under EU asylum and returns law and the Treaties. Importantly, some of the case studies provide evidence on how military and/or quasi-military actors have been deployed and played a very active role in the practical implementation of policies introduced in the name of declared emergencies and 'instrumentalisation' in some EU Member States, which have very limited accountability regimes[84].

The Luxembourg Court has however rejected Member States' security-driven arguments in recent judgments[85]. The Court has insisted that EU Member States cannot use these Treaties' provisions and the mere reference to 'public security and public order' grounds in order to instrumentally evade their EU law *acquis* and constitutional obligations under the EU Treaties, as this would unduly alter the uniform and consistent application of EU law. According to the Court, Member States cannot use these grounds as a *general* prevention policy without a case-by-case, evidence-based and individualised assessment as regards the extent to which a specific individual may pose such an alleged risk to the State, with the burden of proof being in Member States' hands. Importantly, the Court also concluded that Article 72 TFEU must be interpreted strictly, and that Member States already have the necessary tools in EU asylum and returns *acquis* to deal with their security interests.

The Commission proposal assumes that new legislation allowing Member States to apply far-reaching derogations as regards applicable EU rules will ensure that these Member States comply

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82 Refer for instance to the case studies in Annex III covering Greece and Poland. See also the case study on Italy in relation to the declaration of a state of emergency on migration-related basis (*Section 6.2.* of the case study on Italy).

83 Article 4 TEU states that the European Union 'shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.'

84 Refer to the case studies in Annex III on Lithuania (Section 1.2.), Poland (Section 2.1.), Greece (Section 3.2.), Bulgaria (Section 4.2.1. and 4.2.2), and Spain (Section 5.3.).

85 See for instance CJEU, 30 June 2022, C-72/22, *M.A. v Valstybės sienos apsaugos tarnyba* (Lithuania), paragraphs 58 and 59. In this key ruling the Luxembourg Court held that 'law and order' measures do not fall entirely outside the reach of EU law, and that only in specifically defined cases do the EU Treaties provide Member States the possibility to derogate from their obligations. The EU Treaties do not have an 'inherent general exception excluding all measures taken for reasons of law and order or public security from the scope of EU law. The recognition of the existence of such an exception…, might impair the binding nature of EU law and its uniform application'. The CJEU held in paragraph 73 that: '…the Lithuanian Government has not specified what effect such a measure would have on the maintenance of public order and the safeguarding of internal security in the context of the emergency caused by the mass influx of migrants in question.'

with the law[86]. Previous EU Studies[87], the stakeholders' workshop and interviews conducted for the purposes of this Substitute IA have referred to the risk of *ad hoc* legalisation with proposals aimed at legalising EU Member States applying exceptions to current EU legal standards, or 'Europeanising through the back door' national law reforms and policies in some of these same countries, which are currently illegal under EU law and unconstitutional in light of EU Treaties standards (See *Section 3* below for a detailed examination, and the case studies on Poland and Lithuania)[88].

Furthermore, interviews conducted for the purpose of this Substitute IA have shown that not all the relevant EU Member States directly concerned by this proposal would in fact be interested in activating or making use of it once adopted. The Polish Government, for example, does not see the instrumentalisation proposal as applicable to their country as they do not currently implement border procedures and the proposal would not be applicable to the situation in Poland, including in a scenario replicating the 2021 political crisis with Belarus[89]. Furthermore, they consider that they would not make use of the proposed instruments as the currently envisaged derogations are in their view insufficient, and they would have preferred the option to temporarily limit the possibility for TCNs to apply for international protection in cases of 'instrumentalisation'[90].

2.2.7. Drivers

The proposal fails to address additional issues at stake, which are, at times, crucial to understanding the underlying drivers behind the main problem, in particular[91]:

Reverse externalisation

A key driver behind the phenomenon addressed in the proposal is the role that EU migration agenda has played in its cooperation with third countries. EU external migration policy has been characterised by what has been called 'externalisation'[92], which has been understood as the prevailing focus given to the containment of asylum seekers and refugees as well as border controls by third countries actors (delegated or consensual containment), and the increasing political

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86 S. Carrera, D. Colombi and R. Cortinovis (2023), *An Assessment of the State of the Schengen Area and its External Borders*, European Parliament Study, Brussels, Section 5.4 (Safeguarding and Monitoring Fundamental Rights in the Schengen area).

87 Ibid.

88 Interviews with ECRE and PICUM.

89 Interview with Polish Permanent Representation.

90 Ibid. This position goes in line with the Polish Permanent Representation reaction to the Commission's Proposal for a Council Decision under Article 78.3 TFEU, which reportedly qualified as 'counterproductive' and said that it 'went in the opposite direction of what we had proposed'. Instead, the country had 'proposed that the response to a hybrid attack should be the possibility of suspending asylum procedures, not extending them'. 'Suspension of asylum procedures encourages the perpetrator to stop acting, while prolonging asylum procedures overloads the asylum system in Member States and may not work' (Emphasis added). Refer to Agence Europe (2021), *Poland unhappy with Commission's proposed solutions to help manage situation on border with Belarus*, 7 December 2021.

91 According to the European Commission Better Regulation Toolbox 13, 'You should approach this part of the analysis with an inquisitive mind, i.e. also consider causes outside of your usual action radius'.

92 The Refugee Law Initiative (RLI) Declaration on Externalisation and Asylum defines externalisation as 'the process of shifting functions that are normally undertaken by a State within its own territory so that they take place, in part or in whole, outside its territory.' The accompanying analytical paper distinguishes between externalised border controls (including practices of pushbacks) and externalised asylum systems (such as offshore models). Refer to Cantor, D. et al. (2022), 'Externalisation, Access to Territorial Asylum, and International Law. Analytical Paper, Refugee Law Initiative (RLI)', International Journal of Refugee Law, Vol. 34, pp. 120-156. Available at https://academic.oup.com/ijrl/article/34/1/120/6619241?login=false See also Als, S. et al. (2022), Externalisation and the UN Global Compact on Refugees: Unsafety as Ripple Effect, Policy Paper, Migration Policy Centre, EUI, Florence, Italy, https://cadmus.eui.eu/bitstream/handle/1814/75010/RSC-PP-2022-12.pdf?sequence=1&isAllowed=y

salience of 'migration policy' in the EU's external relations[93]. EU external migration and asylum cooperation has been made directly or indirectly conditional to third states agreeing to cooperate with the EU on readmission and border control-related policy priorities, in a framework that has been coined as 'conditionality'[94]. This has come along an increasing 'issue-linkage' in EU external policies giving a political preference to 'migration management' over other foreign affairs policy areas such trade, development and humanitarian assistance[95].

The instrumentalisation proposal does not consider the extent to which EU externalisation policy may have empowered third-country governments to use as political strategies the 'migration management' card back to the EU for pursuing their own foreign affairs gains and interests in other crucial policy domains. Interviewees pointed out that the EU itself created a new market and turned TCNs on the move into new 'commodities' by being willing to exchange sizeable amounts of money to contain migration and asylum[96]. Garces (2022) has emphasised how 'In this sense, and though few are willing to admit it, it was the EU and its Member States that initiated the instrumentalisation of migration. And the way they did it is hardly trivial' [97]. Cassarino (2007; 2018) has referred to these processes as 'reverse conditionality' or 'local re-appropriation' by the norm-recipient countries[98]. As these processes are part of a wider array of issue-linkage priorities driving EU external migration management policies, the notion of *reverse externalisation* is 'fit for purpose' to globally describe the nature of this driver.

In such a context, it is unclear whether the Commission's proposed concept of 'instrumentalisation' could potentially include situations as wide as the refusal by third countries to cooperate with the EU on containment and readmission policies; or third states decisions to subsequently suspend such cooperation in the implementation of EU or bilateral readmission agreements. This would run the risk of over-expanding the instrumentalisation concept in a manner allowing for unfettered flexibility and potential misuses by Member States and/or the Council of the EU of this instrument in order to derogate from EU primary and secondary law standards. Interviews carried out for the purposes of this Substitute IA have underlined how the Commission proposal has given no consideration to its consequences on the respect of third states own sovereignty in international relations to regulate human mobility in manner which may not necessarily follow the EU and its Member States own definitions and political priorities[99].

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93 V. Moreno-Lax and M. Giuffre (2019), 'The rise of consensual containment: from 'contactless control' to 'contactless responsibility 'for forced migration flows', in J. Satvinder (ed), *Research Handbook on International Refugee Law* (Elgar 2019), p. 81.

94 J.P. Cassarino (2010), Readmission Policy in the European Union, Study for the European Parliament, Brussels https://www.europarl.europa.eu/RegData/etudes/etudes/join/2010/425632/IPOL-LIBE_ET(2010)425632_EN.pdf

95 Carrera, S., L. den Hertog, D. Kostakopoulou and M. Panizzon (2019), *The External Faces of EU Migration, Borders and Asylum Policies: Intersecting Policy Universes*, Brill Nijhoff: Leiden.

96 Interview with IOM, 23 August 2023. As a way of illustration, reference was made here to the 2016 EU-Turkey Statement.

97 According to B. Garces, 'the instrumentalisation of migration is simply the other side of the EU's policy of outsourcing migration control and international protection to its neighbours. By forcing neighbouring states to control our borders and host those refugees we are no longer willing to take in, the EU and its Member States have automatically placed themselves in their hands.' B. Garces (2022), Migration as a 'Threat', IEMed Mediterranean Yearbook, pp. 345-347.

98 J.P. Cassarino (2007), 'Informalising Readmission Agreements in the EU Neighbourhood.' *The International Spectator*, Vol. 42(2), p. 179-196; and J.P. Cassarino (2018), 'Beyond the criminalisation of migration: a non-western perspective', *Int. J. Migration and Border Studies*, Vol. 4(4), pp. 398-411.

99 Interview with academic.

Lack of effective and genuine legal pathways and access

Another key driver of the main problem – i.e. instrumentalisation – which is not considered by the Explanatory Memorandum relates to the lack of genuine and effective legal access for TCNs to reach the EU's territory in authorised or regular or lawful ways, including for asylum seeking purposes. This finding has been underlined by previous EPRS studies[100] as a key additional challenge, which has been reconfirmed by the stakeholders' workshop and interviews conducted for this Substitute IA[101]. These have first underlined the lack of effective and genuine possibilities for asylum seekers and refugees to travel legally to the EU from their country of origin or transit – through for instance humanitarian visas in EU Member States' embassies or Protected-Entry Procedures[102].

It must be underlined, however, that the existence of legal pathways must be *additional to* the obligation by EU Member States to uphold the right to asylum and access to asylum procedures for individuals spontaneously arriving at external borders, including those attempting to enter or who have entered in an unauthorised manner[103]. While the European Commission has expressed that it lacks legal competence on this issue[104], this position is not consistent with the finding of a previous EPRS study which concluded that the EU does have legal competence for instance in the area of humanitarian visas under Articles 77.2.b and 78.2.g TFEU[105].

Some of the case studies and interviews conducted for the purposes of this IA show that the current lack of legal pathways goes hand in hand with non-effective and non-genuine legal access to asylum and human rights by TCNs across all EU external borders[106]. According to the SBC, EU Member States must deliver these safeguards and rights *both* in the context of border controls at dedicated Border Crossing Points (BCPs) as well as border surveillance activities across EU external green and blue borders (See *Section 5* of this Substitute IA)[107]. This goes hand in hand with the non-existence of an independent EU-level monitoring of EU asylum, returns and border standards and their fundamental rights impacts on the ground (See *Section 8* of this Study)[108].

Therefore, in light of the analysis provided above, it can be concluded that the proposal is not 'fit for purpose' to address all the identified 'problems' and drivers, which can be expected to persist and even escalate should the legislative initiative be formally adopted.

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100 Pages 29 and 30 of EPRS Horizontal Impact Assessment on the Pact on Migration and Asylum.

101 Interview with Greece Permanent Representation.

102 EPRS European Added Value Assessment accompanying the European Parliament's legislative own-initiative report, Humanitarian Visas, July 2018, pp. 55-57.

103 Interview with UNHCR. On how legal pathways must follow a *principle of additionality* so that they are not a Substitute or alternative to the right to seek asylum and spontaneous arrival, refer to S. Carrera, L. Vosyliute, L. Brumat and N.F. Tan (2021), *Implementing the united nations global compact on refugees?: Global asylum governance and the role of the European Union*, Policy Briefs, 2021/26, Migration Policy Centre, EUI, Florence.

104 Interview with DG Home Affairs, European Commission.

105 EPRS European Added Value Assessment accompanying the European Parliament's legislative own-initiative report, *Humanitarian Visas*, July 2018.

106 Refer in this regard to the case studies on Spain, Greece, Lithuania and Poland. Interviews with UNHCR and the FRA.

107 In this regard, the European Parliament 'Draft Report on The Pact's Crisis Proposal' recommends Member States facing 'a situation of crisis' to consider 'granting humanitarian visas, the setting up of humanitarian corridors or direct evacuation transfers' as part of Member States' responses to deal with 'emergencies' and 'crises'. European Parliament Draft Report (2021), on the Proposal for a Regulation addressing situations of crisis in the field of migration and asylum (COM(2020)0613 – C9-0308/2020 – 2020/0277(COD)), 23.11.2021, Amendment 6 to Recital 6a.

108 S. Carrera, D. Colombi and R. Cortinovis (2023), 'An Assessment of the State of the Schengen Area and its External Borders', European Parliament Study, Brussels. Refer to *Section 5.4* of that Study titled 'Safeguarding and monitoring fundamental rights in the Schengen area'.

3. Review of the objectives of the proposal

Key findings

- The declared objective of the proposal is to support the Member State facing a situation of instrumentalisation of migrants 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.
- The proposal provides no evidence on how the derogations may in practice contribute to address the general objective of the proposal, i.e. to support and create 'stability' across relevant Member States. The envisaged border procedures can be expected to require in practice more efforts, time and resources by EU Member States in practice. Despite claiming the protection of rights as one of its objectives, it fails to include an assessment of how fundamental rights, including absolute ones, might be affected. The instrumentalisation proposal comes with an implicit external relations objective of influencing the conduct of third countries' authorities.

This section analyses and critically reviews the objective(s) as identified by the European Commission in the Explanatory Memorandum of the instrumentalisation proposal. It discusses to what extent the objectives are relevant in relation to the problem identified.

The Explanatory Memorandum states that: 'The objective of this proposal is *to support* the Member State facing a situation of instrumentalisation of migrants 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 having been instrumentalised by a third country, *with full respect for fundamental rights*' (Emphasis Added). The proposal states that 'Member States should have the 'flexibility' to act within a legal framework designed to address that particular situation and ensure that the rights of those falling victim to instrumentalisation are respected', and 'to fully equip (Member States) with 'the necessary legal tools to face future instrumentalisation situations were they to arise. This would provide for a *stable and ready to use framework* to deal with any such situation in the future'[109].

As advanced in *Section 2* of this IA, the Explanatory Memorandum provides no evidence on how these derogations, which seek to establish a specific emergency migration and asylum procedure, may actually contribute to the achieve the general objective of the proposal, i.e. to support and create 'stability' across relevant EU Member States by sharing and decreasing responsibility and administrative work-load. In fact, the Commission proposal does acknowledge that the proposed reform for all asylum applications to be carried out at the external borders will require more time and human / material resources by the EU Member States concerned[110]. It also remains uncertain

[109] The Proposal is pursuing a predominant border control and expulsion-driven objective giving priority to derogations to existing EU law procedures and rights of TCNs, asylum seekers and refugees. This is confirmed by the Proposal's Explanatory Memorandum express reference to the European Council Conclusions of 21/22 October 2021 which emphasised giving priority to ensure 'effective returns and full implementation of readmission agreements and arrangements', and 'effective control of EU external borders' in cases framed as 'instrumentalisation'.

[110] Recital 9 of the Proposal states that 'As a result, in such situations, the Member State concerned may need time to reorganise their resources and increase their capacity, including with the support of the EU agencies. Furthermore, the number of applicants under the border procedure will be higher than under normal circumstances, and therefore

how far 'flexibility' would need to go for relevant EU Member States to comply with EU border, migration and asylum law and their Treaty obligations, including those laid down in the proposal. It is noticeable that the 2021 Commission proposal for a Council Decision on Emergency Measures for Latvia, Lithuania and Poland was never adopted as it did not go far enough as regards exceptions for some of the relevant national governments[111]. As stated above, because this proposal constitutes by and large a replica of the proposal for a Council Decision, it is not evident whether all these Member States would consider that the new proposal meets their demands, and why they would call for its activation should it be formally adopted.

A related objective of the proposal is said to be 'to ensure an immediate and appropriate response in line with EU law and international obligations, including – full – respect for fundamental rights', and that 'the rights of those falling victim to instrumentalisation are respected'[112]. Page 3 states that 'These rules aim to cater for such specific situation without undermining the right to asylum or the principle of *non-refoulement* and in fully ensuring the protection of fundamental rights of people instrumentalised'[113]. However, the proposal does not include a human rights assessment on how the various derogations can be expected to affect the essence and effectiveness of the fundamental right to asylum, effective remedies and absolute rights – e.g. *non-refoulement* – as stipulated in EU Better Regulation Guidelines Toolbox #29. This is despite the fact that a key objective of the proposal is to apply far-reaching procedural and substantive exceptions which can be expected to interfere with some of these fundamental rights[114].

The analysis in *Section 2* above, and the express reference in the Explanatory Memorandum on how the expansion of the accelerated border procedures to all asylum seekers is expected to impact third states' behaviour, has shown that the proposal comes with an *implicit external relations objective* of influencing third states behaviour. This corresponds with what the literature has considered to be a policy approach aimed at making the attempts of third state actors 'infeasible' or 'unattractive' in practice by changing the law and making it equally restrictive for asylum seekers to have access to an effective procedure, and instead giving priority to their detention and expulsions[115].

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the Member State facing a situation of instrumentalisation may need more time to be able to take decisions without allowing entry into the territory.'

[111] Interview with the Polish Permanent Representation; Interview with Lithuanian Permanent Representation; Interview with ECRE.

[112] Pages 1 and 2 of the Explanatory Memorandum.

[113] Recital 10 of the Explanatory Memorandum states that 'Any violent acts at the border must be avoided *at all costs*, not only to protect the territorial integrity and security of the Member State facing a situation of instrumentalisation *but also to ensure the security and safety of the third-country nationals or stateless persons, including families and children that are awaiting their opportunity to apply for asylum in the Union peacefully*. Where the Member State concerned is confronted at its external border with violent actions, including in the context of attempts by third-country nationals to force entry *en masse* and using disproportionate violent means, the Member State concerned should be able to take *the necessary measures* in accordance with their national law to preserve security, law and order, and ensure the effective application of this Regulation.' (Emphasis added). It is unclear what this concept of 'necessary measures' would entail in this context.

[114] As regards international obligations, as a way of example, the Explanatory Memorandum does not cover the compliance of its objectives with elements such as the prohibition of criminalisation and penalisation of refugees in Article 31 of the UN Geneva Convention, or the United Nations Global Compacts on Migration and Refugees.

[115] Following Greenhill's typology of policy options in the hands of policy makers facing situations labelled as 'weaponisation of migration', the Commission has chosen in this Proposal to 'simply make coerced migration by another party infeasible or unattractive in a different way. For example, by changing one's laws so that one can simply say, 'we are not taking these people. Do your worst', or 'You can send them, but we are going to send them back.' We have seen this happen. We see states building walls to try to make it harder'. K. Greenhill (2015), Actors in Forced Migration: An Interview with Kelly Greenhill, *Journal of International Affairs*, 68(2).

Interviews conducted for the purposes of this Substitute IA have confirmed that these stricter and expedited procedures through derogations and stricter access to rights indirectly aim at addressing the so-called pull factor[116] and disincentivising TCNs so that 'they do not come'[117]. For instance, one interviewee argued that the envisaged reduction of material reception conditions may be part of a strategy to trying to complicate the lives of those TCNs who make it to the EU in the hope that they will spread the word that it is not worth trying it[118]. The academic literature and interviews conducted for the purposes of this IA have highlighted that: first, there is no evidence on the extent to which policies giving priority to stricter procedures and less rights for TCNs, actually influence asylum seekers and TCNs' choices/decisions not to travel to the EU[119]; and second, the pull factor argument is incompatible with fundamental rights and international obligations which allow for no derogation or exceptions by states due to their absolute and *erga omnes* nature[120].

[116] Interviews with Greek, Lithuanian and Polish Permanent Representations. This same position has been expressly stated by some EU Member States in a Letter addressed to President of the European Commission, Ursula von der Leyen, and the President of the European Council, Charles Michel, of 6 February 2023, which stated that 'as long as the European asylum system….constitutes a pull factor'. Available at https://media.euobserver.com/c0b38bc90b8c393fe5869b4bb2b8e9ff.pdf

[117] Interview with IOM representative. On the pull and push factor theory refer to Greenwood, M.J. (2019), 'The Migration Legacy of E. Ravenstein', *Migration Studies*, Vol. 7(2), pp. 269-278; see also Massey, D.S., et al. (1993), 'Theories of International Migration: A Review and Appraisal', *Population and Development Review*, Vol. 19(3), pp. 431-466. For a critique of this theory see Guild, E. (2021), 'Promoting the European Way of Life: Migration and Asylum in the EU', *European Law Journal*, Vol. 26(5-6), pp. 355-370.

[118] Interview with IOM.

[119] UNHCR calls on the EU to maintain safe access to territory for asylum seekers, fair and efficient procedures at borders, and predictable models of intra-EU solidarity, and …to uphold the right to asylum and to ensure all safeguards are fully respected.' Interview with UNHCR.

[120] Refer to *Section 5.1.* on fundamental rights and societal impacts for a detailed assessment.

4. Legal assessment of the proposal

Key findings

- The instrumentalisation proposal provides for derogations from the APR and amended APR Proposals, the rRCD Proposal and the rRD proposal: it extends the scope and application of border asylum and return procedures and crucial derogations from material reception conditions.
- The instrumentalisation proposal must be read in parallel with the 2021 proposal amending the SBC, which includes the formal definition of 'instrumentalisation of migrants', as well as instrumentalisation-related provisions for border control and surveillance.
- Its extensive links with the 2016 CEAS reform proposals and the 2020 New Pact on Migration and Asylum create a situation of 'hyper-complexity'. Specifically, one of the main issues relates to the relationship between the instrumentalisation proposal and the Crisis and Force Majeure regulation proposal, their possible overlap and simultaneous application. Additionally, further risks to legal certainty derive from the fact that the instrumentalisation proposal derogates from secondary legislation which already provides for flexibility in some emergency situations. Hence, this would lead to the co-existence of exceptions in the ordinary *acquis* and different proposals that derogate from the *acquis* in exceptional situations.
- The instrumentalisation proposal does not comply with primary EU law and can be considered unconstitutional and as challenging the rule of law. It goes against the objective for harmonisation of the CEAS under Article 78 and 79 TFEU. It would infringe on key rule of law principles, such as effective judicial protection and effective remedies (Article 19 TEU; Article 47 CFREU), as well as the principle of solidarity and fair sharing of responsibility (article 80 TFEU).
- The proposal is also at odds with recent CJEU rulings on Article 72 TFEU. The CJEU has confirmed that Member States cannot derogate from the asylum and return *acquis* on general grounds under Article 72 TFEU without a case-by-case, evidence-based and individualised assessment.
- The introduction of the instrumentalisation proposal during the negotiations of other legislative proposals poses serious issues under Article 13(2) TEU (mutual sincere cooperation between institutions) and the 2016 Interinstitutional Agreement on Better Law-Making and undermines the role of the European Parliament as co-legislator.
- The closure of BCPs and registration points during situations of 'instrumentalisation' does not comply with the scope and fundamental rights provisions of the SBC. The Instrumentalisation Proposal and the related measures included in the 2021 Proposal amending the SBC prove the increasing blurring of boundaries between EU border / policing and asylum policies (including Dublin) which is leading to legal incoherency.

This Section provides a legal analysis of the core elements of the proposal. It includes visualisations mapping and compares the key interconnections and linkages between the proposal, the current EU asylum and migration legal framework and the relevant new proposals under the European Commission's Pact on Migration and Asylum.

4.1. The instrumentalisation proposal

The instrumentalisation proposal provides for a set of permanent measures that EU Member States could adopt, either selectively or cumulatively, in situations labelled as 'instrumentalisation'. The proposal would mainly introduce derogations from: the proposed Asylum Procedure Regulation (APR, 2016)[121]; the amended APR proposal (2020)[122]; the proposed Reception Conditions Directive recast (rRCD, 2016)[123]; and the proposed Return Directive recast (rRD, 2018)[124]. These derogations would apply for an initial period of 6 months maximum and could then be renewed for another six-month period in agreement with the Commission and the Council.

The instrumentalisation proposal is tightly linked to the proposal for a Regulation amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders (SBC proposal)[125], which was presented on the same day. The SBC proposal provides for the definition of situations of 'instrumentalisation of migrants' and measures related to border management, while the instrumentalisation proposal establishes new rules for emergency asylum and return procedures, material reception conditions, and support and 'solidarity measures'. The Commission's main justification for the inclusion of the definition in the SBC is that 'instrumentalisation' is a border management notion – and not an asylum one. Accordingly, based on the different legal bases under the TFEU, the Commission deemed the SBC as the most appropriate instrument to define this concept[126]. To fully understand the rationale, internal coherence and functioning of the instrumentalisation proposal, it is essential to include selected articles of the SBC proposal in the analysis of the instrumentalisation proposal itself.

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121 European Commission, Proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU. COM(2016) 467 final. 13.7.2016. https://www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/com/2016/0467/COM_COM(2016)0467_EN.pdf

122 European Commission, Amended Proposal for a Regulation establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, COM(2020) 611 final. https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A52020PC0611

123 European Commission, Proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast), COM(2016) 465, 13 July 2016. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016PC0465&from=EN

124 European Commission, Proposal for a directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (recast), COM(2018) 634 final. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52018PC0634

125 European Commission, 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 Borders. COM(2021) 891 final, 14 December 2021. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52021PC0891

126 Interview with DG HOME, 12 June 2023.

Table 1: Derogations set by the instrumentalisation proposal

Instrumentalisation Proposal	**Derogations**
Article 2: Emergency migration and asylum procedure in a situation of instrumentalisation of migrants	**Article 27 APR**: Registering applications for international protection **Articles 41(2)(a) and (b), 41(5) and 41(11) amended APR**: Border procedure for the examination of applications for international protection
Article 3: Material reception conditions	**Articles 16 rRCD:** General rules on material reception conditions **Article 17 rRCD**: Modalities for material reception conditions
Article 4: Emergency return management procedure in a situation of instrumentalisation of migrants	**Article 41a amended APR:** Border procedure for carrying out return **Return Directive recast**

Source: Authors' elaboration.

4.1.1. SBC amendment – Border crossing points and border surveillance

Article 1(2) of the SBC proposal would amend Article 5 SBC to allow EU Member States to limit the number of BCPs and their opening hours in a situation of 'instrumentalisation of migrants'. This should be done in 'a manner that is proportionate' and with respect for the rights of persons enjoying the right of free movement, third-country nationals holding residence visas and their families, and – crucially – TCNs seeking international protection. The limitation of BCPs also equates to a reduction of registration points – to be read together with the provisions on registration in Article 2 of the instrumentalisation proposal. It also comes together with intensified border surveillance across Member State' green or blue borders, i.e. respectively the land or sea boundaries between officially recognised BCPs. Article 1(3) of the SBC proposal would amend Article 13 SBC as follows:

> (5) In a situation of instrumentalisation of migrants, the Member State concerned shall *intensify border surveillance* as necessary in order to address *the increased threat*. In particular, the Member State shall enhance, as appropriate, the resources and technical means to prevent an unauthorised crossing of the border. Those technical means may include *modern technologies* including drones and motion sensors, as well as *mobile units* to prevent unauthorised border crossings into the Union. (Emphasis added).

4.1.2. Article 2 – Emergency migration and asylum procedure

The instrumentalisation proposal includes a new 'emergency migration and asylum procedure' for Member States to follow in situations of 'instrumentalisation'.

Registration of asylum applications

The deadline for EU Member States to register asylum applications would be extended to 4 weeks after the application is made. In both the APD (currently in force) and the APR, it is 3 working days in regular circumstances and 10 working days when 'simultaneous applications for international protection by a disproportionate number of third-country nationals or stateless persons make it difficult in practice to register applications within 3 working days from when the application is

made'[127]. The proposal establishes that Member States shall 'prioritise the registration of applications *likely to be well-founded* and those of unaccompanied minors and minors and their family members' (Emphasis added)[128]. The proposal does not specify on what specific grounds such prioritisation would take place and who would carry them out, e.g. border guards, asylum authorities, medical doctors, or other national authorities.

Examination of asylum applications

The instrumentalisation proposal establishes that Member States may decide on the admissibility and merits of asylum applications at their borders or transit zones. These constitute central derogations from Articles 41(2)(a)[129] and 41(5) of the amended APR proposal[130] which set the criteria for the examination of an asylum application at the borders, either on the admissibility or on the merits.

The instrumentalisation proposal extends the application of the border procedure to *all* asylum seekers with no distinctions. According to the Explanatory Memorandum, the extension of the border procedure to all asylum seekers aims 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'[131].

Priority is given to applications that are 'likely to be well-founded and those lodged by unaccompanied minors and minors and their family members'[132]. Some exceptions are acknowledged in Recital 7 of the proposal: First, the emergency asylum management procedure would not apply or should be suspended if the screening reveals that 'an applicant is in need of special procedural guarantees and adequate support cannot be provided in the context of the procedure at the border'[133]; and second, the border procedure would apply to all applicants except for 'medical cases' as per Article 41(9)(c) of the amended APR[134]. There is no mention of these exceptions in the main articles of the proposed Regulation.

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127 Article 6(5), APD; Article 27, APR.

128 Articles 2(1)(a), instrumentalisation proposal.

129 Article 41(2) APR states that, when a border procedure takes place, decisions may be taken based on the inadmissibility of an application (in accordance with Article 36) or after an examination of the merits of the application in an 'accelerated examination procedure' in the cases set out in Article 40(1). The accelerated examination procedure applies to cases where applicants have only 'raised issues that are not relevant to the examination'; have made statements regarding their country of origin that are inconsistent, contradictory or false compared to the information available to the authorities; have misled the authorities with false information or documents or have withheld information or documents, or have made an application to delay or frustrate the enforcement of an earlier or imminent return decision. The accelerated examination procedure can also take place when a third country may be considered as a safe country of origin for the applicant, the applicant is considered a danger to national security and public order of the Member States, the applicant does not comply with the obligations set out in Article 4(1) and Article 20(3) of the Dublin Regulation, or when the application is a subsequent application, where the application is so clearly without substance or abusive that it has no tangible prospect of success.

130 Article 41(5) APR establishes that the border procedure may apply to minors – either unaccompanied or below the age of 12 with their family members – if 'the applicant may be considered to be a danger to the national security or public order of the Member State, or the applicant has been forcibly expelled for serious reasons of public security or public order under national law'.

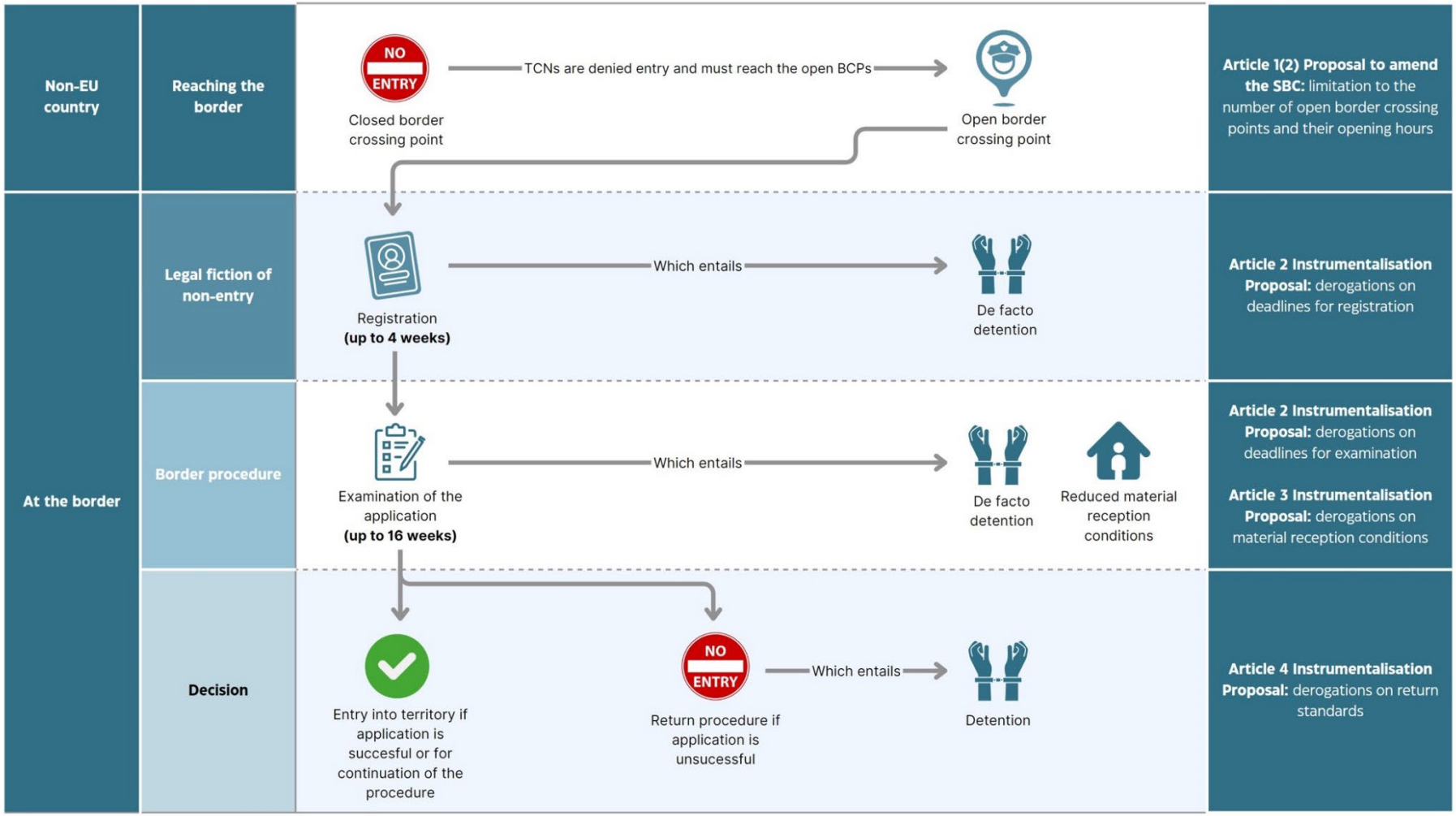
131 Instrumentalisation proposal, p. 5.

132 Articles 2(1)(b), proposal.

133 Ibid., Recital 7.

134 Ibid., p. 13.

Figure 1: Visualisation of procedures under the instrumentalisation proposal



Source: Authors' elaboration.

Duration of the emergency asylum procedure

Article 2(1)(c) of the instrumentalisation proposal establishes that the registered asylum applications shall be examined within a maximum period of 16 weeks. Following that period, if the applicants are not subject to a return decision, they shall be allowed to enter the territory of a Member State for the completion of the procedure. This article allows derogations from Article 41(11) of the (amended) APR proposal and significantly extends the duration of the border procedure compared to the EU legal standards currently in force. Under the 2013 APD, the border procedure is limited to 4 weeks. This is not unique to this proposal: with the amended APR proposal, the duration of the border procedure would be extended to 12 weeks, which could be further prolonged to 20 weeks in times of declared 'crisis' with the crisis and *force majeure* regulation proposal.

Appeal

The 16 weeks provided for the examination of the application would also include possible appeal procedures. There is no automatic suspensive effect when a negative decision is taken under the emergency asylum management procedure[135]. Article 54(3) of the amended APR proposal already excludes the suspensive effect of the appeal when an application is rejected as unfounded or manifestly unfounded in an accelerated procedure, when the applicants are considered to be from a 'safe country of origin', when they are considered to be a danger to national security or in cases subject to the border procedure; when an application is rejected as inadmissible because a non-EU country is considered to be the first country of asylum, unless it is clear that the applicant will not be admitted or readmitted to that country; when an application is rejected because considered implicitly withdrawn; when a subsequent application is considered unfounded or manifestly unfounded; or when an application is withdrawn (Refer to *Section 5.1.5* on 'Effective Remedies' in this IA below).

4.1.3. Article 3 – Material reception conditions

The instrumentalisation proposal allows for derogations from the rRCD proposal: Article 3 allows for Member States facing a situation of instrumentalisation to 'set modalities for material reception conditions different from those provided for in Articles 16 and 17 [of the Reception Conditions Directive recast] in relation to applicants apprehended or found in the proximity of the border with the third country instrumentalising migrants … provided these Member States cover the applicants' basic needs, in particular food, water, clothing, adequate medical care, and temporary shelter adapted to the seasonal weather conditions, and in full respect of human dignity'. This implies critical derogations from Articles 16 and 17 rRCD proposal[136].

4.1.4. Article 4 - Emergency return management procedure

According to Article 4 of the instrumentalisation proposal, Member States facing the arrival of third-country nationals as a consequence of a situation of instrumentalisation can decide not to apply Article 41a of the amended APR (detention limited to 12 weeks) and the whole recast Return Directive (rRD) proposals (maximum detention period between 3 and 6 months, which may be prolonged).

The proposal does not include time limits on detention, nor specific mentions of legal remedies that the applicants may recur to when a return decision is issued. It only states that the period of

[135] Instrumentalisation Proposal, Recital 9.

[136] Articles 16 and 17 rRCD set respectively the general rules and modalities for material reception conditions. The former includes provisions related to adequate standards of living, physical and mental health, special needs for vulnerable people, healthcare, and financial allowances. Article 17 sets obligations regarding housing, conditions of detention, special reception needs, gender-based violence, and legal guarantees.

detention shall be below the limits set in Article 15(5) and (6) of the Return Directive: an overall period of 6 months which can be extended by another 12 months if (a) the third-country national does not cooperate or (b) there are delays in obtaining documents from third countries. The proposal allows Member States to derogate from the rRD proposal in full. The rRD is set to replace the current Return Directive and includes important safeguards and guarantees for people who are under a return procedure.

In the proposal, some basic safeguards are listed in Article 4: (a) respect the principle of *non-refoulement* and take into account the best interests of the child, family life and the state of health of the third-country national; (b) ensuring that their treatment and level of protection are no less favourable than as set out in Article 10(4) and (5) (Limitations on use of coercive measures), Article 11(2)(a) – (postponement of removal), Article 17(1)(b) and (d) (emergency health care and taking into account needs of vulnerable persons), and Articles 19 and 20 (conditions for detention and detention of minors and families) of the rRD.

4.1.5. Article 5 – Support and solidarity measures

Support and solidarity measures are laid down in Article 5 of the instrumentalisation proposal. These include:

- Capacity-building measures in the field of asylum, reception and return;
- Operational support in the field of asylum, reception and return;
- Measures aimed at responding to instrumentalisation situation, including specific measures to support return, through cooperation with third countries or outreach to third countries whose nationals are being instrumentalised; or
- Any other measure considered adequate to address the instrumentalisation situation and support the Member State concerned.

The request for support and solidarity measures shall be sent to the European Commission, which would then invite other Member States to contribute and coordinate the efforts. This shall apply 'without prejudice to the solidarity provisions of Regulation (EU) XXX/XXX [*Crisis and force majeure Regulation*]'[137]. This means that provisions related to relocation are not expressly foreseen or obligatory under this proposal.

Member States *may* request support from the EUAA, Frontex and Europol, and would, therefore, not be bound to receive EU agency support and monitoring in these situations. The potential involvement of the EU Fundamental Rights Agency (FRA) is not expressly foreseen by the proposal. The EUAA, Frontex and Europol may also propose assistance themselves, each in its own area of competence (respectively, asylum, returns and law enforcement cooperation). Specifically, the EUAA could 'help register and process the applications, to ensure screening of vulnerable migrants, support the management, design and putting in place of adequate standards of reception facilities'; Frontex could 'support border control activities, including screening, and return operations'; and Europol would provide intelligence[138].

The Explanatory Memorandum adds that 'these support and solidarity measures would complement other assistance to be provided to the Member State facing instrumentalisation of migrants that might be taken outside the framework that this proposal intends to create, such as Article 25a measures of the Visa Code[139] or foreign policy actions, (e.g. diplomatic outreach,

[137] Article 5(3), instrumentalisation proposal.

[138] Instrumentalisation Proposal, p. 7.

[139] Regulation (EC) No 810/2009 of 13 July 2009 establishing a Community Code on Visas (Visa Code). OJ L243, 15.9.2009, pp. 1-58. https://eur-lex.europa.eu/eli/reg/2009/810/oj

restrictive measures, trade measures) or financial support including under the European Asylum, Migration and Integration Fund (AMIF) or the Border Management and Visa Instrument (BMVI)'[140].

4.1.6. Article 6 – Specific guarantees

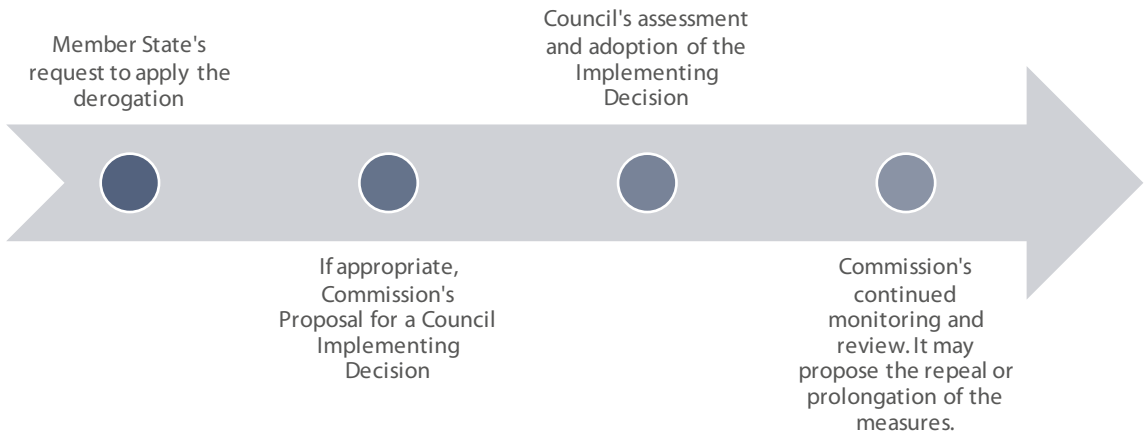
Article 6 of the instrumentalisation proposal provides for procedural guarantees, in particular the 'duty to inform' third-country nationals and stateless people, in a language that the person understands or 'is reasonably supposed to understand', about the measures applied, the location of the registration and border crossing points, as well as the duration of the measures. Furthermore, the emergency migration and asylum procedure (Article 2), the application of alternative material reception conditions (Article 3), and the emergency return management procedure shall last for 'what is strictly necessary to address the situation of instrumentalisation of migrants, and in any case, no longer than the period set out in the Council Implementing Decision'.

4.1.7. Article 7 – Authorisation procedure

Article 7 of the instrumentalisation proposal outlines the authorisation procedure for the application of these measures. The affected Member States would have to request the applications of the derogations in Articles 2, 3 and 4. Therefore, it leaves the activation of the entire procedure in the hands of the concerned EU Member State's government. The European Commission would review the request and – if appropriate – make a proposal for a Council Implementing Decision. The Council would assess said proposal as a matter of urgency and adopt the Implementing Decision authorising Member States to apply the Regulation. The application of these measures would last a maximum of 6 months, which could be then repealed or renewed for a further 6 months by the Council upon proposal by the Commission.

Throughout the application of these measures, the European Commission would be expected to constantly monitor and review the situation of 'instrumentalisation of migrants' and the affected EU Member State(s) shall provide the information needed for the review, the repeal or prolongation or requested by the Commission.

Figure 2: Authorisation procedure



Source: Authors' elaboration

[140] Ibid.

4.2. Linkages with other legislative proposals

This section examines how the instrumentalisation proposal interacts with the changes proposed under the relevant proposals from which it allows derogations, including the New Pact on Migration and Asylum. Particular attention is paid to the proposed crisis and force majeure regulation to assess in which ways a situation described as 'instrumentalisation' would be different from other emergency situations which could be qualified as 'crisis'. The proposal would introduce derogations from the following proposals:

- the 2016 APR proposal[141];
- the 2020 amended APR proposal[142]
- the 2016 Reception Conditions Directive recast[143];
- the 2008 Return Directive recast[144].

These proposals are set to replace the EU asylum and migration instruments which are currently in force: the APR and amended APR are to replace the 2013 APD recast; the rRCD is set to replace the 2013 RCD; and the rRD is set to replace the 2008 Return Directive.

The instrumentalisation proposal is strictly connected through formal links and due to its subject matter to the 2021 proposal for amendment of the Schengen Borders Code (SBC), which would amend the SBC and the Returns Directive, and the 2020 crisis and force majeure proposal and the 2020 Recommendation on migration preparedness and crisis blueprint, which are part of the Pact on Migration and Asylum. Further identifiable links are with the Screening proposal through the amended APR and the Asylum and Migration Management Regulation (RAMM) through the crisis and force majeure proposal. These links are visualised in *Figure 4* below: the red lines indicate the direct derogations; the blue lines links the different proposals (either formal or overlaps based on the subject matter); and the green arrows show amendments or the replacement of current legislation by the Commission's proposals[145]. The picture that emerges is one which can be characterised as hyper-complexity.

[141] European Commission, Proposal for a Regulation establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU. COM(2016) 467 final. 13.7.2016. https://www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/com/2016/0467/COM_COM(2016)0467_EN.pdf

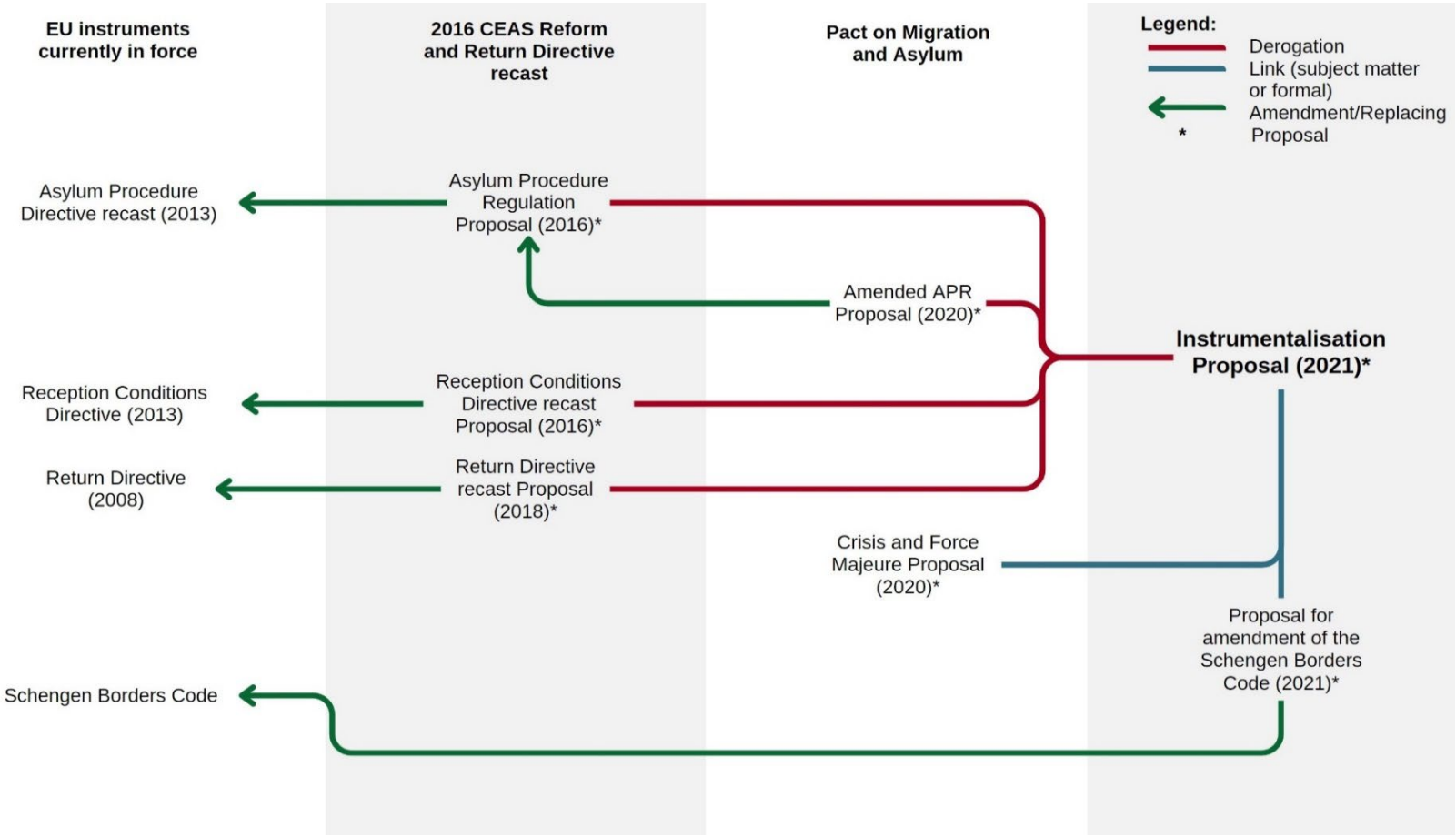
[142] European Commission, Amended Proposal for a Regulation establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, COM(2020) 611 final. https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A52020PC0611

[143] European Commission, Proposal for a Directive laying down standards for the reception of applicants for international protection (recast), COM(2016) 465, 13 July 2016. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016PC0465&from=EN

[144] European Commission, Proposal for a directive on common standards and procedures in Member States for returning illegally staying third-country nationals (recast), COM(2018) 634 final. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52018PC0634

[145] The direction of the arrow goes from the amending or replacing instrument towards the instrument which is currently in force.

Figure 3: Derogations in chain model under the instrumentalisation proposal, links to other proposals and amendments to EU law



Source: Authors' elaboration

4.2.1. Relationship with APR, rRCD and rRD

The main derogations from the APR, rRCD and rRD allowed for by the instrumentalisation proposal have already been described in *Section 4.1*. This Section summarises some of the main points emerging from the comparison between the pre-existing proposals and the instrumentalisation proposal.

General framework

In general terms, the APR, amended APR, rRCD and rRD – together with the Screening proposal and the RAMM – would establish the new standards and procedures for migration management, asylum and returns. They would replace the secondary legislation that is currently in force, establishing new legal standards for EU Member States to follow in 'ordinary situations'. The instrumentalisation proposal and the crisis and force majeure proposal, instead, would set the standards for 'extraordinary' situations – i.e. 'exceptional mass influxes' (crises), situations of *force majeure* and situations of 'instrumentalisation of migrants'. They would thus create parallel legal frameworks that EU Member States could activate if (1) they are affected by one of these situations, and if (2) they deem that the ordinary procedures are insufficient.

Border procedures

The instrumentalisation proposal expands the application of the border procedure which is already included in the APR and amended APR proposals[146]. The APR proposal would introduce mandatory border procedures across all EU Member States. These are, however, primarily on the admissibility of the application. The examination is carried out on the merits in the context of accelerated border procedures if the applicant has raised issues not relevant to the application, has made inconsistent, contradictory, false or improbable representations or has misled the authorities by providing false information or documents or by withholding the real ones. To these cases, the amended APR proposal extends the application of the accelerated border procedure to applicants of a nationality or stateless people who are former habitual residents of a third country with an EU-wide recognition rate below 20 %. The instrumentalisation proposal, on the other hand, does not preserve the personal scope of the border procedure but extends it to *all* TCNs who would apply for international protection.

A related source of unclarity regards the legal fiction of non-entry and the lack of mention to the Screening Regulation proposal[147]. Recital 40 of the amended APR proposal states that 'after the screening, third-country nationals and stateless persons should be channelled to the appropriate asylum or return procedure, or refused entry', and that 'a pre-entry phase consisting of screening and border procedures for asylum and return should therefore be established'[148]. The instrumentalisation proposal, however, does not explicitly explain the relationship between the extension of the deadlines for the registration and examination of applications and the screening procedure[149].

Duration of the border procedures

The instrumentalisation proposal significantly extends the duration of the border procedures compared to the APR. The latter – together with the Screening proposal – establishes that applicants

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146 See *Figure 4*.

147 European Commission, Proposal for a Regulation introducing a 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. COM/2020/612 final. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2020%3A612%3AFIN

148 European Commission, Amended APR Proposal, Recital 40.

149 For example, if the deadline for registration is extended to 4 weeks, it is unclear when national authorities would proceed with the preliminary health and vulnerability check of the applicants.

would first undergo 5 days of screening and 12 weeks for the border procedure (on the admissibility of the application) or 2 months for the accelerated border procedure under Article 40(2) of the APR proposal. The total duration of the border procedure under the instrumentalisation proposal is significantly longer. The deadline for the registration of applications for international protection is set at 4 weeks, followed by 16 weeks of examination (including the appeal in the case of a negative decision).

Existing flexibility

The instrumentalisation proposal allows for derogations from secondary legislation which already provides for some degree of flexibility in some 'emergency situations'. Aside from issues related to the necessity and proportionality of the instrumentalisation proposal itself[150], the co-existence of exceptions in the 'ordinary' *acquis* and different proposals that derogate from it in exceptional situations create further issues of clarity and legal certainty.

Article 27(3) APR, for instance, states that 'where simultaneous applications for international protection by a disproportionate number of third-country nationals or stateless persons make it difficult in practice to register applications within three working days from when the application is made, the authorities of the Member State may extend that time-limit to ten working days'. Similarly, Article 28(3) APR establishes that 'where there is a disproportionate number of third-country nationals or stateless persons that apply simultaneously for international protection, making it difficult in practice to enable the application to be lodged within the time-limit established in paragraph 1, the responsible authority shall give the applicant an effective opportunity to lodge his or her application not later than one month from the date when the application is registered'.

Furthermore, in the case of a disproportionate number of persons applying for international protection, Article 34(3) APR allows for the extension of the time limits of 6 months by another 3 months for the regular examination procedure. Article 17 rRCD allows Member States to set modalities for material reception conditions different from the ones provided in the same Article, in duly justified cases, if an assessment of the specific needs of the applicant is needed or if the housing capacities normally available are temporarily exhausted.

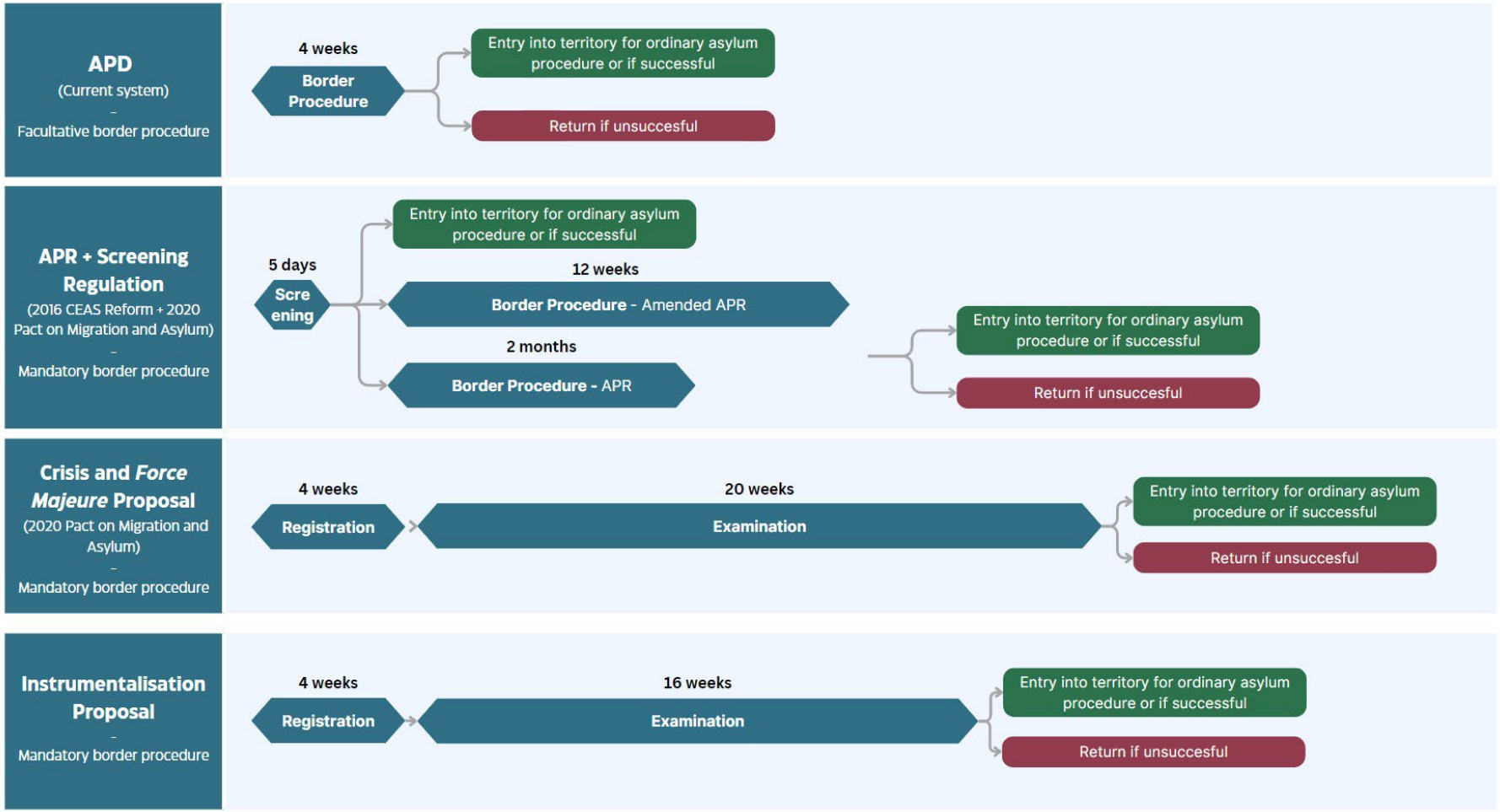
Finally, the Return Directive recast and amended APR proposal already provide for return border procedures that could be applied following the asylum border procedure[151]. Moreover, 'in situations where an exceptionally large number of third-country nationals to be returned places an unforeseen heavy burden on the capacity of the detention facilities of a Member State or on its administrative or judicial staff', Member States can take longer time for judicial review and derogate from the standards on detention set in Articles 19 and 20[152].

[150] See *Section 7*.

[151] Return Directive (recast), Article 22 https://eur-lex.europa.eu/resource.html?uri=cellar:829fbece-b661-11e8-99ee-01aa75ed71a1.0001.02/DOC_1&format=PDF

[152] Ibid., Article 21.

Figure 4: Border procedures under different EU migration and asylum instruments and proposals



Source: Authors' elaboration

4.2.2. Relationship with the crisis and force majeure proposal

Definitions

A first aspect to consider when analysing the linkages between the instrumentalisation proposal and the proposed secondary legislation and other policy instruments is whether the definitions are sufficiently distinct and clear, or whether there are possible overlaps between different concepts under EU law. Table 3 below collects different existing or proposed definitions for situations of 'instrumentalisation of migrants', 'crisis' and 'force majeure'.

Table 2: Definitions of 'instrumentalisation of migrants' and other related concepts

Instrument	Definitions
'Instrumentalisation of migrants' – **2021 SBC proposal**[153]	A situation where a third country instigates irregular migratory flows into the Union by actively encouraging or facilitating the movement of third-country nationals to the external borders, onto or from within its territory and then onwards to those external borders, where such actions are indicative of an intention of a third country to destabilise the Union or a Member State, where the nature of such actions is liable to put at risk essential State functions including its territorial integrity, the maintenance of law and order or the safeguard of its national security.
'Instrumentalisation of migrants' – Proposal **for a Regulation on measures against transport operators COM(2021) 753 final**[154]	The instrumentalisation of migrants, whereby State actors facilitate irregular migration for political purposes is an increasingly worrying phenomenon, which may involve the smuggling of migrants or trafficking of persons in relation to illegal entry into the territory of the Union, thereby endangering the lives and security of those people, while posing a security threat to the borders of the Union.
'Instrumentalisation of migrants' – **2021-2025 EU Action Plan Against Migrant Smuggling**[155]	A highly worrying phenomenon observed recently is the increasing role of State actors in artificially creating and facilitating irregular migration, using migratory flows as a tool for political purposes
'Crisis' – **Crisis and Force Majeure**[156]	(a) 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 States concerned, and nature, that it renders the Member State's asylum, reception or return system non-functional and can have serious consequences for the functioning of the Common European Asylum System or the Common Framework as set out in Regulation (EU) XXX/XXX [Asylum and Migration Management], or (b) An imminent risk of such a situation.

[153] European Commission, Proposal for a Regulation amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders. COM/2021/891 final: Article 1(b)(27). https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2021%3A891%3AFIN

[154] European Commission, Proposal for a Regulation on measures against transport operators that facilitate or engage in trafficking in persons or smuggling of migrants in relation to illegal entry into the territory of the European Union. COM/2021/753 final. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52021PC0753

[155] European Commission, Communication, A renewed EU action plan against migrant smuggling (2021-2025). COM/2021/591 final. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2021:591:FIN

[156] European Commission, Proposal for a Regulation addressing situations of crisis and force majeure in the field of migration and asylum. COM/2020/613 final. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020PC0613

'Crisis' – **Migration Preparedness and Crisis Blueprint**[157]	Any situation or development occurring inside the EU or in a third country having an effect and putting particular strain on any Member State's asylum, migration or border management system or having such potential. This includes and goes beyond the circumstances defined in Article 1(2) of the Proposal for a Regulation addressing situations of crisis and force majeure in the field of migration and asylum or the circumstances defined in Article 2(w) of the proposal for a Regulation on Asylum and Migration Management.
'Force majeure' – **Crisis and Force Majeure**[158]	Abnormal and unforeseeable circumstances outside control, the consequences of which could not have been avoided in spite of the exercise of all due care.

Source: Authors' elaboration

The definition of 'crisis' in the crisis and force majeure proposal is mostly based on the scale of the cross-border movements in relation to the capacities of the EU Member State affected. The definition of 'crisis' lacks any quantifiable indicators or threshold based on which the assessment should be carried out[159]. It would not cover all instances of 'instrumentalisation', e.g. if the scale of the cross-border movement 'encouraged or facilitated' by a third country is not considered 'significant' in relation to EU Member State's capacities.

However, this does not mean that the two definitions are mutually exclusive: cross-border movements instigated or facilitated by a third country and also considered to be disruptive to the capacities of the affected Member State could fall within both categories and lead to the activation of both Regulations. In addition, the definition of 'crisis' in the Recommendations on a Migration Preparedness and Crisis Blueprint is broader and less defined[160]. It could apply in all situations of cross-border movements between a non-EU country and a neighbouring EU Member State.

The definition of situations of *force majeure* is also sufficiently broad to capture all situations of 'instrumentalisation of migrants'. In its explanation of *force majeure*, the Commission specifically made reference to 'the political crisis witnessed at the Greek-Turkish border in March 2021'[161]. These events are a clear example of what the Commission has defined as 'instrumentalisation'.

The definition of *force majeure* stands at odds with the one foreseen in the 2001 draft articles on the Responsibility of States for Internationally Wrongful Acts, with commentaries, adopted by the International Law Commission[162], which states in Article 23 (*force majeure*) that for a State not to be responsible for international wrongful acts, three elements must be met: first, irresistible force or an unforeseen event; second, beyond the control of the state concerned; and third, which makes it immaterially impossible in the circumstances to perform the obligation. The draft articles expressly state that 'force majeure does not include circumstances in which performance of an obligation has become more difficult, for example due to some economic or political crisis'. The inherent political nature of 'instrumentalisation', as recognised by the Commission proposal and the one on transport

[157] European Commission, Recommendation, 2020/1366 of 23 September 2020 on an EU mechanism for preparedness and management of crises related to migration (Migration Preparedness and Crisis Blueprint), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32020H1366

[158] European Commission, Crisis and force majeure Regulation, p. 20.

[159] Brouwer et al. (2021), The European Commission's Legislative Proposals in the New Pact on Migration and Asylum, p. 124.

[160] European Commission, Migration Preparedness and Crisis Blueprint.

[161] European Commission, Crisis and *Force Majeure* Regulation, p. 9.

[162] Refer to United Nations (2001), Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries. https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf

operators[163] means that under international law these situations would not be considered under *force majeure*, but rather as 'crisis'. This means that EU Member States would not be exonerated for international wrongful acts which include fundamental rights violations[164].

The accompanying proposal for a regulation on measures against transport operators COM(2021) 753 brings into the picture a definition of 'instrumentalisation' which acknowledges the *political* considerations behind this issue. A similar definition including 'increasing role of State actors in artificially creating and facilitating irregular migration, using migratory flows as a tool *for political purposes*' (Emphasis added) appears in the 2021-2025 EU action plan against migrant smuggling.

Simultaneous application of instrumentalisation proposal and crisis and force majeure proposal

There is insufficient clarity on the potential for a simultaneous application of the instrumentalisation proposal and the crisis and force majeure proposal. A relationship between the two proposals is acknowledged in the Explanatory Memorandum: the instrumentalisation proposal 'sits alongside the crisis and force majeure proposal as another piece in the framework that will provide additional specific rules for managing the particular situation of instrumentalisation of migrants[165]. According to the Commission, 'the measures included in the 2020 crisis proposal were not designed to deal with situations where "the Union's integrity and security" is under attack as a result of the instrumentalisation – they would only apply "in situations of a mass influx" where a Member State is not able to manage the high numbers of arrivals, and of force majeure'[166].

The instrumentalisation proposal 'draws inspiration' from the crisis and force majeure proposal, but the Commission argues that its provisions were adapted 'to cater for such specific situation [of 'instrumentalisation'] without undermining the right to asylum or the principle of *non-refoulement*' and to '[ensure] the protection of fundamental rights of people instrumentalised'[167]. The only explicit mention of the crisis and force majeure proposal in the operational part of the instrumentalisation proposal is in Article 5 on Support and solidarity measures:

> 3. Without prejudice to the solidarity provisions of Regulation (EU) XXX/XXX [Crisis and force majeure regulation], the Commission, as soon as possible after receiving the request for support and solidarity measures as referred to in paragraph 2, shall invite other Member States to contribute by means of the support and solidarity measures referred to in paragraph 1 that correspond to the needs of Member State facing a situation of instrumentalisation. The Commission shall coordinate the support and solidarity measures referred to in this Article.

'Without prejudice' seems to suggest that the support and solidarity measures in both Regulations could be applied at the same time – and, therefore, the two Regulations could be triggered simultaneously. However, no other details are offered on the practical implementation of both Regulations.

The simultaneous application of the instrumentalisation proposal and the crisis and force majeure regulation proposal could offer different options to Member States depending on the order in which they request the activation of the two instruments. However, a broad application of the general

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[163] European Commission, Proposal for a Regulation on measures against transport operators that facilitate or engage in trafficking in persons or smuggling of migrants in relation to illegal entry into the territory of the European Union. COM/2021/753 final. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52021PC0753

[164] UN, Article 2. Elements of an internationally wrongful act of a State. https://legal.un.org/legislativeseries/pdfs/chapters/book25/english/book25_part1_ch1_art2.pdf

[165] Instrumentalisation Proposal, page 3.

[166] Ibid., page 9.

[167] Ibid, page 3.

international law principle *lex posterior derogat legi priori* (a later law repeals an earlier law)[168] in the context of EU law would mean that, in each case, the provisions in the second law would take over or derogate those under the first one.

1 A Member State activates the instrumentalisation proposal after the Crisis and force majeure proposal.

Following the extension of the registration time limits to 4 weeks, the Member State in question would be able to channel all asylum applicants to border procedures, going beyond the <75 % recognition rate criterion in the crisis and force majeure regulation proposal. It is unclear whether the examination of the application would then take 20 weeks, as per the crisis and force majeure proposal, or 16 weeks, as per the instrumentalisation proposal. It could be reasonable to expect that Member States would apply the 16-week time limit as this would also entail the application of border procedures to all applicants.

The most significant consequence of this scenario relates to the emergency return management procedures under Article 4 of the instrumentalisation proposal. The activation of the derogations contained in the instrumentalisation proposal would remove the return procedures from the scope of the rRD and (amended) APR proposals. This would not be the case if the crisis and force majeure proposal was triggered by itself. Together with the application of the legal fiction of non-entry, the 'suspension' of the rRD might create or nurture a misunderstanding by Member States that they could merely or automatically resort to the refusal of entry under Article 14 SBC. However, such an interpretation would face a number of legal caveats and challenges.

First, the SBC provides a set of procedural safeguards which apply in cases of refusals of entry. These include the requirement to issue a substantiated decision (in a standard form) stating the precise reasons for the refusal (Article 14.2). TCNs should also have access to a right of appeal, with no suspensive effect on the decision not to enter. Furthermore, in accordance with Article 7 SBC, border guards should perform their tasks in full respect of human dignity and 'in particular in cases involving vulnerable persons' and non-discrimination 'on grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation'. Lastly, the SBC applies without prejudice to the principle of *non-refoulement* and fundamental rights (Articles 3.b and 4). Article 4 adds that 'In accordance with the general principles of Union law, decisions under this Regulation shall be taken on an *individual basis*.' (Emphasis added).

Second, the emergency return management procedure envisaged in Article 4 of the instrumentalisation proposal would still entail the obligation by EU Member States to comply with Article 5 of the rRD proposal, which foresees a reference to the non-refoulement principle and the obligation to take into due account 'the best interests of the child, family life and state of health' of TCNs. Member States would also be required to ensure a treatment or level protection no less favourable than the one included in Article 10.4 and 10.5 (limitations on the use of coercive measures), Article 11(2)(a) – (postponement of removal), Article 17(1)(b) and (d) (emergency health care and taking into account needs of vulnerable persons), and Articles 19 and 20 (conditions for detention and detention of minors and families). Consequently, an automatic refusal of entry without securing all these safeguards – and the fundamental rights examined in *Section 5.1.* of this Study - would automatically qualify the expulsion as an illegal pushback running contrary to EU law and the CFREU.

[168] Article 30, Vienna Convention on the Law of the Treaties. https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf)

2 A Member State activates the instrumentalisation proposal before the crisis and force majeure regulation proposal.

Member States could likely resort to triggering the Crisis Regulation following the instrumentalisation proposal if the scale of the cross-border movement was to increase and amount to a 'large-scale influx' under the definition of 'crisis' (See Table 3 above). Assuming that the principle of *lex posterior derogat legi priori* applies, the time limits for the registration and examination would be the ones included in the crisis and force majeure proposal, i.e. 4 and 20 weeks respectively. This would also mean that the border procedure would be limited to applicants who are national or – if stateless – former habitual residence of a country with a <75% EU-wide recognition rate.

The most significant aspect brought in by the activation of the crisis and force majeure proposal would be the application of its support and 'solidarity' measures. While the instrumentalisation proposal only provides support from EU agencies, the crisis and force majeure proposal would also trigger solidarity between the Member States, including intra-EU relocations (see below).

As for the emergency return procedures, it could be assumed that triggering the crisis and force majeure proposal would bring the return procedures under the scope of the rRD and amended APR. This would however come along with the increased time limits for border return procedures (20 weeks in total) and the specific exceptions foreseen by Article 5 of the crisis and force majeure proposal[169].

Comparison of the support and solidarity measures

The crisis proposal includes more extensive 'solidarity measures' than the instrumentalisation proposal. Through derogations from the RAMM, it establishes that – in a situation of declared crisis – EU Member States cannot choose capacity-building measures, operational support and outreach with third countries over intra-EU relocations and return sponsorships. It also expands the scope of relocations: in situations of crisis, it would not be limited to applicants not subject to border procedures and beneficiaries who have held international protection for less than three years; it would also include applicants subject to border procedures and irregularly staying TCNs. Similarly, in relation to return sponsorships, it establishes that Member States shall relocate third-country nationals subject to a return decision to their own territory if the relocation does not take place within four months from the decision. In the RAMM, it is eight months instead. It also includes shorter deadlines to ensure more rapid consultations between the Commission, the co-legislators and the Member States.

Based on the original versions of the instrumentalisation proposal and the Crisis proposal, the absence of relocation mechanisms in the former might not necessarily be a problem in and of itself. If the situation of 'instrumentalisation' is also a case of 'mass influx', then it can be expected that the two Regulations would both apply at the same time – despite uncertainty on the practical implementation of both. However, the actual definition of what does or does not constitute a 'mass or large-scale influx' – and what is large or not in this context – remains equally legally uncertain and contested. At the same time, however, the non-inclusion of relocation under this proposal might be related to the fact that the text is the replica of the Commission proposal for an Emergency Council Decision 'for the benefit of' Latvia, Lithuania and Poland, whose governments have been generally opposed to any form of intra-EU relocation and mandatory solidarity.

The lack of intra-EU relocations in the instrumentalisation proposal is unjustified. Rather than a question of solidarity, however, the actual issue at stake is one of unfair sharing of responsibilities and compliance with Article 80 TFEU. Irrespective of the scale and numbers of TCNs in a declared

[169] Crisis and force majeure Proposal, Article 5. See Brouwer et al., The European Commission's legislative proposals in the New Pact on Migration and Asylum, p. 129-130.

situation of 'instrumentalisation of migrants', the absence of relocations mechanisms would lead to unbalanced responsibilities for the Member States at the external EU borders. The temporary higher number of TCNs in a given EU Member State would put its asylum system under some degree of stress and increase its administrative burden. Accordingly, it is striking that the proposal does not envisage relocation mechanisms on top of the measures already available under Article 5 (i.e. capacity-building measures, operational support and external outreach) as an additional way to support Member States managing EU external borders.

Another aspect to take into consideration is the weak position envisaged by the European Commission to assess which support and solidarity measures would be the most appropriate. As examined in *Section 4.1.5.* of this Study above, the affected Member State would request the Commission for specific actions, which would then *invite* other Member States to contribute and coordinate their efforts. Hence, the choice of support and solidarity measures seems to be completely in the hands of Member States, with no expressed decision-making or enforcement role for the Commission.

4.2.3. Proposal amending the Schengen Borders Code

The proposed revision of the Schengen Borders Code (SBC) is tightly linked to the instrumentalisation proposal. In their current formulation, if one of the two instruments were not to pass, the other one – or at least parts of it – would be meaningless. Importantly, the definition of 'instrumentalisation of migrants' is contained in the SBC proposal. The SBC also sets the instrumentalisation-related provisions in the sphere of border management, i.e. the closure of BCPs and increased surveillance at the external borders.

The European Parliament's Rapporteur on the SBC proposal, Sylvie Guillaume (S&D, France), has suggested in the LIBE Committee Draft Report that all provisions related to instrumentalisation should be removed altogether from the SBC proposal[170]. In her view, the instrumentalisation measures 'serve a geopolitical goal with limited relevance for the rules governing the good functioning of the Schengen area'. The Rapporteur has argued that 'instrumentalisation' should be examined independently and not divided in separate legal texts with different purposes and objectives. The split of instrumentalisation-related provisions between the SBC and the instrumentalisation proposal also poses important open issues related to their different legal bases and variable geometry of the Schengen and asylum *acquis* (See *Sections 4.3.2 and 7.1.*).

4.2.4. EU agencies

As regards the operational framework of EU agencies, according to Article 5 of the instrumentalisation proposal, in a situation of 'instrumentalisation', Member States may – and therefore are under no obligation to – request support from the EUAA, Frontex and Europol. These agencies may also propose assistance on their own initiative, each in its own area of competence (respectively, asylum, returns and law enforcement cooperation).

The three agencies are also part of the EU Migration Preparedness and Crisis Network together with the Member States, the Council, the Commission, the EEAS, eu-LISA and the FRA. This network is supposed to share 'situational awareness' and early warning / forecasting and support the development of resilience in the Monitoring and preparedness stage (*Stage 1*), and provide timely and up-to-date 'information' to support a rapid efficient and coordinated EU response in the

[170] European Parliament, Draft Report on the Proposal for a 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 borders (COM(2021)0891 – C9-0473/2021 – 2021/0428(COD)). 8.11.2022.

Migration crisis management stage (*Stage 2*)[171]. Member States facing a situation of 'instrumentalisation' must report all relevant data to this Network. This information is supposed to be the basis for the Commission's monitoring activities and its decision on whether the derogations should be renewed or repealed.

4.2.5. Parliament's position on the ongoing negotiations

With the instrumentalisation proposal, the Commission is introducing an instrument which amends proposals that are currently undergoing inter-institutional negotiations and scrutiny by the co-legislators, and which, in turn, amend or derogate from the standards that are currently in force. The main relevant files are the APR, amended APR, rRCD, rRD, as well as the crisis and force majeure proposal, the Screening proposal, and the 2021 SBC proposal.

The Parliament's rapporteurs on these files have been proposing crucial amendments to the Commission's original version of these proposals. It is thus important to compare the draft reports by the LIBE Committee and the proposed amendments with the measures contained in the instrumentalisation proposal to avoid possible conflict. The draft report of the respective EP rapporteurs on the APR proposal, the crisis and force majeure regulation proposal, the rRCD proposal, the rRD proposal, the screening proposal are particularly central as regards the legal fiction of non-entry, the scope of border procedures, the limitation of open border crossing points, the increased deadlines for registration of the applications for international protection, the access to material reception conditions, detention, access to remedies and the absence of independent monitoring mechanisms at the border. With the exception of the draft report on the rRD, all the above-mentioned reports have been approved by the LIBE Committee.

In its original version, the instrumentalisation proposal would re-introduce and expand these elements that the EP rapporteurs are seeking to remove or modify in the above-mentioned proposals. *Table 4* provides a (non-exhaustive) overview of the position of the LIBE Committee on the other proposals on selected issues. It shows that the measures contained in the instrumentalisation proposal go against the amendments introduced by the LIBE Committee in the other files. This raises serious concerns for legal inconsistencies and risks to fundamental rights if the instrumentalisation proposal was to be approved.

[171] European Commission, Recommendation (EU) 2020/1366 of 23 September 2020 on an EU mechanism for preparedness and management of crises related to migration (Migration Preparedness and Crisis Blueprint). OJ L 317/26. 01.10.2020. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32020H1366

Table 3: Draft reports of the LIBE committee

Issue	Draft report	Parliament's amendments
Legal fiction of non-entry	Draft report on Screening proposal[172]	The draft report removes the legal fiction of non-entry for the screening as it finds that it is not in line with the APD and the APR proposal. The Rapporteur stresses that the legal fiction of non-entry would entail a comprehensive use of detention or other forms of de facto detention or deprivation of liberty. Furthermore, the substitute impact assessment for the Pact concluded that *the proposed indiscriminate non-entry policies make compliance with the guarantees of the Reception Conditions Directive and the Return Directive impossible*. (Emphasis Added).
	Draft report on APR proposal[173]	A border procedure may take place at or in proximity to the external border or transit zones *on the Member State's territory*, provided that the conditions under this paragraph are fully respected and applicants' special needs are properly safeguarded (Emphasis added).
Border procedure applicable to all applicants	Draft report on Crisis and Force Majeure proposal[174]	The amendments in the draft report remove the introduction of new grounds for border procedures under the Crisis and Force Majeure proposal. This includes the <75 % recognition rate threshold proposed by the Commission. [In the APR draft report, however, the 20 % threshold is extended to situations of crisis.] The only acceptable grounds for border procedures would be the ones included in the APR and amended APR proposals.
	Draft report on Returns recast[175]	The draft report proposes to delete the border procedure as it raises concerns from a fundamental rights and efficiency perspectives.
Limiting the number of border crossing points	Draft report on Crisis and Force Majeure proposal	Instead of proposing the closure of border crossing points in a situation of crisis, the draft report stresses the need to increase the human resources at the border, including through support from the EUAA.
Increased deadline for registration	Draft report on Crisis and Force Majeure proposal	The draft report amends the original proposal by limiting the extension of the registration deadline to 3 weeks (instead of 4) and only in 'the first weeks of a situation of crisis'. Member States should commit to trigger all possible legal mechanisms to guarantee a swift and comprehensive registration of applications,

[172] EP LIBE Committee, Draft report on the Proposal for a regulation introducing a screening of third-country nationals at the external borders, Rapporteur Birgit Sippel, 16 November 2021. https://www.europarl.europa.eu/doceo/document/LIBE-PR-700425_EN.pdf

[173] EP LIBE Committee, Draft report on the implementation of Article 43 of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (2020/2047(INI)), Rapporteur Fabienne Keller, 23 October 2020. https://www.europarl.europa.eu/doceo/document/LIBE-PR-660061_EN.pdf

[174] EP LIBE Committee, Draft report on the Proposal for a regulation of the European Parliament and of the Council addressing situations of crisis in the field of migration and asylum, Rapporteur Juan Fernando López Aguilar, 23 November 2021. https://www.europarl.europa.eu/doceo/document/LIBE-PR-697631_EN.pdf

[175] The LIBE Committee has not reached an agreement on the Draft Report for this file. EP LIBE Committee, European Parliament, Draft report on the Proposal for a directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (recast), Rapporteur Tineke Strik, 21 February 2020. https://www.europarl.europa.eu/doceo/document/LIBE-PR-648370_EN.pdf

		with a view to guaranteeing transparency and access to the procedure, based on principles of good administration.
Rights of applicants and access to reception conditions	Draft report on Crisis and Force Majeure proposal	Even if the registration deadlines are extended, applicants should receive a document testifying the making of such an application. This document should facilitate the access to their rights under the rRCD, following the making of that application, and until its formal registration.
Detention	Draft report on Returns recast	The draft report stresses that the deprivation of a person's liberty should be a measure of last resort. Alternatives should always be given preference. When it comes to minors, the amendments to the Commission's proposal seek to ban detention for children as it is never in the children's best interest, even when family units are available. The draft report also provides for periodic judicial reviews of the necessity and proportionality of the detention of a third-country national in each individual case and for more stringent and defined time limits.
	Draft report on Reception Conditions Directive recast[176]	The draft report states that Member States shall not hold a person in detention for the sole reason that he or she is an applicant or on the basis of an applicant's nationality. The detention shall be based on a decision by judicial authorities, shall be strictly necessary for the purpose of securing the fulfilment of a specific and concrete obligation incumbent on the applicant, shall be ended as soon as the specific and concrete obligation has been fulfilled, and shall not be punitive in nature. Applicants shall not be detained before an assessment of their specific reception needs has been carried out. Detention of applicants shall be ordered in writing by judicial authorities. Detention shall be reviewed by a judicial authority at reasonable intervals of time, ex officio and/or at the request of the applicant concerned. Minors shall not be detained.
	Draft report on APR proposal	A decision to detain an applicant during a border procedure should never be automatic. Such decisions should always be based on an individual assessment of each case that shows that detention is necessary and proportionate and that it is not possible to effectively apply less coercive measures. Such decisions should be subject to judicial oversight. A Member State shall not decide to hold an applicant in detention until it has individually assessed that applicant's case and effectively considered alternatives to detention or less coercive measures.
Access to remedies	Draft report on Returns recast	The draft report finds that 'an appeal against a return decision should always have a suspensive effect, otherwise the applicant lacks an effective remedy'.

[176] EP LIBE Committee, Report on the Proposal for a directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast), Rapporteur Sophie In 't Veld, 10 May 2017. https://www.europarl.europa.eu/doceo/document/A-8-2017-0186_EN.html

Independent monitoring mechanisms	Draft report on Screening proposal	Each Member State should establish an independent monitoring mechanism covering in particular the respect for fundamental rights in relation to border surveillance, the screening, asylum and return procedures, as well as the respect for the applicable rules regarding detention and compliance with the principle of non-refoulement as referred to in Article 3(b) of Regulation (EU) 2016/399. The FRA should offer guidance for monitoring mechanism.
	Draft report on APR proposal	The Commission should set up an independent monitoring mechanism to check and investigate any allegation of non-respect of fundamental rights in relation to the border procedure. That monitoring mechanism should cover procedural and fundamental rights, reception conditions and the application of detention and alternatives to detention.

Source: Authors' elaboration

Importantly, on 10 February 2021, the European Parliament approved a Motion for a European Parliament Resolution on the implementation of Article 43 of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection[177]. This motion – based on the LIBE Committee's Draft Report on the implementation of Article 43 APD[178] and the EPRS's European Implementation Assessment on asylum procedures at the border[179] – explicitly criticised many of the elements identified in the implementation of border procedures across the EU. These include the fiction of non-entry and the ensuing detention of applicants during the procedure; the refusal of entry leading to refoulement; the application of the border procedure to unaccompanied minors and vulnerable persons; the limitation of procedural safeguards; and the use of border procedures in the case of large numbers of arrivals. These elements are, however, an integral part of the emergency asylum and return procedures that would be made available to EU Member States under the instrumentalisation proposal.

In light of the previous positions of the Parliament, both in the LIBE Draft Reports and the February 2021 Resolution on Border Procedures, it is problematic that the Commission has introduced a proposal containing all of these elements without a clear picture of the final product of the ongoing inter-institutional negotiations on the previous legislative proposals. This can effectively hinder the European Parliament's democratic scrutiny on the different files, its role as co-negotiator and lead to inconsistencies and divergences in the resulting final EU legal framework[180].

4.3. Critical assessment

This section starts by examining whether the proposal is consistent with, and how it interacts with the current EU asylum and migration law and policy. What will be the likely impact on the

[177] European Parliament, Resolution of 10 February 2021 on the implementation of Article 43 of Directive 2013/32/EU of 26 June 2013 on common procedures for granting and withdrawing international protection (2020/2047(INI)). Brussels, 10 February 2021. https://www.europarl.europa.eu/doceo/document/TA-9-2021-0042_EN.html

[178] European Parliament, Draft Report on the implementation of Article 43 of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (2020/2047(INI)). 22 October 2020. https://www.europarl.europa.eu/doceo/document/LIBE-PR-660061_EN.pdf

[179] W. van Ballegooij and K. Eisele (2020), Asylum procedures at the border. European Implementation Assessment. European Parliament Research Service (EPRS). https://www.europarl.europa.eu/RegData/etudes/STUD/2020/654201/EPRS_STU(2020)654201_EN.pdf

[180] Stakeholders' workshop: Interview with ECRE; Interview with PICUM.

harmonisation of the asylum *acquis* at EU level and respect for EU law more generally by introducing a permanent mechanism that enables derogations from EU law on a temporary basis? Are the proposed derogations in compliance with EU law in general? Does the Commission proposal offer sufficient clarity on how the existence of a situation of instrumentalisation will be assessed in practice and what objective and verifiable criteria or benchmarks will/should be taken into account to establish this? Is the proposal phrased in a sufficiently clear manner to allow for legal certainty for the individuals affected?

4.3.1. Clarity and legal certainty

The instrumentalisation proposal lacks clarity and legal certainty. The definition of 'instrumentalisation' is based on three constitutive elements:

1. A third country actively encouraging or facilitating 'irregular' cross-border movement into the EU;

2. Its intention to destabilise the Union or a Member State; and

3. A risk for essential State functions including territorial integrity, the maintenance of law and order or the safeguard of national security.

These elements are vague and hard to attest on a robust evidence-based framework. They leave an overly broad margin for interpretation and a potential misuse or over-use by EU Member States on the basis of the following three considerations:

First, the focus on 'irregular migratory flows' is legally inappropriate. In fact, as introduced in *Section 1* above, it does not take into consideration that the TCNs crossing the borders may be asylum seekers and refugees, and therefore the irregular or unauthorised nature of entry and residence is not relevant as regards access to asylum, rights and non-penalisation (Refer to *Section 5.1.* below).

Second, there is no clear indication in the proposal as to what precisely constitutes the '*intention* of a third country'[181]. Even when explicit public remarks may be made by state officials, it is not possible to directly assume that the words of a political leader equate to the 'intention of [the] third country'. A political statement does not necessarily reflect the policies in place on the ground and the specific tactics or responses which are actually implemented in practice. Political statements are not always objective and reliable sources to ascertain with certainty a government's 'intention'. As Forti has argued, 'differentiation on a national basis of the treatment of incoming third-country migrants could be one of the consequences of this broad and unclear definition'[182].

Moreover, the current definition is unclear as to whether the refusal by relevant third countries governments to cooperate with the EU on containment and readmission policy, or their decisions to suspend such as cooperation in light of other foreign policy developments and interests could qualify as 'intention' under the proposed definition of instrumentalisation. This would over-stretch the instrumentalisation concept in a manner that would widen the potential misuse of the notion by relevant Member States. It would pursue a Eurocentric view assuming the legitimacy of EU containment policies and disregarding the potentially legitimate interests and agency by third countries not to cooperate with the EU in containment policies. It would be equally hard to assess and attest if the ultimate goal in these situations is to destabilise the EU and/or a Member State, or

[181] Interview with EEAS representative; Interview with IOM representative.

[182] M. Forti (2023), *Belarus-sponsored Migration Movements and the Response by Lithuania, Latvia and Poland: A Critical Appraisal*, European Papers, available at https://www.europeanpapers.eu/en/europeanforum/belarus-sponsored-migration-movements-and-response-by-lithuania-latvia-and-poland

whether they just indicate their refusal not to continue cooperation with the EU in the areas of migration control and asylum containment as part of a broader external relations agenda.

Third, it is unclear how cross-border movements of a limited scale and of a not-sudden nature could *generally* pose 'a risk' to Member States' territorial integrity, law and order or even 'national security', and how this would be practically assessed. As explained above, the actual scale of the cross-border movement does not seem to be among the key criteria used by the proposal to identify or label a situation as 'instrumentalisation'. On top of this, as outlined in *Section 2.2.2.* of this IA, numbers seem to be relatively contained and of low-scale across most of the relevant case studies analysed in the case studies.

The proposal does not justify why non-large-scale numbers justify the existence of a linkage between cross-border movement and a 'threat to the territorial integrity, law and order or national security' of a given Member State. As it has been mentioned in *Section 1* of this Impact Assessment above, in the case *M.A. v. Lithuania* of 30 June 2022, the CJEU found that the unauthorised nature of entry and residence of an asylum seeker, or generalised assumptions or considerations, do not constitute a legitimate ground for Member States to justify the existence of a 'sufficiently serious threat' to public order and public security, which instead requires an individualised evidence-based assessment[183].

Due to the lack of any concrete evaluation criteria or benchmarks inside the proposal to be used to establish the existence of a situation of instrumentalisation, the current definition appears too broad and vague to guarantee any legal certainty. This is even more evident when one compares it with other EU instruments dealing with situations of 'crisis' or '*force majeure*' which show important overlaps and possible confusion with the concept of 'instrumentalisation'. Several interviewees and participants in the stakeholders' workshop have stressed that the definition is too abstract to be applied in practice by national authorities and would leave extensive discretion to the Member States in their assessment (see also *Section 5.3.*)[184]. Similarly, interviewees have underlined that priority should be given to ensuring a legal definition of 'instrumentalisation' that is as concrete and precise as possible[185].

A further obstacle to legal certainty is the observed difference between the Explanatory Memorandum and the actual articles of the proposal. For example, Recital 7 states that the emergency asylum management procedure would not apply or should be suspended if the screening reveals that 'an applicant is in need of special procedural guarantees and adequate support cannot be provided in the context of the procedure at the border'[186]. The Explanatory Memorandum also states that the border procedure would apply to all applicants except for 'medical cases' as per Article 41(9)(c) of the amended APR[187]. In contrast, the only guarantee in the operational part (Article 2(1)(a)-(b)) is the prioritisation of 'well-founded claims' (which is unclear) and of applications from unaccompanied minors or accompanied minors and their family.

At EU Member States level, the Recitals and the Explanatory Memorandum are generally used to interpret the actual operational part of the legal texts. If, however, there is no mention of safeguards or exceptions in the main provisions of the text, this may lead to the non-application or mis-

183 CJEU, 30 June 2022, C-72/22, *M.A. v Valstybės sienos apsaugos tarnyba* (Lithuania).

184 Stakeholder workshop, 12 June 2023; Interview with ECRE; Interview with IOM representative.

185 Interview with the German Permanent Representation to the EU.

186 Instrumentalisation Proposal, Recital 7.

187 Ibid., p. 13.

application by Member States' authorities of these provisions when implementing the proposed Regulation, which may also limit legal certainty.

The split of instrumentalisation-related provisions between the SBC and the instrumentalisation proposal may also hinder legal certainty. The variable geometry and asymmetry between the Schengen *acquis* and the asylum *acquis* might produce paradoxes when it comes to the implementation of the Regulation. Several Member States (Bulgaria, Cyprus[188], Romania, and Ireland) are bound by the EU legal instruments on migration and asylum but are not – or not yet – part of the Schengen Area.

Further, as introduced in *Section 2.2.1.* above, the instrumentalisation proposal reproduces a false dichotomy between 'asylum' and 'return'. Asylum and returns are presented as the two only possible outcomes of the border procedure: if an applicant is found ineligible for asylum, then they will be channelled into the return procedure. This is however misleading and overly simplistic[189]. As several interviewees have noted, border procedures fail to take the variety of national statuses envisaging alternative protection statuses on humanitarian grounds – which are granted in addition to asylum - into account[190]. The mandatory return of an applicant who is not eligible for asylum curtails the possibilities afforded to TCNs in different national contexts and might lead to the expulsion of individuals who have valid humanitarian protection grounds in the EU.

Based on the analysis above, it is possible to conclude that the instrumentalisation proposal does not offer sufficient legal clarity for the individuals affected, even though the fundamental rights' impacts on their status are expected to be significant (See *Section 5.1.* of this IA).

4.3.2. Compliance with EU law

The instrumentalisation proposal consists of derogations from a set of secondary law proposals which are currently undergoing scrutiny by the co-legislators. This means that the secondary legislation currently in force (i.e. the 2013 APD, the 2013 RCD and the 2008 Return Directive) must be modified for the proposal to enter into force. Assessing whether the instrumentalisation proposal is in compliance with the current system of secondary legislation would thus not be helpful. This section will therefore focus on whether the instrumentalisation proposal complies with primary EU

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188 While not yet part of the Schengen Area, Cyprus joined the Schengen Information System on 25/7/2023. https://cyprus.representation.ec.europa.eu/news/schengen-area-cyprus-joins-schengen-information-system-2023-07-25_en#:~:text=The%20connection%20of%20Cyprus%20to%20SIS%20allows%20law,objects%20%28e.g.%20cars%2C%20firearms%2C%20boats%20and%20identity%20documents%29.

189 A 2019 Comparative Study by the European Migration Network found that different national protection statuses are available in 20 Member States and in Norway. These statuses are available in addition to the international protection enshrined in EU law (i.e. refugee, subsidiary protection and temporary protection). The EMN Study found that, as of 2019, with the exception of Bulgaria, alternative protection statuses on humanitarian grounds were available in all case studies selected for the present IA (i.e. Lithuania, Poland, Greece, Spain and Italy). They significantly differ from one national context to another: in Italy, available grounds include exceptional circumstances, climate change and natural disasters, medical reasons, national protection based on the principle of non-refoulement, and special statuses for children and minors; in other contexts, the grounds are more limited. Further protection statuses are also available across the EU for victims of trafficking, for family reasons and stateless persons. European Migration Network (2020), Comparative overview of national protection statuses in the EU and Norway. EMN Synthesis Report for the EMN Study 2019. https://home-affairs.ec.europa.eu/system/files/2020-06/emn_synthesis_report_nat_prot_statuses_final_02062020_0.pdf

190 Interview with PICUM; Interview with ICMPD. See also PICUM (2021), Why is the Commission's Push to link Asylum and Return Procedures Problematic and Harmful?, Briefing paper, Brussels. Available at https://picum.org/wp-content/uploads/2021/10/Why-is-the-Commissions-push-to-link-asylum-and-return-procedures-problematic-and-harmful.pdf#:~:text=Why%20is%20the%20Commission%E2%80%99s%20push%20to%20link%20asylum,to%20return%20%E2%80%93%20either%20by%20force%20or%20%E2%80%9Cvoluntarily%E2%80%9D.

law (TEU, TFEU and CFREU) and the SBC. In this regard, interviewees have noted that the instrumentalisation proposal may be considered *unconstitutional* and contrary to the rule of law[191]. The proposed measures do not only derogate from proposed secondary legislation; they also derogate from and de facto amend primary EU law, including key rights envisaged in the Treaties and CFREU.

Articles 78 and 79 TFEU and (dis)harmonisation

A natural point of departure for this analysis is Article 78 TFEU. This article constitutes the legal basis for the instrumentalisation proposal and the other proposals from which it derogates. Article 78 TFEU is the foundation for the realisation and harmonisation of the CEAS, in compliance with the 1951 Geneva Convention and its 1967 Protocol. Several interviewees highlighted that the introduction of derogations available to Member States on a permanent basis goes against the very idea of a *common* asylum system[192].

Together with the crisis and force majeure proposal, the instrumentalisation proposal runs a real risk of undermining the *common* nature of EU asylum policy, as it leaves a wide margin of manoeuvre, too high level of discretion and flexibility in the hands of Member States during implementation which can be expected to lead to arbitrariness. Based on the specific circumstances that the Member States are experiencing, there could be different border management, asylum and return regimes in place at the same time in different Member States or sections of the border. This undermines the Treaties objective of achieving '*common* procedures for the granting and withdrawing of uniform asylum or subsidiary protection status' (Article 78(2)(d) TFEU)[193]. The establishment of different exceptions regimes available to Member States on a permanent basis can be expected to exacerbate non-compliance rather than to ensure more compliance[194]. This would seriously undermine the CEAS, particularly of its '*common*' component.

The case studies (Annex III) and *Section 5* on the impacts of the instrumentalisation proposal show that the national policies in the selected EU Member States in situations of declared 'instrumentalisation of migrants' and other 'emergencies' reveal important challenges regarding effective access to asylum and compliance with the principle of *non-refoulement*. Very similar issues arise when studying the impacts of the derogations proposed by the Commission in this proposal, which raise compatibility issues with the 1951 Geneva Refugee Convention and, consequently, Article 78 TFEU (See *Section 5.1.*).

A significant difference between the original Commission proposal for a Council Decision on Emergency Measures to the Benefit of Latvia, Lithuania and Poland and the instrumentalisation proposal lies in the temporary character and limited geographical scope of the former. Under Article 78(3), the Council is allowed to adopt provisional measures upon a proposal by the Commission 'in the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries'[195]. The instrumentalisation proposal would make these measures available at all times to all EU Member States, provided that they prove that they are facing a situation of 'instrumentalisation of migrants'. This, again, would pave the way to the

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191 Interview with academic.

192 Interviews with the FRA, ECRE, PICUM and Academic.

193 Interview with ECRE; Interview with PICUM; Interview with FRA.

194 Conclusion from the stakeholders' workshop.

195 Article 78(3) TFEU. During the discussion of the Proposal at the European Parliament Plenary Session in Strasbourg on 15 December 2021, several MEPs raised serious concerns regarding the choice by the European Commission of Article 78.3 TFEU as the legal basis for the Proposal for Council Decision because this Treaty provision excludes Parliament as co-legislator and only foresees its consultation role. Refer to https://www.europarl.europa.eu/doceo/document/CRE-9-2021-12-15-ITM-018_EN.html

application of *differentiated* and potentially divergent asylum and return standards across different EU Member States, undermining the envisaged harmonisation objective behind the CEAS under Article 78 TFEU and coherency.

Similar issues can be observed in relation to Article 79 TFEU, which sets the bases for 'a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings'[196]. Article 79 TFEU, *inter alia*, establishes common EU return policies.

The instrumentalisation proposal creates a new emergency return procedure which deviates from the 'ordinary' ones in the amended APR and rRD. According to PICUM, the establishment of a new return procedure adds a further layer of complexity and confusion to migration management. In their February 2022 Submission to the UN Special Rapporteur on the Human Rights of Migrants, they identify seven different existing or proposed return procedures to which the new one would be added: the return procedure regulated by the 2008 Return Directive, the simplified norms under Article 2(2) of the same Directive, two separate return border procedures regulated by article 22 of the Recast Return Directive and article 41a of the APR proposal, the different timelines to the return border procedure under the proposed Crisis Regulation and the refusal of entry under the Schengen Borders Code . The multiplication of return procedures risks further complicating the work of border guards on the ground and lead to the channelling of TCNs into the wrong procedures.

The Commission's modus operandi in this proposal risks undermining the current stage of harmonisation in the areas of asylum, migration and returns, which reflect the objectives prescribed in the EU Treaties. Instead of enforcing existing EU migration, asylum and return legal standards, the proposal risks legalising current practices by EU Member States studied in the case studies which are incompatible with existing EU law and its already envisaged derogations for situations of declared emergencies.

The rule of law, effective legal protection and effective remedies

The derogations allowed for by the instrumentalisation proposal show conflicts with effective legal protection and effective remedies, which are constitutive principles of the EU notion of the rule of law as enshrined in Article 2 TEU[197]. The non-suspensory nature of appeals for asylum seekers runs against Article 19.1 TEU, which requires EU Member States to 'provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.' In this respect, the principle of effective judicial protection by independent courts has been considered as a central tenet of the Union's notion of the rule of law. The Luxembourg Court has concluded that 'The very existence of effective judicial review designed to ensure compliance with EU law is of the essence of the rule of law'[198]. Furthermore, as studied in *Section 5* below, the proposal impacts crucial fundamental rights in the CFREU some of which are of an absolute and *erga omnes* nature. The non-derogability of effective remedies in relation to these fundamental rights becomes therefore a *sine qua non* for safeguarding

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196 Article 79 TFEU.

197 Henril-Karnel, E. (2014), 'Constitutional Principles in the EU Area of Freedom, Security an Justice', in D. Acosta and C. Murphy (eds), EU Security and Justice Law, Oxford, Hart Publishing; Carrera, S., D. Curtin and A. Geddes (2020), 20 Years Anniversary of the Tampere Programme: Europeanisation Dynamics of the EU Area of Freedom, Security and Justice, EUI: Florence; and European Parliament Research Service (2019), An EU mechanism on democracy, the rule of law and fundamental rights, In-Depth Analysis, European Added Value Unit, Brussels, available at: https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_IDA%282016%29579328.

198 Refer to Court of Justice of the European Union (CJEU) case law: Case C-64/16, Associação Sindical dos Juízes Portugueses v. Tribunal de Contas; case C- 216/18 PPU, LM, case C-619/18, Commission v. Poland (order of 17 December 2018); Order of the Court, Case C-441/17, European Commission v Poland, 20 November 2017; and Order of the Court, Case C-791/19, European Commission v Poland, 8 April 2020.

their essence and effectiveness. The non-suspensory nature of appeals therefore translates into the ineffectiveness of the envisaged remedies, and therefore can be expected to translate into profound impacts on the right to effective judicial review and a violation of Article 47 CFREU.

Article 80 TFEU

The instrumentalisation proposal also appears to be at odds with the principle of solidarity and fair sharing of responsibility under Article 80 TFEU. The possibility to resort to derogations in situations of 'instrumentalisation of migrants' would create imbalanced responsibilities for EU Member States: some of them would continue to comply with the EU asylum *acquis*, while less demanding standards would apply to EU Member States that decide to apply the measures in the instrumentalisation proposal[199]. This is worsened by the above-mentioned vagueness and lack of legal certainty of the definition of 'instrumentalisation of migrants', as well as the inherent weaknesses of the authorisation procedure. This could lead to a 'race to the bottom' among EU Member States on EU asylum, borders and returns standards and human rights more generally, shrinking the protection space in Europe and undermining the harmonisation goal behind the CEAS[200]. Thus, the derogations-based understanding of the EU principle of solidarity put forward by the Instrumentalisation proposal is incompatible and at odds with the Treaties which subordinate this principle, and require its full compliance with, the CFREU and Article 2 TEU values[201].

Some Member States could demand the application of derogations more easily than others. This would be the case for Member States that share a land external border with specific non-EU countries. The resulting variable geometry of standards would widen even further the differences between Member States based on their geographical location and the nature of their borders and undermine the uniform and consistent application of EU policy in these areas. Furthermore, the lack of relocation under the solidarity measures between Member States envisaged in the proposal also goes against the principle of equal solidarity enshrined in Article 80 TFEU. Unlike in the Crisis proposal, there is no reference to mandatory relocation mechanisms. This stands at odd with the CJEU case law call for 'equal solidarity', according to which when one or more Member States are faced with an emergency situation, such as the one foreseen in Article 78.3 TFEU, the responsibility 'must, as a rule, be divided between all the other Member States, in accordance with the principle of solidarity, since, in accordance with Article 80 TFEU, that principle governs EU asylum policy'[202].

Article 72 TFEU

Article 72 TFEU is another important element to consider in relation to the instrumentalisation proposal. While it is not directly linked to the proposal itself, derogations similar to the ones proposed by the Commission have been implemented by several Member States on the basis of Article 72 TFEU, i.e. the responsibility of Member States with regard to the maintenance of law and order and the safeguarding of internal security.

Recent case-law from the CJEU has clarified that Article 72 TFEU must be interpreted strictly and 'cannot be read in such a way as to confer on Member States a power to depart from the provisions

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199 Interview with ECRE.

200 Interview with UNHCR.

201 Carrera and Cortinovis instead call for a rule of law and human rights-centred notion of solidarity in EU law, which puts justice and individuals at the heart. See S. Carrera and R. Cortinovis (2023), 'The Declaration on a Voluntary Solidarity Mechanism and EU Asylum Policy: One Step Forward, Three Steps Back on Equal Solidarity', in S. Carrera and M. Ineli-Ciger (Eds), EU Responses to the Large-Scale Refugee Displacement from Ukraine: An Analysis of the Temporary Protection Directive and Its Implications for the Future of EU Asylum Policy, European University Institute: Florence, pp. 499-526.

202 Refer to CJEU, Joined Cases C-643/15 and C-647/15, *Slovak Republic and Hungary v. Council of the European Union*, 6 September 2017, paragraph 291.

of EU law based on no more than reliance on the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security'[203]. In *M.A. v Valstybės sienos apsaugos tarnyba* (Lithuania) and *Commission v. Hungary*, the CJEU confirmed that the mere existence of unauthorised cross-border human movements does not allow Member States to derogate from EU law on the basis of Article 72 TFEU. Member States would need to justify the existence of a threat to law and order or internal security on an assessment of the 'individual conduct' of third-country nationals and whether it 'represents a genuine, present and sufficiently serious threat'[204].

It is problematic that, with the instrumentalisation proposal, the Commission is now seeking to legalise extensive derogations from the asylum *acquis* based on generalised and preventive grounds related to public order and public security. The Commission is using the same non-individualised arguments of 'national security, territorial integrity and law and order' that the CJEU rejected in the cases against the Hungarian and Lithuanian authorities. The main justification adduced for the new derogations is that the actions of the non-EU state 'instrumentalising' TCNs would 'put at risk essential State functions, including its territorial integrity, the maintenance of law and order or the safeguard of its national security'[205]. Together with the issue of disharmonisation in relation to Article 78 TFEU, allowing for extensive derogation on grounds of national security, territorial integrity and law and order would contribute to the dismantling of the 'Common' European Asylum System, and its consistent and uniform application, and it would legalise non-compliance with the EU asylum *acquis*.

Article 13(2) TEU and 2016 Interinstitutional agreement on better law-making

As already highlighted in Section 4.2.4, the introduction of the instrumentalisation proposal during the negotiations on the APR, rRCD, rRD and the 2020 Pact on Migration and Asylum is also at odds with Article 13(2) TEU, i.e. the principle of mutual sincere cooperation between the EU institutions. The release of new proposals amending or derogating from other proposals under negotiation, which in turn would amend the current asylum acquis, negatively affects the democratic scrutiny and oversight role of the European Parliament and undermines its role as co-negotiator. It raises the risks of inconsistencies and of potentially re-introducing provisions removed – or excluding new ones introduced – by the Parliament, or in other pending files through subsequent proposals.

The inherent complexity of the instrumentalisation proposal also appears to go against the 2016 Interinstitutional agreement on better law-making and, particularly, the objective of producing high-quality legislation. Based on the Agreement, the three institutions (i.e. European Commission, Parliament and Council) 'recognise their joint responsibility in delivering high-quality Union legislation', 'agree to observe general principles of Union law, such as democratic legitimacy, subsidiarity and proportionality, and legal certainty', 'agree that Union legislation should be comprehensible and clear, allow citizens, administrations and businesses to easily understand their rights and obligations, include appropriate reporting, monitoring and evaluation requirements, avoid overregulation and administrative burdens, and be practical to implement'. The present Substitute IA finds that these principles are severely undermined by both the proposal itself and the conduct of the Commission in presenting it.

The Schengen and Dublin *acquis*

The closure of some border crossing points (BCPs) and registration points during a situation of declared 'instrumentalisation' would not comply with the scope and fundamental rights provisions

[203] CJEU, *MA v Lithuania*.

[204] CJEU, *Commission v Hungary*, C-808/18, paragraph 221.

[205] Instrumentalisation proposal, p. 2.

of the Schengen Borders Code (SBC) (Article 3(b) and Article 4). Border management policies at the external EU borders must be without prejudice 'to the rights of refugees and persons requesting international protection, in particular as regards *non-refoulement*'[206]. They must comply with the CFREU, international law and, in particular, the 1951 Geneva Convention. Furthermore, any decision taken on the basis of the SBC 'shall be taken on an individual basis'[207]. and, therefore, not on the basis of the specific situation affecting the Member State at a given moment.

Limiting the points of access for all TCNs at the external borders, including applicants for international protection, constitutes an unnecessary obstacle to 'effective, easy and rapid access to the procedure for international protection'[208]. Some of the case studies have revealed that access to the open BCPs or other official registration points (e.g. embassies abroad) is severely limited or completely impossible in practice[209], which makes embassy procedures currently unfeasible for providing effective and genuine access to asylum procedures. This would be the case in respect of situations where TCNs would be actively taken towards the green borders or the geographical distance between open BCPs may be lengthy. UNHCR has underlined that Member States' choice to grant access to territory and asylum through their embassies 'must complement and not undermine (or be presented as an alternative to) access to asylum procedures for individuals arriving at borders or seeking international protection within the territory'[210]. Therefore, while Member States have the competence to manage their external borders under EU law, their border policies fall now under EU and international human rights scrutiny, and must not interfere with the right to asylum and the principle of *non-refoulement*.

An additional challenge in relation to the SBC is the increasing blurring of boundaries between EU border and asylum policies, and consequently the Schengen and Dublin *acquis*. As noted in relation to the Migration Pact, 'the incoherency resulting from the hybridisation approach advocated by the Pact does not only relate to questions of "variable geometry" regarding Member States' participation in the Schengen and Dublin systems; it is one embedded in a substantive or thematic inconsistency of the objectives pursued by two policy areas at stake with the objectives laid down in EU primary and secondary legislation'[211]. Despite the Commission's claims that the instrumentalisation proposal is only an 'asylum instrument', the proposal shows this hybridisation between border and asylum law. The inclusion of all border-related provisions in the SBC is not sufficient to prove that these legal areas are still distinct. It effectively blurs 'asylum' measures with border / policing and leads to legal incoherency.

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206 SBC, Article 3(b).

207 SBC, Article 4.

208 CJEU, *Commission v Hungary*, C-808/18, paragraph 104.

209 See Annex III for instance the case studies on Lithuania (Section 1.3.) and Spain (Section 5.4.). The case study on Lithuania explains that asylum seekers encounter major difficulties in accessing border checkpoints as they would need to pass the Belarus side, present a valid travel document and evidence of legally staying in Belarus (See Section 1.3.2.).

210 UNCHR, Submission before the European Court of Human Rights in the case of *H.Q. v Hungary* (Application No. 46084/21), paragraph 3.2.5. Interview with UNHCR.

211 According to Brouwer et al., 'each of these pieces of EU secondary legislation serve different and distinct purposes, each having their own conditions for application and practical operability'. See Brouwer et al. (2021), The European Commission legislative Proposals in the New Pact on Migration and Asylum, p. 147. This incoherency was also underlined by the Council Legal Service. See Council of the European Union, Legal Service, The proposed new Pact on Migration and Asylum – 'Variable geometry' – Schengen and Dublin *acquis* relevance of components of the proposed Pact, 6357/21, Brussels, 19 February 2021. Refer also to the CJEU C-646/16 – *Jafari*, 26 July 2017, where the Luxembourg Court underlined the importance of keeping separate key concepts in the distinct legal domains of migration, borders and asylum under the EU legal system.

5. Assessment of the impacts

Key findings

- The derogations in the instrumentalisation proposal would have major negative impacts on fundamental rights. The right to asylum and the principle of non-refoulement would be severely affected by the limitation of registration and BCPs, the extension of registration deadlines, the accelerated asylum and return procedures and the legal fiction of non-entry. Similarly, the proposal raises serious risks of collective expulsion and pushbacks and would lead to increased rates of detention, including de facto detention, across the emergency asylum and return procedures, including for minors. Material reception conditions standards are reduced to the basic needs of the applicants without providing for clear modalities. This would leave too much discretion to the Member States and might raise incompatibility issues with EU law and international legal standards. Together with the limitation of BCPs and the concentration of applicants in selected ones, this could lead to overcrowding and inhuman and degrading treatment.
- The instrumentalisation proposal would significantly affect rule of law standards, chiefly the right to effective remedies. The non-suspensive effect of appeals against expulsion decisions goes against CJEU case law and Article 47 CFREU. Further issues emerge in relation to freedom of association, the rights of human rights defenders and the civil society space in the EU. This would be in violation of Articles 2 TEU and 12 CFREU and international standards like the UN Declaration on Human Rights Defenders.
- With regard to the economic impacts, all selected EU Member States are expected to experience an increase in costs generated by the implementation of the regulation in cases of 'instrumentalisation'. Possible benefits are difficult to assess and expected to be very limited in practice. Assuming that EU financial and operational support will be implemented for Member States facing instrumentalisation, this would be sufficient to cover emerging costs for three out of six Member States included in the analysis.
- Regarding territorial impacts, its reference to territorial integrity seems largely unjustified in international law. The proposal is based on a one-size-fits-all approach disregarding regional and local specificities in EU external borders. It is expected to increase territorial imbalances between EU Member States. It would lead to border control bottlenecks, the unlawful confinement of TCNs near border areas where differentiated standards would apply and the multiplying of militarised 'anomalous zones' along external borders. This would alter the uniform and consistent application of EU law, generating an uneven distribution of outcomes and impacts also within Member States.
- As regards EU external relations, the instrumentalisation proposal would not have significant direct geopolitical impacts on the actions of the third country accused of 'instrumentalising migrants'. Invoking the notion of 'instrumentalisation' can be expected to have significant negative repercussions, in the bilateral diplomatic relations between the EU and concerned third states. More broadly, the proposal could be perceived as a sign of backsliding in the sphere of human rights and further harm the EU's credibility abroad and its international reputation.

This section examines the main expected impacts of the instrumentalisation proposal, notably the fundamental rights and social impacts (*Section 5.1.),* the economic (costs/benefits) impacts (*Section 5.2.)*, the territorial impacts (*Section 5.3.*) as well as the impacts on EU external relations (*Section 5.4.*). The analysis of impacts is mainly qualitative and quantitative in nature.

5.1. Fundamental rights and social impacts

This section examines the impacts of the proposal on fundamental rights. Does the proposal comply with international public law, human rights and fundamental rights under the CFREU, including the relevant case law of the Court of Justice of the EU (CJEU) and the European Court of Human Rights (ECtHR)?

5.1.1. Right to asylum and non-refoulement

The EU legal system enshrines a fundamental right to asylum in Article 18 of the CFREU, which has the same legally binding value as the Treaties for EU Member States, European institutions and EU agencies[212]. Crucially, the EU fundamental right to asylum is now enshrined and anchored upon EU primary law, which confirms its higher constitutional and legal value in comparison to EU secondary legislation. As recognised by den Heijer (2021), 'secondary Union law ensures and promotes the right to asylum, but is at the same time restrained by it'[213]. The right to asylum encompasses a range of rights ranging from being allowed entry in EU Member States' territory, having access to status determination procedures and so-called durable solutions'[214]. It includes refugees as well as individuals in need of other forms or categories of protection. Even though the instrumentalisation proposal states that it aims at not 'undermining the right to asylum or the principle of *non-refoulement',* this has not been accompanied by an assessment of the fundamental rights' impacts and practical repercussions of the foreseen derogations to this right.

Article 18 CFREU is distinct from, but needs to be read in combination with, Article 19 CFREU, which lays down the principle of *non-refoulement*[215]. The principle of *non-refoulement* is a constitutive component of EU fundamental rights general principles of law. It is absolute in nature, and thus accepts no derogations or exceptions prioritising migration policy priorities, even at times of declared political emergencies – such as those under the Commission's proposed notion of 'instrumentalisation' – or those labelled as 'crisis'. The *non-refoulement* principle finds expression in: first, Article 4 CFREU, which declares the prohibition for anyone – irrespective of migration status – to be subject to torture or inhuman and degrading treatment; second, Article 19.4 CFREU, which emphasises the duty not to expel anyone when such a serious risk of mistreatment exists; and third, Article 78.1 TFEU which requires EU asylum policy to comply with the principle of *non-refoulement*. Articles 4 and 19.4 CFREU incorporate, as a minimum basis, Article 3 ECHR and the protection

[212] Article 18 CFREU states that 'The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union'.

[213] M. den Heijer (2021), Article 18 – Right to Asylum, in S. Peers, T. Hervey, J. Kenner and A. Ward (eds), *The EU Charter of Fundamental Rights: A Commentary*, Bloomsbury Publishing.

[214] Ibid. On the interpretation of the right to seek and enjoy asylum refer to M.-T., Gil-Bazo and E. Guild (2021), *The Right to Asylum*, in C. Costello, M. Foster and J. McAdam (eds), The Oxford Handbook of International Refugee Law, p. 867.

[215] Article 19 CFREU stipulates that '1. Collective expulsions are prohibited. 2. No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.'

standards developed by the Strasbourg Court, which needs to read concurrently with Article 33 of the 1951 Geneva Convention in what Moreno Lax has called a 'cumulative standards approach'[216].

The personal scope of *non-refoulement* in the EU legal system covers *any* TCN irrespective of refugee or unauthorised migration status. Crucially, the *non-refoulement* obligation also includes *indirect* or chain *refoulement*, which corresponds with situations where a TCN is returned to a transit country that then in turn expels that same person to another country of transit or origin where s/he would face a risk of mistreatment or persecution. Further, according to Article 4 of the SBC, 'border controls' at Border Crossing Points (BCPs) as well as in the context of border surveillance activities at land and sea borders, must be carried out in full compliance with international refugee law, chiefly the obligation to ensure access to asylum under the 1951 Geneva Convention, the principle of *non-refoulement* and fundamental rights[217]. Moreover, the Luxembourg Court has concluded that refugees enjoy a higher level of protection from refoulment in the scope of EU law than that guaranteed by the Geneva Convention, since their expulsions must be in compliance with the right to asylum and the *non-refoulement* principle enshrined in Articles 4 and 19.2 CFREU[218].

The Commission's Better Regulation Toolbox #29 states that all European Commission initiatives must comply with the CFREU, and absolute rights must not be limited or restricted 'no matter how important the policy objective'[219]. The EU Better Regulation Toolbox concludes that 'If the conclusion is that the examined policy option limits an absolute right, it should be discarded already at this stage (proposal stage) and a further analysis under the following points is not needed'. According to Box 2 of *Toolbox #29* the prohibition of torture and inhuman or degrading treatment or punishment is one of these rights. As the instrumentalisation proposal implies major risks to these rights and the *non-refoulement* principle, the Commission has failed to discard the envisaged procedural derogations at the proposal stage.

The instrumentalisation proposal can be expected to impact negatively on the right to asylum and the *non-refoulement* principle on account of: (1) the envisaged limiting of border crossing points (*Section 5.1.1.1.*); (2) the extension of the registration deadlines (*Section 5.1.1.2.*); (3) the use of accelerated asylum and return procedures (*Section 5.1.1.3.*); and (4) the legal fiction of non-entry (*Section 5.1.1.4.*).

5.1.1.1. Limiting registration and border crossing points

The designation of specific registration points as advanced by the proposal, which may correspond with or include specific external border crossing points (BCPs) for registering and lodging asylum

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216 V. Moreno-Lax (2018), *The Added Value of EU Legislation on Humanitarian Visas – Legal Aspects*, in W. van Ballegooij and C. Navarra, EPRS European Added Value Assessment accompanying the European Parliament's legislative own-initiative report, Humanitarian Visas, July 2018, Brussels.

217 Article 4 SCB states that 'When applying this Regulation, Member States shall act in full compliance with relevant Union law, including the Charter of Fundamental Rights of the European Union ('the Charter), relevant international law, including the Convention Relating to the Status of Refugees done at Geneva on 28 July 1951 ('the Geneva Convention'), *obligations related to access to international protection*, in particular the principle of non-refoulement, and fundamental rights. In accordance with the general principles of Union law, decisions under this Regulation *shall be taken on an individual basis'* (Emphasis added).

218 CJEU, Joined Cases C-391/16, C-77/17 and C-78/17, *Mv. Ministerstvo vnitra; X and X v. Commissaire général aux réfugiés et aux apatrides [GC]*, 14 May 2019. Paragraph 96 the ruling held that 'in so far as Article 14(4) and (5) of Directive 2011/95 provides, in the scenarios referred to therein, for the possibility for Member States to revoke 'refugee status' as defined in Article 2(e) of that Directive or to refuse to grant that status, while Article 33(2) of the Geneva Convention, for its part, permits the refoulement of a refugee covered by one of those scenarios to a country where his or her life or freedom would be threatened, *EU law provides more extensive international protection for the refugees concerned than that guaranteed by that convention'* (Emphasis added).

219 European Commission, Better Regulation Toolbox, Tool #29. https://commission.europa.eu/system/files/2022-06/br_toolbox_-_nov_2021_-_chapter_3.pdf

applications, raises serious fundamental rights risks. The proposal envisages the possibility for EU Member States to derogate from current provisions under the SBC and limit the number of BCPs designated for registration and lodging an asylum application. The Explanatory Memorandum's Section dealing with 'Fundamental Rights' states that 'Member States facing a situation of instrumentalisation should ensure there are sufficient registration points, including border crossing points, open and easily accessible'. However, the proposal foresees no sufficient guarantees and safeguards that the sufficiency, openness and accessibility criteria will be actually ensured in practice.

Territorially limiting the possibility to make an asylum application always runs the risk of not being 'sufficient' for the concerned individuals. The case studies annexed to this Substitute IA show that the external land borders of a majority of selected EU Member States count already with a highly limited number of operating BCPs, with some of them having only one or two places designated for 'lawful entry' across their land and sea external borders, and others having severely restricted them already[220]. Furthermore, as also underlined in our interviews[221], if applicants for asylum are expected to walk many kilometres to reach these designated BCPs, this would take away the very 'effectiveness' criterion laid down by the Luxembourg Court ruling *European Commission v Hungary* of 22 June 2023[222], In this ruling the CJEU emphasised that the aim of the Asylum Procedures Directive (APD) is to guarantee 'effective, easy and rapid access' to asylum procedures by applicants of international protection, and concluded that whatever deviates from these benchmarks is not in line with EU law[223]. The interview with the FRA underlined that the proposal's derogation consisting of not allowing TCNs to lodge their asylum application across *all* their green borders, and therefore being forced to stay in the neighbouring country, may pose very high risks to the principle of *non-refoulement*.

Indeed, the proposal does not consider the relevance of the actual geographical distance between BCPs and their exact location, and what this means regarding their accessibility on the ground for people who may be walking their way to or across EU external borders. In practice, many of the TCNs concerned would arrive at one of the external border fences existing in a majority of selected EU Member States, and there they would be told to go or travel to a designated BCP for registration and lodging of asylum application without being given effective and immediate access to EU territory. The fact that they would be left in the relevant third neighbouring country, where their safety and security may be put at a serious risk, raises serious incompatibility issues as regards the principle of *non-refoulement* and the prohibition of inhuman or degrading treatment in the event of

[220] For instance, the case study on Lithuania states that during the declared state of emergency in Lithuania, authorised passage through 13 BCPs was prohibited (Section 1.3.1. in Annex III). The case study on Greece underlines that 'there are no designated border crossing points that allow the entrance of asylum seekers (Section 3.3.1. in Annex III). The case study covering Bulgaria stipulates that at present there are 3 BCPs which are operational with Turkey (Section 4.2. in Annex III). In Spain, there are only 2 BCPs in Ceuta, yet only one (Tarajal) is considered as a BCP (case study on Spain, Section 5.3. in Annex III). As regards Italy, the case study underlines the Italian authorities policy of limiting disembarkation points for rescued boats and the constraining space of SAR civil society actors (Section 6.3.2. in Annex III).

[221] According to an interview at the Finnish Ministry of Interior, the closure of BCPs could constitute an obstacle to effective access to asylum if it is applied in a way that prevents individuals from applying for asylum or if that leads to returns in violation of the principle of non-refoulement. On 27 July 2022, the Council of Europe Commissioner for Human Rights issued a letter to the Finnish Minister of the Interior expressing her concerns that some Finnish law provisions 'could prevent individuals from applying for asylum and may lead to them being returned in violation of the principle of non-refoulement. This would be the case, in particular, if persons would be turned back without an individual assessment of their situation simply because they do not present themselves at a designated point'. Available at https://www.coe.int/en/web/commissioner/-/finland-amendments-to-border-guard-act-must-be-accompanied-by-clear-human-rights-safeguards

[222] CJEU, Case C-823/21, *European Commission v Hungary*, 22 June 2023.

[223] Refer to Paragraphs 46 and 51 of the ruling.

expulsions. Some of the case studies refer to evidence showing how some third-country regime actors have used disproportionate use of force and violence against asylum seekers[224].

All this leads to a profound contradiction in the instrumentalisation proposal. If EU Member States would invoke the Instrumentalisation notion and request the activation of the envisaged derogations to rights, they would also be admitting that the affected TCNs are being mistreated by a given third-country regime. In other words, depending on the specific circumstances, saying that an event qualifies as 'instrumentalisation' would inherently constitute an official recognition that TCNs would run a real risk of being subject to inhuman and degrading treatment by a non-EU state. In *Hirsi Jamaa v. Italy* case, the ECtHR found that a State acquires jurisdiction over persons when competent border national authorities come into contact with them, and not only once the persons have crossed or entered into the State's territory[225]. Similarly, the Strasbourg Court has confirmed and reiterated that EU Member States cannot rely on EU secondary legislation to circumvent their absolute obligation to comply with Article 3 ECHR – and by correlation Article 19.2 CFREU[226].

Despite this, the proposal does not effectively respond to the needs of these TCNs who would be trapped by such events, but mostly aims at obstructing legal access to the EU's territory. Therefore, in a situation of 'instrumentalisation', there would be, by default, substantial grounds for believing that the immediate denial of lawful entry and access to EU territory would effectively mean sending them back to an unsafe non-EU state and exposing them there to a real risk of being subject to further inhuman and degrading treatment, in contradiction of Article 19.2 CFREU. The only adequate and lawful solution for EU Member States in these circumstances would be to instead freeze expulsion to the state in question, and allow TCNs to legally enter the Member State's territory as soon as they come into contact with the national authorities engaged in border surveillance activities, without requiring them to further reach a designated BCP within the non-EU state. As the next subsections of this study show, further concerns related to inhuman and degrading treatment can also arise from the extension of de facto detention and the reduced material reception conditions foreseen by the proposal.

Limiting the BCPs can henceforth be expected to negatively affect the very effectiveness of the right to asylum. The CJEU Case C-72/22, *M.A. v Lithuania* of 30 June 2022 is in this respect of central importance. It dealt with the legality of Lithuanian policy following the declaration of a 'state of emergency' in light of the increase in the number of TCN entries from Belarus back in 2021. The Luxembourg Court confirmed that 'any third-country national or stateless person has *the right* to make an application for international protection on the territory of a Member State, *including at its borders or in its transit zones, even if he or she is staying illegally in that Member State*' (Emphasis added)[227]. This, the CJEU underlined, 'is a condition of the effectiveness of the right to asylum' under Article 18 CFREU[228].

Therefore, this judgment held that the Lithuanian legislation, which provided that TCNs irregularly staying were deprived of the opportunity of making/or lodging an asylum application after having entered Lithuania, was incompatible with EU primary law as it prevented them from effectively enjoying the right to asylum enshrined in the CFREU, and Articles 6 and 7.1 of the APD. Importantly for the purposes of this Substitute IA, the Court also found that while EU Member States may require

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224 Refer to case studies covering Lithuania and Poland as regards Belarus.

225 ECHR, *Hirsi Jamaa and Others v. Italy*, Application no. 27765/09). Strasbourg, 23 February 2012.

226 Refer to for instance ECtHR, *MMS v Belgium and Greece*, Application No. 30696/09, 21 January 2011; E. Guild (2021), *Article 19 – Protection in the Event of Removal, Expulsion or Extradition*, in S. Peers, T. Hervey, J. Kenner and A. Ward (eds), The EU Charter of Fundamental Rights: A Commentary, Bloomsbury Publishing.

227 CJEU, 30 June 2022, C-72/22, *M.A. v Valstybės sienos apsaugos tarnyba (Lithuania)*, paragraphs 58 and 59.

228 Paragraph 61.

asylum applications to be lodged at a designated place 'the Member States cannot exercise that option in such a manner as would, in practice, prevent third-country nationals, or some of them, from lodging an application or from lodging one 'as soon as possible''. This, in the Court's view, would violate the APD objective to secure 'effective, easy and rapid access' to the asylum procedure and seriously interfere and undermine the effective of the EU right to seek asylum which 'every third-country national enjoys'[229].

5.1.1.2. Extension of registration deadlines

Article 2.1.a of the instrumentalisation proposal foresees the extension of the registration deadline for asylum applications from 3 days, as currently stipulated in the Asylum Procedures Directive (APD) 2013/32, to 4 weeks, which may lead to delays in the examination of asylum applications. This further increases concerns regarding the effective access to asylum procedures as part of the EU fundamental right to asylum given the requirements to provide asylum applicants with a decision within a reasonable time. During this 4-week period, interviews and the stakeholder workshop underlined concerns in relation to the actual protection that would be given to TCNs and their access to documents certifying that they are indeed 'asylum applicants' and not simply irregularly staying TCNs, which otherwise puts the person at risk of migration-enforcement measures. As underlined by Refugee Support Aegean (RSA) and ECRE, 'The legal effect of acquisition of "applicant for international protection'" status is produced by the act of "making" an application, not "registration''[230], and the protections attached to "applicant for international protection" status…are rendered illusory if the persons concerned lack official documents from the competent authorities to demonstrate that an asylum claim has been made'[231].

Crucially, the foreseen extension of the registration deadline raises incompatibility issues with the above-mentioned CJEU ruling *European Commission v Hungary* of 22 June 2023. The CJEU held in this judgment that as soon as an asylum application is made, the TCN automatically becomes 'a person seeking international protection' within the scope of the APD, and 'must be allowed to remain in the territory of that Member State' following Article 9 APD[232]. The Court concluded that the condition envisaged in Hungarian law according to which consideration to an asylum application would only be given to those persons who had previously 'lodged a declaration of intent at a Hungarian embassy in a third country and has obtained a travel document enabling him or her to enter Hungary' was unlawful. It ran contrary to the APD obligation for Member States to ensure a TCN's right to make an asylum application at their external borders – including territorial waters and transit zones – even if they are staying irregularly in their territory or 'irrespective of the prospect of success of such a claim'[233]. These CJEU standards are now key components of the EU fundamental right to asylum enshrined in EU primary law which can be considered to play a crucial role in

[229] Paragraph 65.

[230] See in this regard CJEU, 30 June 2022, C-72/22, *M.A. v Valstybės sienos apsaugos tarnyba (Lithuania),* where the Court stated in paragraph 62 that 'while *the making* and *the lodging* of an application for international protection are two separate, successive steps, there is nevertheless a *close connection* between those acts, inasmuch as they are meant to ensure effective access to the procedure in which applications for international protection are examined and to ensure the *effectiveness* of Article 18 of the Charter.'

[231] RSA, *Rights denied during Greek asylum procedure suspension*, April 2020; and ECRE, *Comments on the Commission* Proposal *for a Council Decision on provisional emergency measures for Latvia, Lithuania and Poland*, December 2021. Refer also to the case study on Greece, which in Section 3.3.5. states that the protections attached to an asylum seeker status are 'rendered illusory if the persons concerned lack official documents from the competent authorities to demonstrate that an asylum claim has been made'.

[232] See also CJEU, Case C-821/19, *European Commission v Hungary*, paragraph 137, which dealt with the criminalisation of assistance to asylum seekers.

[233] Paragraphs 43 and 50.

ensuring its overall effectiveness[234]. Therefore, the proposed changes in the instrumentalisation proposal would imply a delayed access to asylum procedures and the right to asylum, and have negative effects on these rights.

5.1.1.3. Accelerated asylum and return procedures

Another issue affecting fundamental rights impacts relates to the proposal's provisions – Article 2.1.b – dealing with the use and expansion of accelerated (border) asylum procedures regarding both the admissibility of the claim and the substance or merits of *all* asylum applications. This differs from the 2020 crisis and *force majeure* proposal, which limits the application of border procedures to asylum applicants originating from a state with an EU-wide recognition rate of 75 % or less[235]. The envisaged accelerated asylum procedures entail a fundamental risk of unfairness and overall lack of quality[236] by not being given proper consideration to due process standards and reducing key procedural standards for asylum seekers to substantiate their protection claims, such as effective remedies (See *Section 5.1.6* below)[237]. It is also unclear in the proposal how EU Member State authorities would assess in practice the prioritisation of asylum applications that 'seem likely to be well-founded'[238] in way that would not be entirely arbitrary, and without undermining these same safeguards as well as the prohibition of discrimination on the basis of origin, race, colour, sexual orientation, etc.[239].

These derogations also include groups of people with specific procedural and reception needs such as minors, families and unaccompanied children, which raises serious incompatibility issues with Article 24 CFREU[240]. This is despite the fact that the proposal states that 'the safeguards applicable under EU law continue to apply to ensure the protection of vulnerable persons, including children'[241]. The instrumentalisation proposal is even stricter in comparison to Article 41 of the proposal for a Recast APR, which stipulates that EU Member States should not apply or shall stop applying border procedures in cases where 'the necessary support' to the procedural needs of these groups could not be properly secured or provided, and that in such cases the national authorities should allow entry of the applicant into their territories[242]. While the instrumentalisation proposal refers to the need to take due account of the 'best interests of the child' and family life (Recital 13), the operative provisions do not exempt children from the accelerated procedures, it only states that their claims must be 'prioritised'. A previous EPRS Study has proved that border procedures are

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234 Paragraph 47 states that 'A Member State cannot, without undermining the *effectiveness* of Article 6 of that Directive, unjustifiably delay the time at which the person concerned is given the opportunity to make his or her application for international protection'.

235 Crisis Proposal, COM (2020) 619 final, Article 4(1) (a).

236 The ECtHR has confirmed that reduced time-limits in assessing asylum applications can be expected to negatively affect the quality of the asylum procedures. See for instance ECtHR, *A.C. and others v. Spain*, Application No. 6528/11, April 2014.

237 Other relevant due process standards include, according to UNHCR 'The right of the applicant to information on the nature of the procedure and on his/her rights and obligations, including applicable deadlines, and relevant remedies; - The right to prepare the application and seek legal advice and representation; - The right to an interpreter; - The right to be heard; - The right to receive decisions that are properly reasoned, written, and in a language that the applicant understands; …..' See UNHCR (2018), 'Fair and Fast': UNHCR Discussion Paper on Accelerated and Simplified Procedures in the European Union', pages 12 and 13.

238 As expressly included on p. 5 of the Explanatory Memorandum, and Article 2.1.a and b.

239 Article 21 CFREU.

240 Article 24.2 CFREU states that 'In all actions relating to children, whether taken by public authorities or private institutions, *the child's best interests must be a primary consideration*.' (Emphasis added).

241 Page 4 of the Explanatory Memorandum.

242 Article 41.9.b of the Proposal for a Recast APR. Refer to Article 41.e of the Council of the EU General Approach text of the Recast APR, Council Doc. 10444/23, 13 June 2023.

simply unsuitable for minors and persons with specific procedural and reception needs[243]. Furthermore, interviews have underlined the need to ensure general exceptions to the application of border procedures not only when dealing with unaccompanied minors under the age of 18, minors and their families, and other categories of people with 'special reception needs' so as not to traumatise them further[244].

The proposal completely neglects the specific reception and procedural needs of LGBTQIA+ TCNs, including those seeking asylum during their journeys and upon arrival at EU external borders. ILGA Europe has underlined that LGBTQIA+ asylum seekers are often at risk of additional dangers and risks, and require specific procedural and reception needs throughout the asylum procedures. ILGA has also emphasised how 'fast-track mechanisms entail the risk that people in need of protection are not identified; as a careful case-by-case evaluation is not possible in these procedural frames a particularly great risk in the case of asylum claims by LGBTQIA+ people, which tend to be complex and delicate by their nature'[245]. The instrumentalisation proposal exacerbates the risk that LGBTQIA+ asylum applicants will 'fall through the cracks' of the envisaged minimum safeguards to procedural derogations.

Furthermore, the EPRS Horizontal Impact Assessment on the Pact concluded that, based on the practical lack of specific national mechanisms for effectively identifying the existence of specific procedural or reception needs of applicants presenting structural vulnerabilities, it can be expected that the envisaged derogations would have increased negative impacts on the rights of persons with special needs[246]. Interviews conducted for this Substitute IA have underlined that the sole fact that these groups are not formally exempted from accelerated border procedures means a clear risk to their fundamental rights as these procedures actually have shorter deadlines and fewer safeguards, including at the appeal stage. According to the FRA, priority should be instead given to preparedness and contingency planning to build up better reception capacities corresponding to the needs of such people that could be activated immediately, and not just because a particular political situation would be declared as 'exceptional' and their specific needs would be completely neglected.

As regards accelerated returns procedures, the procedural safeguards currently envisaged by the EU Returns Directive would not apply in situations labelled as 'instrumentalisation'. The recast Returns Directive proposal would still be applicable as regards the following provisions: first, any coercive measures shall be in any case proportionate and not exceed reasonable force, and 'in accordance with fundamental rights and due respect for the dignity and physical integrity of the third-country national concerned' (Article 10.4 recast Return Directive proposal); second, Member States are granted the possibility to postpone removal in individual cases taking into account 'the specific circumstances of the individual case', in particular a TCN's physical state or mental capacity, or 'technical reasons, such as lack of transport capacity, or failure of the removal due to lack of identification' (Article 11.2); third, Member States shall ensure the provision of emergency health care and essential treatment of illness and the 'special needs of vulnerable persons' pending return (Article 17.1); and fourth, Member States shall ensure specific safeguards regarding detention conditions as regards minors and families (Refer to *Section 5.1.4*. below). It remains however by and large unclear how these basic guarantees would be consistently delivered into practice.

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243 EPRS, *Asylum Procedures at the Border*, European Implementation Assessment, November 2020.

244 Interview with the German Permanent Representation.

245 ILGA Europe (2021), Policy Briefing on LGBTI Refugees and EU asylum legislation, September. Available at https://ilga-europe.org/policy-paper/policy-briefing-on-lgbti-refugees-and-eu-asylum-legislation/

246 Page 102 of the Horizontal Impact Assessment on the Pact.

5.1.1.4. Legal fiction of 'non-entry'

The Explanatory Memorandum of the proposal states, when outlining the accelerated asylum border procedure that the foreseen 16 weeks' extension aims at 'helping the Member State to apply the fiction of non-entry for a longer period of time' (as explained in *Section 4.2.1.* above)[247]. The actual scope and impacts of the legal fiction of non-entry, both in the scope of the accelerated asylum and returns procedures foreseen by the instrumentalisation proposal is, however, characterised by legal unclarity.

The EPRS Horizontal Impact Assessment of the Commission's Pact on Migration and Asylum concluded that the envisaged legal fiction of non-entry in the Pact's proposals could be expected to have 'a negative impact on the effectiveness and legal clarity of the protection of the right to asylum and the principle of *non-refoulement*', and they failed to provide a solid justification behind the rationale for distinguishing the factual presence of a person under EU Member States' jurisdiction and the legal qualification of a given person as ' non-present'[248]. The instrumentalisation proposal presents very similar challenges in this regard. Previous research has shown how the legal fiction of non-entry does not discharge State authorities from their responsibilities to comply with fundamental rights under EU law. However, the legal ambiguity inherent to this 'fiction' may blur or obscure Member States' understanding or interpretation of their duties under EU and international law – including those related to the right to asylum and *non-refoulement* - and lead to illegal practices to the detriment of the legal status and human rights of TCNs.

Interviews conducted for the purposes of this Substitute IA with EU Member States' Representations have shown that there is a misunderstanding as regards the actual scope and extra-territorial outreach of their obligations under fundamental and human rights standards which apply to TCNs presumed as not having lawfully entered and therefore present in their territories at external borders. Some EU Members States' representatives declared that in their view their EU law and human rights' responsibilities only extend as long as TCNs have lawfully entered their countries or find themselves inside their territories[249]. One EU Member State representative referred to the ECtHR Interim Measures issued in relation to Poland and Latvia during the 2021 political crisis with the Belarusian regime, which in their view granted national authorities the possibility not to admit TCNs into their territories, and the *N.D. and N.T. v. Spain* ECtHR ruling of 2020 which is wrongly perceived as generally allowing for collective expulsions[250]. A border practitioner stated that the ECtHR *N.D. and N.T. v Spain* case has been a difficult judgement for national border guard practitioners. It has led to increased political pressures on border guards, which might conflict with their legal obligations and codes of conduct[251].

The Strasbourg Court Interim Measures in the cases *R.A. and Others v. Poland* (application no. 42120/21)[252] and *H.M.M. and Others v. Latvia* (application no. 42165/21) stated that these two EU

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247 Page 16 of Explanatory Memorandum.

248 Refer to pp. 94 and 95 of the EPRS Horizontal Substitute Impact Assessment of the Migration Pact.

249 Interviews with Lithuanian Government and Greek Permanent Representation. The Greek Permanent Representation emphasised that "We are of the opinion that if persons are within the territory, EU law applies; if they are not, EU law does not apply".

250 Interview with Lithuanian Government. Refer to the case study on Greece, *Section 3.3.5.* which states that the Greek authorities have carried out pushback practices based on a misinterpretation of the *N.D. and N.T. v Spain* ruling by the ECtHR. See also the interview of Greek Migration Minister in CNN in November 2021, at https://twitter.com/CNNConnect/status/1456643481884143617.

251 Interview with border guard.

252 The case R.A. and Others v. Poland was rather exceptional compared to the 60+ other cases where the ECtHR granted interim measures. The Court not only obliged Poland to provide humanitarian assistance to the applicants but also to

Member States were not required by the Court to 'let applicants enter into their territories'[253]. The Strasbourg Court only required them to provide applicants 'with food, water, clothing, adequate medical care and, if possible, temporary shelter', and in the case of Poland, access to a lawyer. That notwithstanding, these Interim Measures do not exonerate in any way Member States from their absolute obligations to comply with Article 3 ECHR (and corresponding Articles 4 and 19.4 CFREU) obligations[254]. Crucially, human rights jurisdiction follows irrespective of whether the TCNs find themselves inside or outside a Member State's territory according to either national or EU law, and as long as they fall under their jurisdiction and de facto/*de jure* control (see *Section 5.1.2*. below). As evidence in the case study on Lithuania shows, however, even in cases when ECtHR interim measures are granted, access for applicants to an asylum procedure is not always ensured nor is *non-refoulement* prevented[255].

Additionally, the ECtHR found in the 2020 *M.K. and Others v. Poland* and 2021 *D.A. and Others v. Poland* cases[256] that the Polish authorities had failed to provide effective access to asylum procedures by TCNs travelling from Belarus. The Court identified a '*systematic practice* of misrepresenting statements given by asylum-seekers in the official notes' in Poland[257], and concluded that Belarus could not be considered as a 'safe third country' for asylum seekers and refugees, placing them at risk of *chain-refoulement*[258]. The Polish authorities were 'under the obligation to ensure the applicants' safety, in particular by allowing them to remain within Polish jurisdiction until such time as their claims had been properly reviewed by a competent domestic authority'[259]. Therefore, the ECtHR concluded the expulsions by the Polish authorities were contrary to the *non-refoulement* principle and the prohibition of inhuman and degrading treatment, collective expulsions and effective remedies under the Convention[260]. The Strasbourg Court held in the *D.A. and Others v. Poland* ruling that in cases where State authorities choose to expel asylum seekers to a third country instead of the country of origin, their responsibility remains 'intact' regarding their legal obligation not to return them 'if substantial grounds have been shown for believing that such action would expose them, directly (that is to say in that third country) or indirectly (for example, in the country of origin or another country), to treatment contrary to, in particular, Article 3 ECHR'[261].

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not remove them from the territory of Poland (see: ECtHR, Update on interim decisions concerning member States' borders with Belarus, February 2022).

253 European Court of Human Rights (ECtHR), Court indicates interim measures in respect of Iraqi and Afghan nationals at Belarusian border with Latvia and Poland, Press Release, ECHR 244 (2021), 25.08.2021; see also European Court of Human Rights (ECtHR), Court gives notice of 'R.A. v. Poland' case and applies interim measures, Press Release ECHR 283 (2021), 28.09.2021; and ECtHR (2022), Update on interim decisions concerning member States' borders with Belarus, Press Release, ECHR 051 (2022), 21.02.2022.

254 This has been also previously concluded by EPRS Horizontal Impact Assessment of the Pact on Migration and Asylum which in page 94 states that 'Protection of the right to asylum and non-refoulement, and other fundamental rights, is theoretically possible without entry being formally authorised'.

255 The case study on Lithuania, Section 1.3.6. in Annex III.

256 European Court of Human Rights (2020), Case *M.K. and Others v. Poland*, Applications nos. 40503/17, 42902/17 and 43643/17, 14 December 2020. European Court of Human Rights (2021), Case *D.A. and Others v. Poland*, Application no. 51246/17, 8 July 2021

257 Paragraph 60 of the judgment.

258 Paragraph 63 of *D.A. and Others v. Poland*.

259 Paragraph 64.

260 S. Carrera (2021), Walling off Responsibility? The Push Backs at EU External Borders with Belarus, CEPS Policy Insight, No. 2021-18, November 2021.

261 Paragraph 58.

5.1.2. Protection in the event of expulsions

The instrumentalisation proposal's accelerated asylum and return procedures raise serious risks of unlawful expulsions and push backs of TCNs contrary to the CFREU. Article 19.1 CFREU prohibits collective expulsions. The second paragraph of this same Article forbids EU Member States to expel anyone – irrespective of migration status – to a third country where he/she would face a serious risk of being subjected to the death penalty, torture or inhuman and degrading treatment or punishment (Refer to *Section 5.1.1.* on *non-refoulement* and Article 4 CFREU mentioned above).

Article 19.1 CFREU corresponds with the scope of Article 4 of Protocol 4 of the ECHR. As Guild has underlined 'Those who claim Article 19.2 CFREU protection are those who not only seek to avoid expulsion, but also seek to remain on the territory of the host state because the alternative, being sent to another country, would entail an Article 4 CFREU or Article 3 ECHR risk'.[262] Furthermore, the Council of Europe[263] and the case studies[264] have identified evidence on the use of disproportionate use of force and violence by EU Member States national authorities in the context of the widespread and systematic push back practices. These run contrary, depending on their gravity, to the right to life enshrined in Article 2 CFREU and/or Article 3 CFREU on account of TCNs physical and mental integrity.

The very essence of the prohibition of collective expulsions[265] is preventing unfettered arbitrariness by State authorities. It places upholding the rule of law and effective access to justice at the heart of the equation in migration, border and asylum policies. As regards the scope of the prohibition of collective expulsions, the literature has concluded that the above-mentioned *N.D. and N.T. v. Spain* case[266], does not constitute *carte blanche* for automatic expulsions and pushbacks of TCNs at EU external borders[267]. The ECtHR confirmed in this ruling that the protection foreseen in Article 3 ECHR and Article 4 Protocol 4 (prohibition of collective expulsions) apply to *any* TCN, including but not only those who are seeking international protection[268]. In such a manner, the Strasbourg Court confirmed that individualised procedures should not be limited to *non-refoulement* relevant cases.

Furthermore, the ECtHR held in this same judgment that a non-admission of a person should be equated in substance with his or her 'return' (*refoulement*) and that a Member State refusal of entry of a TCNs *under its jurisdiction* within the scope of Article 1 ECHR – including extra-territorially - does not release that State from its human rights obligations arising from the *non-refoulement*

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262 E. Guild (2021), *Article 19 – Right to Protection in the Event of Removal, Expulsion or Extradition*, in S. Peers, T. Hervey, J. Kenner and A. Ward (eds), The EU Charter of Fundamental Rights: A Commentary, Bloomsbury Publishing.

263 Council of Europe Commissioner for Human Rights (2022), Recommendation, *Pushed beyond the Limits: Four Areas of Urgent Action to end Human Rights Violations at Europe's Borders*, Strasbourg.

264 Refer for instance to the case studies covering Spain (*Section 5.3.*), Greece (*Section 3.1.)*, Poland (*Section 2.3.1.*) and Bulgaria (*Section 4.3.4.*), See also the Border Violence Monitoring Network, which provides a compendium of testimonies of people having suffered push backs and violence across EU Member States https://borderviolence.eu/

265 'Collective Expulsions' has been understood by the Strasbourg Court as 'any measure compelling aliens, as a group, to leave the country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group'. Moreover, 'The fact that a number of aliens receive similar decisions does not lead to the conclusion that there is a "collective expulsion" when each person concerned has been given the opportunity to put arguments against his expulsion to the competent authorities on an individual basis'. See Guide on Article 4 of Protocol No. 4 - Prohibition of collective expulsions of aliens (coe.int)

266 ECtHR, Case of *N.D. and N.T. v. Spain*, Applications nos. 8675/15 and 8697/15, Grand Chamber, Strasbourg, 13 February 2020.

267 Carrera, S. (2020), The Strasbourg court judgement 'N.D. and N.T. v Spain': a 'carte blanche' to push backs at EU external borders?, Working Paper, EUI RSCAS, 2020/21, Migration Policy Centre, Florence.

268 Paragraph 187 of the judgement.

principle[269]. Human rights' jurisdiction follow even when States artificially frame part of their territory as 'non-territory', or apply a legal fiction of 'non-entry' through the use of transit zones and border fences[270]. Importantly, this jurisdictional link covers their actions or inactions taking place extraterritorially in the scope of border surveillance tasks and pushbacks both at green and sea external border management activities[271].

In *N.D. and N.T. v Spain* the Strasbourg Court exonerated State authorities from the duty to conduct individual assessment under Article 4 Protocol 4 ECHR if this 'could be attributed to the applicant's own conduct'. Academics have since then criticised this new restrictive line of jurisprudence by the Strasbourg Court, which has continued in subsequent judgments[272]. They have underlined how this case law sits uneasily with human rights which accept no derogation or are *jus cogens* in nature such as the prohibition of inhuman and degrading treatment under Article 3 ECHR and Article 4 CFREU[273], as well as its incompatibility with the wider range of EU law and CJEU legal standards in this field. In fact, the ECtHR has found that Article 3 ECHR constitutes 'one of the fundamental values of a democratic society' and prohibits, without any possible exceptions or derogations, inhuman or degrading treatment, irrespective of the individual's conduct[274].

Conversely, in fact, in the above-mentioned *M.K. v. Poland* and *D.A. and Others v. Poland* cases, the Strasbourg Court held that the Polish authorities could – and should have – refrained from expelling the applicants back to Belarus. It confirmed that under EU law, including the SBC and the APD 2013/32, they should not only fully embrace the *non-refoulement* principle, but they should also 'apply it to persons who are subjected to border checks before being admitted to the territory of one of the member States'. These provisions, according to the ECtHR, 'oblige the State to ensure that individuals who lodge applications for international protection are allowed to remain in the State in question until their applications are reviewed'[275].

Indeed, the EU legal system now provides a higher level of protection and fundamental rights safeguards in these cases when compared to those laid down in Strasbourg Court standards. This

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269 The Court concluded in this ruling that '…the protection of the Convention cannot be dependent on formal considerations such as whether the persons to be protected were admitted to the territory of a Contracting State in conformity with a particular provision of national or European law applicable to the situation in question', and that 'The Convention cannot be selectively restricted to only parts of the territory of a state by means of an artificial reduction in the scope of its territorial jurisdiction'. Refer to Paragraph 181 and 184; and paragraphs 109 and 110.

270 S. Carrera (2021), Walling off Responsibility? The Push Backs at EU External Borders with Belarus, CEPS Policy Insight, No. 2021-18, November 2021.

271 European Court of Human Rights (2012), Case *Hirsi Jamaa and Others v. Italy*, Application no. 27765/09, 23 February 2012.

272 European Court of Human Rights, Case *A.A. and Others v. Macedonia*, Nos. 55798/16 and 4 others, 5 July 2022; Case M.H. and Others v. Croatia, Nos. 15670/18 and 43115/18, 4 April 2022.

273 D. Schmalz (2022), *A.A. and others v. North Macedonia: Enlarging the Hole in the Fence of Migrants' Rights*, 6 April 2022, https://verfassungsblog.de/enlarging-the-hole-in-the-fence-of-migrants-rights/ ; N. Sinanaj (2020), *Push backs at land borders: Asady and Others v. Slovakia and N.D and N.T v. Spain. Is the principle of non-refoulement at risk?,* Refugee Law Initiative, University of London, available at https://rli.blogs.sas.ac.uk/2020/06/10/pushbacks-at-land-borders-asady-and-others-v-slovakia-and-n-d-and-n-t-v-spain-is-the-principle-of-non-refoulement-at-risk/ ; Carrera, S. (2020), *The Strasbourg court judgement 'N.D. and N.T. v Spain': a 'carte blanche' to push backs at EU external borders?*, Working Paper, EUI RSCAS, 2020/21, Migration Policy Centre, Florence.

274 Refer for instance to ECtHR Case, *M.A. v. France*, Application No. 9373/15, 1 February 2018; ECtHR Case, *Salah Sheekh v. the Netherlands*, Application No. 1948/04, 11 January 2007, paragraph 35; and ECtHR Case, *Soering v. the United Kingdom*, Application No. 14038/88, 7 July 198. As clarified by the 2020 FRA and CoE Handbook on European Law relating to asylum, borders and immigration, 'Under Article 3, a State's responsibility will be engaged when any expulsion is made where substantial grounds have been shown for believing that the person concerned faced a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the country to which he or she was returned,' page 107.

275 Paragraphs 78-84, and 181 of the *M.K.* judgment., and paragraph 66 of the *D.A.* ruling.

has been confirmed by Advocate General (AG) Emiliou, who in his Opinion issued on 2 June 2022 regarding the above-mentioned *M.A. v Lithuania* declared that the *N.D. and N.T. v Spain*, which was relied on by the Lithuanian Government, cannot be interpreted to mean that respect of the *non-refoulement* principle is dependent on the conduct of the person concerned. The AG concluded that 'even if that judgment is to be understood as meaning that…which I very much doubt, it would simply follow that EU law therefore provides, in Article 18 and 19.2 CFREU, more extensive protection than the ECHR, as is expressly provided by Article 52.3 of the Charter'.[276]

In particular, EU law follows a functional approach[277] at times of determining and attributing responsibility and jurisdiction in cases of negative fundamental rights impacts. According to this approach, the most crucial connecting factor for determining the lawfulness of derogations – including emergency procedures in the scope of both border controls and border surveillance – is the extent to which they fall or not within the scope of EU law. As outlined in *Section 5.1.1.* above, EU law includes the actual existence of a fundamental right to asylum in the CFREU, which finds no direct correlative under the ECHR. It also counts with an autonomous definition of what qualifies as 'detention' as part of border procedures for EU law-purposes (See *Section 5.1.4.* below), and provides for other specific legal guarantees/rights laid down in secondary legislation.

First, the SBC includes central procedural safeguards including the respect of human dignity[278], non-discrimination[279] and a right to appeal against a refusal of entry. These apply both in the context of border controls in BCPs as well as in the scope of border surveillance activities across green and blue external borders; Second, the Asylum Procedures Directive (APD) which states that its scope of application covers 'officials who first come into contact with persons seeking international protection, in particular officials carrying out the surveillance of land or maritime borders or conducting border checks'; third, the EU Returns Directive, and the use made by EU Member States of its Article 2.1, which deals with due process guarantees applicable to TCNs who 'are apprehended or intercepted by the competent authorities in connection with the irregular crossing by land, sea or air of the external border'.

5.1.3. Lack of genuine and effective access to means of legal travel and entry

In the above *N.D. and N.T. v Spain* ECtHR case, the Strasbourg Court applied the own-conduct exception doctrine to the application of the prohibition of collective expulsions – yet not to the principle of *non-refoulement*. This doctrine generally follows a cumulative criteria which the ECtHR often applies in parallel: First, third-country nationals attempt to cross external borders irregularly by 'deliberately taking advantage of their large numbers and use force', and this creates a 'clearly disruptive situation which is difficult to control and endangers public safety'; and second, at the same moment, they could have made use of available 'genuine and effective access to means of

[276] AG Emiliou Opinion, 2 June 2022, paragraphs 142 and 143.

[277] V. Moreno-Laz and C. Costello (2021), *The Extraterritorial Application of the Charter: From Territoriality to Facticity, the Effectiveness Model'*, in S. Peers, T. Hervey, J. Kenner and A. Ward (eds), The EU Charter of Fundamental Rights: A Commentary, Bloomsbury Publishing.

[278] In the CJEU ruling, C-23/12, Mohamad Zakaria, 17 January 2013, the Court held in paragraph 40 that ', it must be noted that border guards performing their duties, within the meaning of Article 6 of Regulation No 562/2006, are required, inter alia, to fully respect human dignity. It is for Member States to provide in their domestic legal system for the appropriate legal remedies to ensure, in compliance with Article 47 of the Charter, the protection of persons claiming the rights derived from Article 6 of Regulation No 562/2006.'

[279] Border checks at BCP must be also implemented in a non-discriminatory manner against every person based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

legal entry', including border procedures – and putting into effect 'a sufficient number' BCPs – and applying for visas in diplomatic and consular representations in their countries of origin or transit[280].

The existence of effective and genuine legal entry opportunities or pathways provided or made available by States' authorities play therefore a crucial role in the ECtHR legality test of expulsion policies. The instrumentalisation proposal lacks a proper and detailed consideration as regards the extent to which TCNs would in fact have access to legal venues of travel and lawful entry into the EU and relevant Member States' territories. Based on the case studies attached to this Substitute IA and interviews[281], it is questionable whether the selected EU Member States with external land borders actually have a sufficient number of BCPs to properly and effectively fulfil their EU law obligations, and the exact legal nature of what qualifies as 'sufficient' in the EU legal system for these same purposes. The instrumentalisation proposal encourages and incentivises EU Member States with external EU land and sea borders to strategically limit the number of BCPs to a bare minimum. The extent to which this would qualify as 'sufficient' for ECHR Article 4 Protocol 4 ECHR obligations, and to meet the CJEU standards laid down in the Case C-72/22, *M.A. v Lithuania* of 30 June 2022 to ensure the effectiveness of the fundamental right to seek asylum, is highly questionable.

Previous research, the stakeholders' workshop, the case studies and interviews conducted have confirmed the practical impossibility and barriers faced by TCNs in effectively accessing legal entry tools and BCPs, including access to humanitarian visas[282]. The emerging picture is one characterised by non-genuine and ineffective legal channels of entry in the EU, which are generally inaccessible and unreliable on the ground.

The derogations and exceptions envisaged by the instrumentalisation proposal make legal access even more complicated in comparison to the current situation, which is exacerbated by the proposal's predominant focus on containment and expulsions, instead of the provision of legal pathways such as humanitarian visas, the setting up of humanitarian corridors or direct evacuation transfers as part of the possible toolbox of EU Member States' responses in situations labelled as 'instrumentalisation'. Furthermore, as already mentioned in *Section 4.3.2.* above on the compatibility of the proposal with EU law, Member States' obligation to make available 'legal pathways' for TCNs to travel and be granted access to territory through embassies must comply with the principle of additionality, according to which these instruments need to be complementary to, and not jeopardise, the right to asylum in cases of spontaneous unauthorised arrivals[283].

5.1.4. Liberty and security: detention

Detention constitutes an exception to the fundamental right to liberty and security under Article 6 CFREU. Detention is subject to very strict safeguards and limitations under EU law[284], so as to avoid its arbitrariness. Detention of TCNs subject to expulsion and asylum procedures must be a measure of 'last resort' and only if other alternatives have been exhausted[285]. The fundamental right to liberty and security needs to be read in combination with the prohibition of penalisation or punishment to refugees enshrined in Article 31 of the 1951 Geneva Convention, which is also enshrined in EU

[280] Paragraph 213 of *N.D. and N.T. v. Spain* judgment. These same criteria appeared in the subsequent ECtHR ruling *Shahzad v. Hungary*, No. 12625/17, 8 November 2021, paragraph 59.

[281] Interviews with the FRA and UNHCR.

[282] See for instance C. Navarra and M. Fernandes (2021), *Legal Migration Policy and Law: European Added Value Assessment*, EPRS; W. van Ballegooij and C. Navarra (2018), *The Cost of Non-Europe in Asylum Policy*, EPRS Brussels;

[283] Interview with UNHCR. Refer to UNCHR, Submission before the European Court of Human Rights in the case of *H.Q. v Hungary* (Application No. 46084/21), paragraph 3.2.5.

[284] Refer to Article 8 of the Reception Conditions Directive; Article 28 of the EU Dublin Regulation; and Article 15 of the Returns Directive.

[285] FRA and CoE (2020), Handbook on European Law relating to asylum, borders and immigration, Vienna, p. 198.

asylum law under Article 14.6 of the 2011 EU Qualifications Directive, and which has been interpreted as an emerging general principle of international law[286]. The proposal's push for accelerated asylum and return procedures can be expected to lead to a higher rate of rejection, which will consequently lead to higher levels of detention.

The proposal extends the time-limit to decide about allowing TCNs to enter into the Member State territory to 16 weeks (Article 2.1.c), which compares to the currently applicable time-limit under existing EU rules of 4 weeks. According to the FRA, Member States may be inclined to resort to detention as the default option during a period of about 4 months[287]. The proposal fails to consider the compatibility of these provisions with recent judge-made standards in national courts in some of the selected EU Member States[288]. The proposal's call for EU Member States to keep TCNs at the proximity of the border or at designated BCPs, and restrict their freedom of movement, can be expected to lead EU Member States to generally opt for an increased use of de facto detention[289]. This is even more so in light of the fact that detention – instead of less restrictive or coercive means such as alternatives to detention – is an increasing practice used by Member States in their national policies[290]. The relationship and impacts between these provisions and the legal fiction of non-entry studied in Section *5.1.1.4.* above remains unclear in the proposal, which may give further incentives for Member States to over-use or excessive recourse to detention as 'the norm'. All this raises crucial questions regarding the lack of proportionality of the proposal's procedural derogations and their expected practical application by competent national authorities.

Nevertheless EU Member States would still be subject to ECHR standards as interpreted by the Strasbourg Court. And the ECtHR has held that the length of detention should not extend beyond what is 'reasonably required'. As a way of illustration, it found a violation of Article 5 ECHR in cases where asylum seekers were confined in a transit zone or reception centres in border regions for nearly 4 months[291]. Therefore, there is a very high risk that the implementation of the instrumentalisation proposal, and its above-mentioned low legal quality resulting from the legal uncertainty regarding the exact scope of many of its key procedural derogations, would mean EU Member States breaching their obligations under the ECHR standards[292].

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286 Refer to C. Costello and Y. Loffe (2021), 'Non-penalisation and Non-criminalisation', in C. Costello, M. Foster and J. McAdam (eds), *The Oxford Handbook of International Refugee Law*, Oxford University Press.

287 Interview with the FRA.

288 Refer for instance to the case study on Lithuania which in Section 1.3.4. in Annex III explains how the Lithuanian Constitutional Court ruled on 7 June 2013 that national law providing for accommodation of asylum seekers without given them the possibility to move freely inside Lithuania's territory is unconstitutional. See also *Section 1.3.7.* of this same case study which refers to various decisions by the Lithuanian Supreme Court stating that a right to appeal by TCNs against restrictions of movement must be upheld even at times of declared emergencies. Refer also to the case study on Spain in Section 5.3.3. in Annex III on the way in which national courts are handling unlawful returns of minors.

289 On how detention in border settings typically leads to detention (including de facto detention) refer to https://ecre.org/wp-content/uploads/2021/07/ECRE-Heinrich-Boll-StiftungReception-Detention-and-Restriction-of-Movement-at-EU-External-Borders-July-2021.pdf; and https://picum.org/wp-content/uploads/2022/09/Immigration-detention-and-de-facto-detention.pdf

290 Refer to EU Fundamental Rights Agency and Council of Europe (2020), *Handbook on European law relating to asylum, borders and immigration*. https://www.echr.coe.int/documents/d/echr/Handbook_asylum_ENG Refer for instance to the case studies on Greece and Italy in Annex III.

291 For an overview of the Strasbourg Court case law refer to Council of Europe and FRA (2020), Handbook on European Law related to Asylum, Borders and Immigration, *Section 7.6.4.* (Maximum length of detention), pp. 218-222. EU Fundamental Rights Agency and Council of Europe (2020), Handbook on European law relating to asylum, borders and immigration. Edition 2020. https://www.echr.coe.int/documents/d/echr/Handbook_asylum_ENG

292 For any legal measure in this area to be compatible with Article 5 ECHR, the law must be foreseeable, accessible and comprehensible/legally precise as a condition to prevent arbitrariness and comply with the rule of law.

Furthermore, the CJEU has confirmed that 'detention' is now an autonomous concept of EU law which constitutes 'any coercive measure that deprives that applicant of his/her freedom of movement and isolates him/her from the rest of the population, by requiring him/her to remain permanently within a restricted and closed perimeter'[293]. In the 2020 case *European Commission v Hungary* cited above, the Luxembourg Court held that holding asylum seekers in the context of a border procedure applying in a transit zone – which was labelled as 'non-territory' by the Hungarian authorities – qualified as 'detention' for EU law purposes and the Reception Conditions and Asylum Procedures Directives[294]. This CJEU ruling confirms that the above-mentioned legal fiction of non-entry into territory envisaged by the proposal is legally irrelevant for EU Member States responsibilities in cases of potential fundamental rights violations in detention or deprivation of liberty-related cases to be jurisdictionally captured by their obligations under both EU primary and secondary law.

As regards the accelerated return procedures, the safeguards currently envisaged by the EU Returns Directive on detention cases would generally not apply in situations labelled as 'instrumentalisation'. This would be the case, for instance, with the exception of the recast Returns Directive safeguards dealing with the 'conditions of detention and detention of minors and families' in Article 20[295]. As previously underlined in the 2018 EPRS Substitute Impact Assessment of the EU Returns Directive Recast, in its fundamental rights impacts assessment of the proposed new Article 20, 'increasing the grounds for the detention of adults… might result in an increased number of children being detained together with their parents,' and 'the very limited procedural safeguards offered by this (new return) procedure, may lead to the arbitrary detention of minors'[296].

The envisaged increased detention of minors and unaccompanied minors raises, however, major fundamental rights impacts as regards Article 24 CFREU which envisages the obligation to take into account, as a primary consideration, the best interest of the child principle. The UN Committee on the Rights of the Child has reiterated on several occasions its call[297] to end the immigration detention of children, as it is by design incompatible with their 'best interest'. Importantly, in the Joint General Comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child, the two international human rights bodies reiterated that 'any kind of child immigration detention should be forbidden by law and such prohibition should be fully implemented in practice'[298]. The migration administrative status of children or their parents should never be used as

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293 CJEU, Case C-808/18, *European Commission v Hungary*, 17 December 2020, paragraph 159.

294 The systematic detention of all asylum seekers aged 14 and more was deemed by the Court as contrary to EU law. Paragraphs 167-211 of the judgment.

295 The proposed Article 20 of the Recast Return Directive Commission Proposal states that '1. Unaccompanied minors and families with minors shall only be detained as a measure of last resort and for the shortest appropriate period of time. 2. Families detained pending removal shall be provided with separate accommodation guaranteeing adequate privacy. 3. Minors in detention shall have the possibility to engage in leisure activities, including play and recreational activities appropriate to their age, and shall have, depending on the length of their stay, access to education. 4. Unaccompanied minors shall as far as possible be provided with accommodation in institutions provided with personnel and facilities which take into account the needs of persons of their age. 5. The best interests of the child shall be a primary consideration in the context of the detention of minors pending removal.'

296 Pages 74 and 75 of the EPRS Substitute Impact Assessment of EU Return Directive (Recast).

297 OHCHR, UN Child Rights Experts call for EU-wide ban on child immigration detention. https://www.ohchr.org/en/press-releases/2018/02/un-child-rights-experts-call-eu-wide-ban-child-immigration-detention?LangID=E&NewsID=22681

298 Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and Committee on the Rights of the Child, In Joint General Comment no. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child. CMW/C/GC/4-CRC/C/GC/23. 16 November 2017. https://www.refworld.org/docid/5a12942a2b.html

legitimate grounds for the detention of children, and not even as a measure of 'last resort'. Rather, States should implement non-custodial solutions and involve child protection actors and social workers[299]. Reiterating the conclusions reached by the two UN Committees, interviewees have noted that discussions on 'alternatives to detention' should also be avoided altogether, as these measures still promote de facto detention of children and nurture their 'detainability' and not their inherent right to liberty[300].

5.1.5. Reception conditions

The instrumentalisation proposal makes reference to 'basic material reception conditions' in Article 3. While the proposal states that, for these purposes, 'basic needs' are to be considered as comprising 'food, water, clothing, adequate medical care, and temporary shelter adapted to the seasonal weather conditions', the Commission does not elaborate however on the precise scope of different modalities – such as the exact scope and specific kinds of shelter and accommodation facilities – for providing these material reception conditions by EU Member States.[301] This is particularly worrying in view of the open questions left by the above-mentioned legal fiction of non-entry[302].

Furthermore, Article 3 of proposal does not envisage any clear requirements for how these modalities must deal with the specific reception needs of minors and their families, women, people with disabilities, LGBTQIA+ people, etc. This entails a serious risk of inconsistency across EU Member States as regards how some of these communities are excluded or included from reception and safety guarantees. The resulting picture yet again allows Member States a large amount of discretion during the implementation phases, which in turn would further complicate the need to ensure common and uniform reception standards across the Union.

According to the FRA there is also a risk that the specific safeguards foreseen under Article 18 of the RCD (Article 17 of the recast version) will be disregarded[303]. Article 18 RCD includes crucial safeguards such as the applicant's possibility to communicate with relatives, access to legal advisers or counsellors, the obligation to have access to family members, NGOs and UNHCR, while taking into account age and gender special reception needs. In the same vein, and consequently, the instrumentalisation proposal puts forward a material reception conditions model which does not fully match the '*adequate* standard of living' expressly envisaged by Article 18 of the RCD and Article 17 of the recast proposal version. The proposal also raises incompatibility concerns with the socio-economic rights stipulated in Article 11 of the International Covenant on Economic, Social and

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299 Refer to the International Detention Coalition (2015), *There are Alternatives: A Handbook for Preventing Unnecessary Detention* (revised edition), which develops on a Revised Community and Assessment Model (Revised CAP model) supporting community-based options. See also FRA (2015), 'Alternatives to detention for asylum seekers and people in return procedures', Vienna, available at https://fra.europa.eu/sites/default/files/fra_uploads/fra-2015-alternatives-to-detention-compilation-key-materials-2_en.pdf

300 Interview with Global Detention Project, 12 July 2023. See also N. De Genova (2016), Detention, Deportation, and Waiting: Toward a Theory of Migrant Detainability. Global Detention Project Working Paper No. 18. https://www.globaldetentionproject.org/wp-content/uploads/2016/12/De-Genova-GDP-Paper-2016.pdf

301 Regarding material reception conditions, interviews have underlined that it is essential to have clear rules and indicators of what Member States need to provide, and to avoid that TCNs are left at the border without anything. Interview with Finnish Ministry of Interior.

302 The Explanatory Memorandum states that 'However, the affected Member State needs to ensure that any actions respect basic humanitarian guarantees, such as providing third-country nationals *on their territory* with food, water, clothing, adequate medical care, assistance to vulnerable persons and temporary shelter, as also set out by the European Court of Human Rights in recent orders for interim' (Emphasis added), page 6. Refer also to Recital 11 of the Instrumentalisation Proposal.

303 Interview with the FRA.

Cultural Rights (ICESCR), which applies to all EU Member States and benefits refugees, asylum seekers and undocumented TCNs.[304]

Moreover, the proposal's invitation for Member States to limit the number of registration and border crossing points, together with the extended application of border procedures, can be expected to lead to situations of overcrowding, sub-standard sanitation facilities and health-care services which may constitute inhuman and degrading treatment contrary to Article 4 CFREU. And while the proposal adds that the derogations to the reception conditions will in any case need to comply with human dignity, the foreseen scope of the so-called basic needs in the proposal may fall too short and provide not enough protection to uphold the *human dignity* criterion enshrined in Article 1 CFREU, which is intimately tied to a dignified standard of living[305].

5.1.6. The right to effective remedies

The right to a fair trial under Article 47 EU Charter, which includes as one of it sub-components effective remedies, presents some crucial non-derogable or absolute elements under international human rights law. The right to a fair trial is instrumental to guaranteeing the *very essence* of absolute rights. It is considered as essential and non-allowing derogation to ensure their effectiveness. Effective remedies are co-constitutive components of the EU principle of effective judicial and legal protection enshrined in Article 19 TEU, which has a constitutional value in the EU legal system under the concept of the rule of law under Article 2 TEU. Moreover, and differently from the ECHR setting, the *effectiveness* of judicial scrutiny under Article 47 CFREU entails or requires the involvement of an independent and impartial tribunal or court[306]. The right to an effective remedy is of paramount importance to TCNs who would be subject to the accelerated asylum and return procedures foreseen by the instrumentalisation proposal, as it constitutes the *sine qua non* for ensuring protection against expulsions and the *non-refoulement* principle. The right to an effective remedy is closely intertwined with the right to free legal assistance and access to a lawyer and a competent interpreter[307], which are all of paramount importance to ensure the principle of equality of arms and the overall fairness and effectiveness of the applicable procedures.

The instrumentalisation proposal states that asylum seekers receiving a negative decision under the accelerated asylum procedure will not benefit from an appeal with automatic suspensive effect. The

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[304] Office of the High Commissioner of Human Rights (OHCHR) (2014), *The Economic, Social and Cultural Rights of Migrants in an Irregular Situation*, Geneva. Available at https://www.ohchr.org/sites/default/files/Documents/Publications/HR-PUB-14-1_en.pdf. See also UNHCR (2000), *Reception Standards for Asylum Seekers in the European Union*, Geneva. Available at https://www.refworld.org/docid/3ae6b3440.html. On the scope of the right to adequate housing under the ICESCR, and its scope in European law, and the conditions for it to be considered as 'adequate' refer to I. Westendorp (2022), A Right to Adequate Shelter for Asylum Seekers in the European Union, *Nordic Journal of Human Rights*, Vol. 40, No. 2, pp. 328-345.

[305] Interview with UNHCR. Article 1 CFREU states that 'Human dignity is inviolable. It must be respected and protected'. In this respect, the CJEU concluded in the 2019 Case *Zubair Haqbin* that: 'With regard specifically to the requirement to ensure a *dignified standard of living*, it is apparent from recital 35 of Directive 2013/33 that the directive seeks to ensure *full respect for human dignity* and to promote the application, inter alia, of *Article 1 of the Charter of Fundamental Rights* and has to be implemented accordingly. In that regard, respect for human dignity within the meaning of that article requires the person concerned not finding himself or herself in a *situation of extreme material poverty* that does not allow that person to meet his or her *most basic needs* such as a place to live, food, clothing and personal hygiene, and that undermines his or her *physical or mental health* or puts that person in a *state of degradation* incompatible with human dignity (Emphasis Added' CJEU, Case C-233/18, *Zubair Haqbin v. Federaal Agentschap voor de opvang van asielzoekers*, 12 November 2019.

[306] On the EU's specificity in this regard refer to S. Carrera and M. Stefan (2020), Introduction: Justicing Europe's Frontiers, in S. Carrera and M. Stefan (eds), *Fundamental Rights Challenges in Border Controls and Expulsion of Irregular Immigrants in the European Union: Complaint Mechanisms and Access to Justice*, Routledge, pages 10-14.

[307] Article 47 CFREU stipulates that 'Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.'

proposal gives no proper consideration to the compatibility of the non-suspensive effect of appeals with ECHR standards as interpreted by the Strasbourg Court. The ECtHR has reiterated on several occasions that in cases where TCNs seek to prevent the execution of their expulsion / removal order alleging that this would place them risk of inhuman and degrading treatment under Article 3 ECHR or Article 4 Protocol 4, the automatic suspensive effect is a *pre-condition* for considering appeal as an effective remedy for ECHR purposes[308]. Furthermore, the proposal does not take into account the Luxembourg Court case law according to which the lack of suspensory effect of an appeal against a decision rejecting an asylum application is 'in principle' compatible with the *non-refoulement* principle and Article 47 CFREU 'since the enforcement of such a decision cannot, as such, lead to removal of the TCN concerned'[309]. The Luxembourg Court has also added that an appeal against a return decision must enable automatic suspensory effect since the decision would expose the TCN concerned to a real risk of treatment contrary to Articles 18 and 19.2 CFREU and Article 33 1951 Geneva Convention[310].

The amended APR proposal establishes that, 'a court or tribunal shall have the power to decide, following an examination of both facts and points of law, whether or not the applicant shall be allowed to remain on the territory of the Member States pending the outcome of the remedy upon the applicant's request'[311]. According to the Commission, this could be expected to also apply in 'instrumentalisation cases'[312]. However, this is certainly not evident from the actual text of the proposal, as it does not expressly mention this aspect. It is unclear what would actually happen if an appeal had a positive outcome after the expulsion of the applicant to a third state concerned. In fact, returnees would not be given access to the right to suspensive appeal and review of a returns decision before a judge, and s/he would not have the possibility to have legal advice and legal assistance free of charge, etc. Furthermore, the derogations applicable to the Returns Directive also suspend the application of key safeguards and administrative guarantees which are crucial to ensuring due process in these procedures[313]. In light of the above, it can therefore be concluded that the non-suspensive effect of appeals put forward by the proposal runs therefore contrary to Article 47 CFREU.

5.1.7. Freedom of association and civil society spaces

Another fundamental rights impact relates to the civil society space (CSA), which has an EU constitutional value under the notion of democracy in Article 2 TEU. The instrumentalisation proposal states in its Explanatory Memorandum that 'Member States should also ensure access and allow for the provision of humanitarian assistance by the humanitarian organisations in line with the existing needs of the persons concerned' (Recital 11)[314]. The proposal allows Member States to

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308 See for instance ECtHR rulings in *Conka v. Belgium*, no. 51564/99, §§ 81-83, ECHR 2002-I; *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, § 199, ECHR 2012; *Gebremedhin [Gaberamadhien] v. France,* no. 25389/05, § 66, ECHR 2007-II; *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, § 293, ECHR 2011; and *A.E.A. v. Greece*, no. 39034/12, § 69, 15 March 2018. See also paragraph 40 of the 2021 Case *D.A. and Others v. Poland*, no. 51246/17.

309 See CJEU Case C-181/16, *Sadikou Gnandi v Etat Belge*, 19 June 2018, paragraph 55; as previously indicated by the CJEU in the Case C-239/14, *Tall*, 17 December 2015, paragraph 56.

310 CJEU Case C-181/16, *Sadikou Gnandi v Etat Belge*, 19 June 2018, paragraph 56.

311 Article 54(4), Amended APR Proposal.

312 Interview with European Commission, DG HOME.

313 For instance, entry refusals and re-entry bans should be issued in writing and reasons or grounds being given according to the RD and the SBC.

314 Refer to Article 8.2. of the Instrumentalisation Proposal. Furthermore, Recital 20 states that UN agencies and 'other relevant partner organisations, in particular the International Organization for Migration and the International Federation of Red Cross and Red Crescent Societies, should have effective access to the border'; and Article 8.2 emphasises that Member States shall determine the specific modalities for support.

restrict access to only *specific categories* of civil society actors (and constraining access by CSAs providing legal assistance and human rights monitoring or with a watchdog role), which as underlined during the stakeholders' workshop constitutes a more restrictive standard when compared to currently existing EU *acquis*[315].

This can be expected to have a negative impact on transparency and accountability of States' actions/inactions, as well as the fundamental right of freedom of assembly and association envisaged in Article 12 CFREU[316]. It can also be expected to have negative impacts on the human rights of human rights defenders as stipulated in the 1999 UN Declaration on Human Rights Defenders which is directly informed and develops those previously envisaged in the International Covenant on Civil and Political Rights (ICCPR). Furthermore, there is a growing amount of evidence showing that human rights defenders, including search and rescue (SAR) NGOs' attempts to disembark boats, have been policed, intimidated and criminalised[317] in some EU Member States by national authorities in the scope of migration and asylum policies[318]. The case studies of EU Member States such as Poland, Greece and Italy show that this has been the case during past episodes framed as 'instrumentalisation' or recently declared 'state of emergency' on migration-related grounds[319]. Furthermore, the above-mentioned legal fiction of non-entry can be expected to create insurmountable obstacles in practice for TCNs to have effective access to civil society actors' legal advice and humanitarian assistance which are of paramount relevance at times of guaranteeing the very effectiveness of all the fundamental rights covered in this section of the Study.

Here too, the Luxembourg Court has set up crucial EU-level standards that EU Member States must comply with in the scope of migration and asylum policies. In the Case C-78/18 *European Commission v. Hungary (Transparency of Associations)*[320], the Court upheld the central role performed by NGOs and the right to freedom of association as they constitute 'one of the essential bases of a democratic and pluralist society, in as much as it allows citizens to act collectively in fields of mutual interest and in doing so to contribute to the proper functioning of public life'. In order to prevent a

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315 Refer in particular to Articles 8.2 and 12.1 of the Asylum Procedures Directive; Articles 10.4 and 18.2.b of the Reception Conditions Directive; and Article 16.4 Returns Directive. See also to CJEU, C-821/19 *Commission v Hungary*, 16 November 2021, para. 56.

316 Article 12 CFREU states that '1. Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests'.

317 M. Gionco and J. Kanics (2022), *Resilience and Resistance: In Defiance of the Criminalisation of Solidarity Across Europe*, PICUM, Brussels. See also S. Carrera, D. Colombi and R. Cortinovis (2023), *Policing Search and Rescue NGOs in the Mediterranean: Does Justice end at Sea?* CEPS In-Depth Analysis, Brussels. Refer for instance to the case studies on Poland (Section 2.3) and Italy (Section 6.3.1).

318 See for instance Submission by the FRA to the European Commission in the context of the preparation of the annual Rule of Law Report 2022, available at https://commission.europa.eu/system/files/2022-07/european_union_agency_for_fundamental_rights_0.pdf ; and European Commission 2022 Annual Rule of Law Report Country Chapters on Greece (which on pages 21 and 22 states that 'The requirements for the registration of CSOs specifically active in the area of asylum, migration and social inclusion continue to raise concerns and the issue is pending before the Council of State', and which includes a recommendation to the Greek Government to 'Ensure that registration requirements for civil society organisations are proportionate in view of maintaining an open framework for them to operate.' See p. 8 of https://commission.europa.eu/system/files/2022-07/4_1_194542_comm_recomm_en.pdf ; Italy (which concludes on p. 25 that: 'The civic space remains narrowed, in particular for civil society organisations dealing with migrants', in particular those working on search and rescue at sea); or as regards Poland (which emphasises that: 'The civic space has further deteriorated' on pages 28 and 29 of the Country Chapter, and recommends the Polish Government on page 21 to 'Improve the framework in which civil society and the Ombudsperson operate, taking into account European standards on civil society and Ombuds institutions.'

319 See Annex III for instance Section 6.3.1. of the case study on Italy; Section 3.3.3. of the case study on Greece; and Section 2.3. of the case study on Poland.

320 CJEU Case C-78/18, *European Commission v Hungary*, 18 June 2020.

general environment of mistrust and avoid the stigmatisation of their activities, the CJEU underlined the obligation to safeguard the independence of NGOs and stressed that any restrictions to their rights must pursue legitimate goals and be 'necessary in a democratic society'.

5.2. Economic impacts

This section provides an assessment of economic impacts expected from the application of the instrumentalisation proposal by the selected EU Member States covered in this Study.

5.2.1. Overall approach

As pointed out in the previous sections of this Substitute IA, it is challenging to identify a baseline scenario against which the possible effects of the proposal could be assessed. This is also because the definition of 'instrumentalisation' is ambiguous, making it difficult to identify an alternative situation of 'non-instrumentalisation' (*Section 4.2.2.* above). Furthermore, the increase of unauthorised crossing of TCNs in recent years is increasingly linked to the lack of legal alternatives / access and the further tightening and containment-driven focus of EU migration and asylum policies [321], rather than to alleged actions of instrumentalisation by third countries, which as some of the case studies demonstrate are still poorly proven and identifiable. Accordingly, the approach adopted to carry out the economic analysis is based on the following four pillars:

- First, draft of a theory-based casual chain to detect main consequences and linked economic effects expected from the application of the derogations envisaged in the Regulation (See *Section 5.2.2*).
- Second, assess the baseline for each derogation envisaged in the Regulation expected to generate an economic impact based on the evidence gathered though the country research and desk research (e.g. number of arrivals causing a declaration of state of emergency or activating the instrumentalisation discourse, orders to return, average days of detentions, average reception costs etc.) (*Section 5.2.3* and *Annex II*)
- Third, assume and explain what could happen should Member States activate the derogations (*Section 5.2.3* and *Annex II*); and
- Fourth, limit the analysis only for the most distinctive elements generating economic costs or benefits (*Section 5.2.3* and *Annex II*).

Costs and benefits are identified following the Better Regulation Guidelines and Toolbox, in particular Tool #56. Considering the peculiar nature of an 'instrumentalisation' scenario, it is challenging to attribute frequency to costs and benefits (one-off vs recurrent). We considered recurrent economic effects to be those costs or benefits which could be expected any time instrumentalisation occurs.

5.2.2. Expected areas of costs and benefits

The analysis focuses on costs and/or benefits expected to be experienced only by EU Member States. This approach follows what is stated in Section 4 of the proposed text for the Regulation: 'Any costs arising from the implementation of this proposal will be accommodated within the budget of the existing EU funding instruments under the period 2021-2027 in the field of Migration and Asylum. Where exceptionally necessary, the flexibility mechanisms provided under the current multiannual financial framework under Council Regulation (EU, Euratom) 2020/209315 could be used. In terms of the asylum procedural aspects, this proposal does not impose any financial or administrative burden on the Union. On those parts, therefore, it has no impact on the Union budget'. Considering

[321] Refer to *Section 5.1.* above on fundamental rights impacts.

the measures envisaged in the proposed Regulation, we expect that economic effects will be generated in two main areas:

(1) Emergency migration and asylum management procedures at the external borders in situations of instrumentalisation; and
(2) Support and solidarity measures.

Consequences from the implementation of measures envisaged in each area may lead to the economic effects summarised in the following Table. Overall, the key expected effects that have an economic relevance will be linked to: (i) enhancement of border infrastructures, (ii) need to increase and upgrade reception facilities, (iii) increase of *de-facto* detention, (iv) increased number of appeals and (v) increased financial and operative support from the EU.

Table 4: Overview of expected economic effects, by derogation and measure

Reg. section	Measure	Consequences	Expected economic effect for Member States
(1) Emergency migration and asylum management procedure at the external borders in situations of instrumentalisation			
Art. 2	• Possibility to limit number of border crossing points	• Creation of border controls bottlenecks in specific locations due to increased workload • Disproportionate enhancement/investments in border surveillance and 'infrastructures' across a larger scope of external borders to prevent unauthorised entry / pushbacks • Overexposure of specific border regions – territorial unbalances within the country and across the EU • Less legal entry ways are expected to increase the number of visa requests	• Cost to enhance border infrastructures
Art. 2 (a)	• Extension of the registration deadline for applications for international protection to up to 4 weeks	• Increased reception / detention centres while processing asylum applications	• Costs related to increased reception and detention
Art. 2 (c)	• Extension of emergency procedure to all applications • Extension of the application of the border procedure to up to 16 weeks	• Increased reception / detention centres while processing asylum applications • Extended legal fiction of non-entry • Increased number of appeals, despite non-suspensory	• Costs related to increased detention • Costs related to increased legal/reception expenses due to increased number of appeals

Art. 3	• Alternative modalities to material reception conditions	• Basic needs should be ensured, despite derogations, and therefore reception facilities need to be upgraded	• Costs to upgrade existing reception facilities to meet minimum requirements
Art. 4	• Derogations under the emergency return management procedure	• Ineffective enforcement of expulsions due to legal, administrative/technical barriers related to identification and third country of origin non-approval	• Costs related to increased detention
(2) Support and solidarity measures			
Art. 5	• Member States support	• Increased assistance from other Member States to Member States in need	• Benefits from increased support from the EU and other Member States
Art. 5	• EU coordination and support	• Increased assistance with EU funds to border procedures • Increased assistance from the EUAA, Frontex, the EBCGA and Europol to Member States in need	

Source: Authors' elaboration

5.2.3. Economic analysis

As outlined in the Table 4, the proposed Regulation is expected to generate the following typologies of costs and benefits [322] for EU Member States:

Direct compliance costs – *adjustment costs* – and enforcement costs – *information and monitoring costs* due to increased reception and detention (*Section 5.2.3.1.*)

Direct compliance costs – *adjustment costs* – and enforcement costs – *information and monitoring costs* – to enhance border infrastructures (*Section 5.2.3.2.*)

Direct compliance costs - *adjustment costs* to upgrade existing reception facilities to meet minimum requirements (*Section 5.2.3.3.*)

Enforcement costs – *information and monitoring costs* related to increased legal / reception expenses due to increased number of appeals (*Section 5.2.3.4.*)

Direct benefits – *cost savings* due to increased support from the EU (*Section 5.2.3.5*)

Overall, the results of the economic assessment suggest that all Member States concerned[323], despite starting from different national contexts, would see a relevant increase in costs at the national level (for compliance and enforcement with the measures of the Regulation) in cases of declared instrumentalisation, which are mainly due to the application of Articles 2, 3 and 4 of the proposal. Part of the cost increase – related to increased reception and detention costs – can be partially offset by savings brought by the application of the envisaged 'emergency return management procedures' and border procedures. However, this argument remains uncertain and difficult to quantify. It is not easy to estimate how such procedures would be applied or implemented in practice, and in any case, EU Member States could not avoid respecting the administrative guarantees laid down in *Section 4.2.2.* above, and the fundamental rights assessed in *Section 5.1.*, some of which accept no derogations.

Possible benefits are instead difficult to assess and expected to be very limited. On one hand, Article 5 of the instrumentalisation proposal does not provide sufficient indications as to the economic gains that could be expected by EU Member States facing a situation of declared instrumentalisation. On the other hand, the available evidence suggests that EU institutions and agencies could still provide relevant financial and operational support, however, these are very unlikely able to outweigh the costs. Table 5 below summarises the estimated costs and benefits associated for each type of economic effect. The assessment and calculations are described in more detail in the following sub-sections.

[322] For a detailed explanation of calculations and assumptions, please refer to Annex II.

[323] Following the analysis reported in the case studies for Italy and Bulgaria, there is no evidence that the country will ever address situations of crisis as an instrumentalisation situation. However, we compute an estimate also for these countries relying on several assumptions explained throughout the text.

Table 5: Summary of economic effects (€ million)

	Effect	Art.	Type of cost/benefit	Countries affected					
				Spain	Italy	Greece	Lithuania	Poland	Bulgaria
	Direct compliance costs and enforcement costs due to increased reception and detention								
Costs	Increased reception	2 (a), 2 (c)	Direct enforcement costs | Information and monitoring (recurrent)	**27.7**	**111.3**	**83.2**	**14.6**	**34.6**	**70.8**
	Increased detention	4	Direct enforcement costs | Information and monitoring (recurrent)	**51.1**	**51.9**	**156.4**	**15.9**	**36.0**	**19.9**
	Building of new facilities	2, 4	Direct compliance | Adjustment cost (one-off)	**Expected increase in case of overcrowding**					
	Direct compliance costs to upgrade existing reception facilities to meet minimum requirements								
	Increased costs to update existing facilities	3	Direct compliance | Adjustment costs (one-off)	**3.7 – 5.4**	**14.8 – 21.7**	**11 - 16**	**2 – 2.9**	**4.7 – 6.9**	**18.7 – 27.5**
	Enforcement costs due to increased number of appeals								
	Increased number of appeals	2 (c)	Direct enforcement costs | Complaint handling (recurrent)	**1.7**	**14.7**	**32.1**	**1.8**	**15.4**	**0.1**
	Direct compliance costs and enforcement costs to enhance border infrastructures								
	Handling border procedures	2	Other indirect costs | Substitution costs (recurrent)	**Additional costs only in specific part of the territory (where border crossing points are designed for border procedures)**					
	Border infrastructures maintenance	2	Direct enforcement costs | Information and monitoring (recurrent)	**2.4**	N/A	**Additional costs to maintain current fences in case of instrumentalisation**			**5**
	Increased border fences and surveillance	2	Direct compliance costs | Adjustment costs (recurrent)	**0**	N/A	**371.4**	**0**	**406.1**	**9.6**
Benefits	**Cost savings due to increased support from the EU**								
	Financial and operational support by EU institutions	5	Cost savings (recurrent)	**163**	**269.6**	**305.6**	**58.4**	**81.1**	**37**

Source: Authors' elaboration.

5.2.3.1. Costs related to increased reception and detention

The implementation of Articles 2(a), 2(c) and 4 of the instrumentalisation proposal is expected to increase reception costs and the use of *de jure/de facto* detention. We estimated that in case of

instrumentalisation the application of the above-mentioned articles could generate additional adjustments and enforcement costs for EU Member States to a large extent. Table 6 below summarises these economic effects, which are described in more detail in this section.

Table 6: Increased reception and detention - summary of economic effects (€ million)

Main component	Type of cost	ES	IT	EL	LT	PL	BG
		Additional costs					
Increased reception	Direct enforcement costs | Information and monitoring (recurrent)	27.74	111,3	83.23	14.61	34.59	70.77
Increased detention	Direct enforcement costs | Information and monitoring (recurrent)	51.1	51.9	156.4	15.9	36.0	19.9
New facilities	Direct compliance | Adjustment cost (one-off)	Additional costs expected in case of overcrowding					

Source: Authors' elaboration

Increased reception

Article 2 (a) of the proposal will extend the registration deadline for applications for international protection to up to 4 weeks. This would generate an increase in the overall reception costs while processing applications. Considering that in both the APD (currently in force) and the APR, the duration of the registration process is between 3 and 10 working days, enforcement costs to guarantee reception during longer registrations are expected to rise in comparison to the status quo (see Table 7). Similarly, Article 2 (c) establishes that registered asylum applications shall be examined within a maximum period of 16 weeks. Considering that under the 2013 APD, the border procedure is limited to 4 weeks, enforcement costs to guarantee reception during longer border procedures are expected to rise as well (see Table 7).

These costs may be partially mitigated in the case where one Member State applies derogations from the rRCD provided by Article 3 of the proposal. However, as explained in *Section 5.1.5.*, the scope of the Article is so broad and legally uncertain that it is challenging to ascertain precisely how this would happen, and, consequently, to what extent the reception costs would be actually reduced in practice. Moreover, Article 3 is also expected to generate costs for EU Member States related to the upgrade of existing facilities and meeting so-called basic needs as well as the human dignity criterion which is tied to a dignified standard of living. For all these reasons, it is not possible to estimate to what extent the derogations from the rRCD could offset the costs generated by the implementation of Article 2(a).

Both costs are expected to be recurrent, but the timeframe of such recurrence will largely depend on the magnitude of the 'instrumentalisation' situation. Overall, enforcement costs to guarantee reception during longer registrations and border procedures are expected to rise to a large extent in comparison to the status quo, where maximum additional costs could range from EUR 14.6 million in Lithuania to EUR 83.2 million in Greece.

Table 7: Increase in reception costs (detail)

Country	Cost of reception costs per day, per individual, in € [324]	Number of arrivals generating instrumen-talisation situation [325]	Costs (registra-tion) - status quo, in € million [326]	Costs (registra-tion) - with the Reg in force, in € million [4]	Costs (eme procedure) - status quo, in € million [4]	Costs (eme procedure) - with the Reg in force, in € million [4]	Total costs - status quo (A)	Total costs - with the Reg (B)	Additional costs (B-A)
EL	34	24.000	8.16	22.85	22.85	91.39	**31.01**	**114.24**	**83.23**
ES	34	8.000	2.72	7.62	7.62	30.46	**10.34**	**38.08**	**27.74**
IT	34	32.101	10.9	30.6	30.6	122.2	**41.5**	**152.8**	**111.3**
BG	34	20.407	6.94	19.43	19.43	77.71	**26.37**	**97.14**	**70.77**
LT	34	4.214	1.43	4.01	4.01	16.05	**5.44**	**20.06**	**14.61**
PL	34	9.974	3.39	9.50	9.50	37.98	**12.89**	**47.48**	**34.59**

Source: Authors' elaboration

Increased detention

Article 4 of the proposal allows Member States facing a situation of instrumentalisation not to apply Article 41 (a) of the amended APR and the recast Return Directive (rRD) proposals with some exceptions outlined in *Section 5.1.4.* above. The proposal does not set specific limits to the detention period, stating that it shall be below the duration set in Article 15.5 and 6 of the Return Directive, namely 6 months which could be extended by another 12 months if the TCN does not cooperate or there are delays in obtaining documents from third countries.

However, as noted during the stakeholders' workshop, the interviews conducted for the purposes of this Substitute IA and the case studies, the use of detention goes frequently beyond the limits formally prescribed at the national or international level and has become 'the rule' rather than 'the exception' (See *Section 5.1.3.* above) [327]. Moreover, pre-removal detention may significantly increase in cases labelled as 'instrumentalisation' considering that expulsions may be ineffective due to practical and legal obstacles, such as, among other issues, related to the identification of the legal identity of the person, or the non-approval or lack of cooperation by the third country of origin authorities [328].

For these reasons, it seems reasonable to estimate that in situations of declared instrumentalisation, EU Member States would be in the position to make use of the time extension [329], increasing the use of detention to an average duration [330] of 12 months. Moreover, higher number of asylum seekers and/or TCNs subject to return procedures can be expected. This would reasonably increase the

[324] The Cost of Non-Europe in Asylum Policy (EPRS, 2018).

[325] Refer to the case studies, considering number of arrivals / asylum seekers when state of emergency or instrumentalisation was officially declared by national authorities.

[326] Assuming all asylum applications are processed using all days available.

[327] Interview with the FRA; Interview with Global Detention Project.

[328] As already foreseen in Article 4.a of the Proposal and the envisaged application of Article 11.2 of the recast Returns Directive the possibility for Member States to postpone removal in individual cases taking into account a TCN's physical state or mental capacity, or 'technical reasons, such as lack of transport capacity, or failure of the removal due to lack of identification'.

[329] The case studies show that this already happens quite often.

[330] The average duration is calculated considering a minimum duration of 6 months and a maximum possible duration of 18 months.

number of detainees[331] to be managed. It would generate an increase in the overall detention costs to be borne during the envisaged border procedures. Considering an average use of detention of 12 months, with an increased number of detainees, enforcement costs related to detention would rise on recurrent basis[332], ranging from the €16 million additional costs in Lithuania to €156.4 million in Greece (see the following Table). As for the reception costs, the timeframe of such recurrency largely depends on the actual scale of the 'instrumentalisation' situation under consideration, which is not possible to estimate at the current stage.

These costs could be partially mitigated by the fact that some EU Member States would understand the non-application of the rRD as a possibility to automatically apply a refusal of entry under Article 14 SBC. However, as it has been argued in *Section 4.2.2.* of this Study above, EU Member States would still need to apply the procedural guarantees envisaged in Articles 3(b), 4, 7 and 14(2) of the SBC, as well as a set of safeguards foreseen in several provisions of the rRD proposal, including those related to the detention of minors and their families, and taking into account the needs of people with special reception needs. Therefore, it is not possible to estimate the extent to which the application of the SBC and the derogations to the rRD proposal could really offset the costs generated by the implementation of Article 4.

[331] As reported in the case studies, asylum seekers during the peak of declared crises have been temporarily hosted in conditions of de facto detention.

[332] As assessed in previous EPRS studies. See The proposed Return Directive (recast) (EPRS, 2019), The European Commission's New Pact on Migration and Asylum (EPRS, 2021) | The Cost of Non-Europe in Asylum Policy (EPRS, 2018).

Table 8: Increase in detention costs (detail)

Country	Return orders issued[333]	Number of persons in pre-removal detention – status quo[334]	% of persons with a return order who are in pre-removal detention – status quo	Assumed % of persons with a return order who are in pre-removal detention – with the Reg[335]	Number of persons in pre-removal detention – with the Reg	Cost of detention per day, per detainee, in €[336]	Average number of days of detention (12 months)	Total costs - status quo (A), in € million	Total costs - with the Reg (B), in € million	Additional costs (B-A), in € million
EL	33.500	11.857	35%	45%	15.075	135	360	576.3	732.7	156.4
ES	10.805	2.082	19%	29%	3.133	135	360	101.2	152.3	51.1
IT	11.095*	5.145*	46%	56%	6.213	135	360	250.1	302	52
BG	4.255	781	18%	28%	1.191	135	360	38	58	20
LT	3.190	2.511	79%	89%	2.839	135	360	122	138	16
PL	7.635	1.473	19%	29%	2.214	135	360	72	108	36

* Only for Italy, 2021 data were used since figures for 2022 were not available.

Source: Authors' elaboration

New reception facilities

In addition, Member States may also face the cost of constructing new facilities to accommodate asylum seekers (or unsuccessful asylum seekers) in cases of declared instrumentalisation. The case studies show that in several of the selected EU Member States (e.g. Greece, Lithuania, Poland) overcrowding is an issue of great concern regardless of different national contexts or approaches to instrumentalisation. It is challenging to assess to what extent the construction of new reception facilities and 'temporary shelter' according to Article 3 of the instrumentalisation proposal would be needed in light of possible situations of instrumentalisation. Reportedly, the EU-funded new facility in Samos has cost around EUR 42 million[337]. It is highly likely that given the current challenges related to accommodation, EU Member States would incur in one-off adjustment costs to create enough capacity and face overcrowding.

5.2.3.2. Costs to enhance border infrastructures

The implementation of Article 2 of the proposal on derogations to registration and border procedures should be read together with Article 1.2 of the SBC proposal which would allow Member States to limit the number of border crossing points (BCPs). Accordingly, we estimate that in cases of instrumentalisation, the application of the above-mentioned articles could generate additional adjustment and enforcement costs for EU Member States, while possible benefits remain highly uncertain. It is important to note that this measure is unlikely to be efficient in reducing the number

[333] Eurostat Third-country nationals ordered to leave - annual data (rounded) (online data code: MIGR_EIORD) - 2022.

[334] Refer to the case studies. For Lithuania we used the Amnesty report: "Lithuania: Forced out or locked up – Refugees and migrants abused and abandoned" (pg. 23) available at https://www.amnesty.org/en/documents/eur53/5735/2022/en/; For Spain we used the : Country Report: Spain (European Council on Refugees and Exiles, 2023)

[335] Since there is no available evidence which allow to quantify this increase, we assume here the scenario of a 10 p.p. increase compared to the status quo. The scenario used in the EPRS Substitute Impact Assessment on the Proposed Return Directive (recast) – share of pre-removal detention up to 60 % – is not applicable in this case as the shares of persons with a return order who are in pre-removal detention in the status quo are much higher than those of countries considered in that study.

[336] The Cost of Non-Europe in Asylum Policy (EPRS, 2018). It is four times higher than standard reception.

[337] See at: https://asylumineurope.org/reports/country/greece/reception-conditions/housing/conditions-reception-facilities/

of unauthorised entries if it does not go hand in hand with a substantial increased surveillance of the green land borders. Table 9 below summarises these economic effects, which are described in detail in this section.

Table 9: Enhancing border infrastructures – summary of economic costs (€ million per year)

Main component	Type of cost	ES	IT	EL	LT	PL	BG
		Additional costs					
Handling border procedures	Other indirect costs | Substitution costs (recurrent)	Additional costs only in specific part of the territory (where border crossing points are designed for border procedures)					
Border infrastructures maintenance	Direct enforcement costs | Information and monitoring (recurrent)	2.4	Not applicable	Additional costs to maintain current fences in case of instrumentalisation			5
Border fences and surveillance	Direct compliance costs | Adjustment costs (recurrent)	0	Not applicable	371.4	0	406	9.6

Source: Authors' elaboration.

One could assume that the closure of BCPs would allow Member States to fully direct human and infrastructural resources to some specific points devoted to managing border procedures in situations of instrumentalisation. This would affect: (i) the expenses devoted to handle border procedures in BCPs and (ii) the expenses devoted to the management of border infrastructures both at BCPs and along green borders. For both types of expenses, it is very unclear what possible criteria might activate this type of derogation. Therefore, we assume for both expenses that one country could decide to close BCPs to achieve possible cost-efficiency in a situation of instrumentalisation (i.e. managing the same procedures with less costs).

Handling border procedures

It could be assumed that a limited number of open points would allow for a lower mobilisation of human and material resources at national level and hence to a reduction of costs. However, evidence collected at national level in the case studies is weak on this aspect. Only in Bulgaria is it assumed that up to EUR 2.2 million per year could be saved[338]. This estimate is, however, offset by the fact that closing BCPs in that country is estimated to have 'little impact since most arrivals occur through irregular entries at the green border, i.e. weakly protected sections of the national border'[339]. This finding was also found to be true for other selected Member States under analysis, for which there is no evidence that the reduction of BCPs would bring economic gains in the handling of border procedures.

On the contrary, it seems reasonable to assume that the reduction of BCPs in a situation framed as 'instrumentalisation' would only move the strain to one or a few parts of the country (as estimated also in some case studies). In the best scenario, this would leave expenses linked to border procedures almost unaltered, while re-distributing the effort only to specific geographical parts of one EU Member State. In the worst-case scenario, expenses would increase, due to possible emerging necessities such as (i) to move asylum seekers from one point to another, (ii) to increase border infrastructure, (iii) to increase reception (or detention) duration, (iv) upgrade facilities to meet accommodation needs and specific reception needs for specific groups such as families, minors,

[338] Refer to the case study on Bulgaria. Data provided by the Bulgarian Ministry of Interior.

[339] Ibid.

women, etc. In both scenarios, the application of the derogations considered here will substantially alter the territorial and distributional impact of these expenses.

Management of border infrastructures

As previously anticipated, there is no evidence to suggest that limiting the number of BCPs would help to reduce the number of unauthorised crossings by TCNs. There is instead strong evidence that, looking at what has been done by concerned Member States in recent years[340], the enhancement of border infrastructures, including border fences, would be the preferred solution for cases labelled as 'instrumentalisation', particularly if official BCPs were to be reduced. This may generate (i) direct enforcement costs for maintaining existing border infrastructures, as well as (ii) adjustment costs if new investments are needed.

With regard to the first, Member States with border infrastructures in place would also have to face the costs incurred by the maintenance of border fences, equipment (transports, radars, video cameras, etc.) and other surveillance and military resources used at the external borders (e.g. including digital technologies to include efficiency of border controls as mentioned in the Bulgaria case study). The data available on these elements is scarce and partial for most countries:

- For Spain, and its two enclaves of Ceuta and Melilla, the Ministry of Interior announced in 2021 that it would allocate EUR 9.7 million for the maintenance of border fences over 4 years[341], which corresponds to roughly EUR 2.4 million per year. An annual cost which is expected to hold in cases of instrumentalisation.
- For Bulgaria, the cost of maintaining the Integrated System for Control and Monitoring of the Bulgarian–Turkish border and the border fence facilities was EUR 3 million and EUR 1.3 million respectively. In addition, the cost for the maintenance of the infrastructure and the equipment of the three border crossing points on the Bulgarian–Turkish border was around EUR 0.7 million. Overall, the cost to Bulgaria for managing its border infrastructures with Turkey is expected to be around EUR 5 million per year. An annual cost which is expected to hold in cases of instrumentalisation.
- In Lithuania 60 military troops have been deployed during the various states of emergency and they will remain there until at least 3 August 2023, notably to assist the State Border Guard Service (SBGS). An annual effort which is expected to hold in cases of instrumentalisation, but which is, however, not possible to quantify.
- In Greece and Poland an annual effort is expected to maintain infrastructures in case of instrumentalisation but again it is not possible to quantify it. With regard to the second cost (new investments needed), three out of the six Member States concerned have already enhanced their border infrastructures (border fences and surveillance) or have planned to do so. We used planned investments on border fences to proxy additional expenses which could be envisaged in case of instrumentalisation (see Table 10 below). The possibility to build new border fences would not apply to Spain and Lithuania since their land borders with third countries is already fully fenced, nor to Italy since it does not share a land border with the main third countries from where migrants arrive. As shown in Table 10 below, the available data allow to estimate that:
- If Greece and Poland were willing to further extend their border fences, they would pay EUR 2.86 and EUR 1.90 respectively per extra kilometre; the cost incurred to fully

[340] As widely described in the case studies as well as in relevant studies, see for example Walls and Fences in Europe (EPRS, 2022).

[341] El mantenimiento de las vallas y puestos fronterizos de Ceuta y Melilla costará 9,7 millones de euros en cuatro años (El Confidencial, 2021).

cover their borders with Turkey and Belarus would therefore be approximately EUR 371 million for Greece and EUR 406 million for Poland.

- In the case of Bulgaria, the government decided to spend about EUR 75 million for 230km of fences in 2017[342], which implies a cost of EUR 0.32 million per kilometre of border covered.

Table 10: Estimated costs of building border fences (detail)

Country (3rd country)	Approx. length of the border with 3rd country, in km	Total length of fences (including recently announced projects of extension), in km	Recently announced projects of extension, in km	Cost of the project, in € million	Cost per extra km, in € million	Length of the border without fence, in km	Estimated extra cost to fully fence the border, in € million
EL (Turkey)	200	72.5	35[343]	100	2.86	130	371.43
ES (Morocco)	21	21	Not applicable			0	0
IT	Not applicable						
BG[344] (Turkey)	260	230	Not applicable		0.32	30	9.6
LT (Belarus)	550	550	550[345]	145	0.26	0	
PL (Belarus)	400	186	186[346]	353	1.90	214	406.14

Source: Authors' elaboration

5.2.3.3. Costs to upgrade existing reception facilities to meet minimum requirements

Despite the above-mentioned necessity to build new reception facilities, the implementation of Article 3 of the proposal (together with the requirements of the rRCD) would require EU Member States to update existing reception facilities in order to ensure basic needs in material reception as well as their human dignity. We estimate that in cases framed as 'instrumentalisation' the application of the proposal could generate additional adjustment costs for EU Member States. Table 11 below summarises these economic effects, which is described in detail in this section.

342 Source: https://www.investor.bg/a/332-ikonomika-i-politika/226834-tsenata-na-ogradata-po-granitsata-naba bna-do-blizo-170-mln-lv

343 Greek prime minister renews call for EU cash for border fence (Politico, 2023).

344 According to some sources, the fence would actually be 130km-long. We took here the same figure used in Walls and Fences in Europe (EPRS, 2022). We assume that this mismatch is due to the poor quality and efficiency of the Bulgarian fence that is mainly composed of a simple barbed wire, which suffers greatly from the comparison with, for example, Poland's 5-meter high wall. Since we cannot make an accurate estimation of the cost per kilometre, we used the same estimation as for Greece.

345 Is Lithuania's 550-km border fence going to be money well spent? (Euronews, 2021).

346 Poland completes 186-kilometre border wall with Belarus after migration dispute (Euronews, 2022).

Table 11: Upgrade reception facilities - summary of economic effects (€ million)

Main component	Type of cost	ES	IT	EL	LT	PL	BG
		Additional costs					
Upgrade reception facilities and meet basic needs	Direct compliance | Adjustment costs (one-off)	3.7 – 5.4	14.8 – 21.7	11 - 16	2 – 2.9	4.7 – 6.9	18.7 – 27.5

Source: Authors' elaboration

Article 3 of the proposal allows EU Member States facing a situation of instrumentalisation to derogate Articles 16 and 17 of the Reception Conditions Directive recast in relation to applicants apprehended or found in the proximity of the border. However, EU Member States are also required to cover the applicants' basic needs, in particular food, water, clothing, adequate medical care, and temporary shelter adapted to the seasonal weather conditions. As argued above, EU Member States will additionally need to uphold the *human dignity* criterion enshrined in Article 1 CFREU, which is firmly tied to a dignified standard of living which extends beyond 'basic needs' (See *Section 5.1.5.* on Reception Conditions above).

The qualitative research on EU Member States included in the case studies provides a heterogenous picture, with relevant data gaps, on the current capacity of reception facilities which can be considered adequate to comply with Article 3. It should be noted however that in external border areas, the inadequacy of reception conditions has been well assessed[347]. All Member States with external borders are expected to face the costs derived from the application requirements of Article 3 and the rRCD to ensure basic needs. Considering the cost per asylum seeker to upgrade (as a lower bound of possible expenses) or replace (as an upper bound of possible expenses) existing facilities computed in the EPRS Study on the European Commission's New Pact on Migration and Asylum, adjustment costs are expected to be between EUR 11 and EUR 16 million in southern EU countries to a range between EUR 8 and EUR 14 million additional costs in eastern EU countries (see Table 12).

[347] See EPRS Study on the New Pact on Migration and Asylum (section 2.3.2, p. 30)

Table 12: Upgrade reception facilities costs (detail)

Country	Number of arrivals generating instrumentalisation situation [348]	% of capacity which is considered inadeqaute[18]	**Assumed number of asylum seekers in inadequate reception facilities**	Cost per asylum seeker to upgrade existing facilities – lower bound, in €[349]	Cost per asylum seeker to replace facilities – upper bound[1], in €[9]	**Increased costs – lower bound, in € million**	**Increased costs – upper bound, in € million**
EL	24.000	35%	8.400	1.317	1.932	**11.06**	**16.23**
ES	8..000	35%	1.103	1.317	1.932	**11.06**	**16.23**
IT	32.101	35%	11.235	1.317	1.932	**14.8**	**21.7**
BG	20.407	81%	16.519	1.133	1.662	**9.52**	**13.96**
LT	4.214	50%	2.107	948	1.390	**7.96**	**11.68**
PL	9.974	50%	4.987	948	1.390	**7.96**	**11.68**

Source: Authors' elaboration

5.2.3.4. Costs related to increased legal expenses due to increased number of appeals

The implementation of Article 2.c of the proposal is expected to increase the number of appeals. We estimated that in cases of instrumentalisation the application of the proposal could generate additional enforcement costs for EU Member States. Table 13 below summarises these economic effects, which are described in detail in this Section.

Table 13: Increased number of appeals - summary of economic effects (€ million)

Main component	Type of cost	ES	IT	EL	LT	PL	BG
Increased number of appeals	Direct enforcement costs | Complaint handling (recurrent)	1,68	14,7	32,1	1,79	15,38	0,06

Source: Authors' elaboration

Article 2.c – establishing that the registered asylum applications shall be examined within a maximum period of 16 weeks – includes also appeals. A twofold effect could be estimated: on one hand the non-suspensory nature may discourage some appeals; on the other hand, it is highly likely that within an extended timeframe and considering the lower quality and fairness of the envisaged emergency asylum and return procedures analysed in *Section 5.1.* above, the appeals will increase[350]. For this analysis, we considered that the latter effect will offset the former since no significant deterrence effect is expected for TCNs in particular for those with asylum claims and refugees.

[348] Latest data available from the case studies, assuming a number for instrumentalisation which equals number of arrivals / asylum seekers when state of emergency or instrumentalisation was officially declared by national authorities. For Italy we used 2022 number of arrivals detected from Tunisia.

[349] The European Commission's New Pact on Migration and Asylum. Horizontal Substitute impact assessment (EPRS, 2021). Here considered one-off.

[350] Interview with UNHCR.

Accordingly, if this applies to all six selected EU Member States concerned, it will generate an increase in the overall costs for appeals procedures. Considering that there is no evidence on the extent to which the return orders may increase, we assume a scenario of a 10 % annual increase in case of instrumentalisation compared to the current situation. Considering this increase in appeals presented, enforcement costs would rise on a recurrent basis (see Table 14) and will be of particular relevance in Poland and Greece, where the appeal rate is high[351].

Table 14: Costs from increased appeals (detail)

Country	Return orders[352]	Appeal rate[353]	Estimated number of appeals	Cost of 1 appeal for MS, in €[354]	Expected increase in orders to return (10%)	Estimated number of appeals with the Reg[355]	Cost of appeals - status quo, in € million	Cost of appeals - with the Reg, in € million	Additional costs, in € million
EL	47.612	75%	35.648	9.000	52.373	39.213	**320.83**	**352.91**	**32.08**
ES	33.207	6%	1.872	9.000	36.528	2.059	**16.85**	**18.53**	**1.68**
IT	23.207	70%	16.358	9.000	25.528	17.993	**147.2**	**161.94**	**14.7**
BG	1.880	4%	69	9.000	2.068	76	**625.01**	**687.51**	**62.50**
LT	2.920	68%	1.987	9.000	3.212	2.186	**17.88**	**19.67**	**1.79**
PL	17.523	97%	17.084	9.000	19.275	18.793	**153.76**	**169.14**	**15.38**

Source: Authors' elaboration

5.2.3.5. Benefits from increased support from the EU

The implementation of Article 5 of the proposal is expected to increase the possibility for an EU Member State to obtain operational and financial support from other EU Member States and the EU in cases of instrumentalisation. From an economic standpoint, these could allow EU Member States to save some costs in the management of the emergency asylum and return procedures. Table 15 below summarises these economic effects, which is described in detail in this section. Assuming that all the EU support will be fully used by Member States, it could help to cover the quantifiable costs envisaged above only in three countries: Spain, Italy and Lithuania. However, previous sections suggest that it is challenging to ascertain (i) how this would happen while upholding the lawfulness of their actions, and (ii) to what extent these costs would be reduced in practice. For Greece, Poland and Bulgaria these benefits will not be sufficient to outweigh the quantifiable costs estimated in the previous sections of the economic analysis.

[351] For this assessment, we assume that the appeal rate will equal the average of the last 5 years in case of instrumentalisation, while the return orders will increase as an effect of the application of Article 4 and, partially, of the solidarity measures of Article 5.

[352] Eurostat, Third-country nationals ordered to leave – annual data (rounded) (online data code: MIGR_EIORD).

[353] As for the EPRS Study on the Return Directive, Eurostat asylum statistics were used. In particular, the appeal rate is estimated as the number of final decisions as a share of rejected first instance decisions [online data code: MIGR_ASYDCFSTA]. The APR provides that asylum and return decisions must be issued in the same act or, if in separate acts, at the same time and together. Accordingly, return orders is a good proxy in this case in relation to appeals.

[354] The Cost of Non Europe in Asylum Policy (EPRS, 2018).

[355] A constant appeal rate is assumed.

Table 15: EU financial and operational support - summary of economic effects (€ million)

Main component	Type of benefit	ES	IT	EL	LT	PL	BG
EU operational and financial support	Cost savings (recurrent)	163	269.6	305.6	58.4	81.1	37

Source: Authors' elaboration

As Article 5 has a very generic and legally uncertain phrasing, and that relocation of asylum seekers is beyond the scope of the proposal, it is challenging to assess how the national support could be translated into practice. This is mostly due to the poor level of monitoring and transparency of the kind of EU funds which could be used to activate the support envisaged in Article 5, notably with regard to their compliance with fundamental rights when used at national and local levels – as outlined by several studies[356].

The EU support is instead quantified following the funding allocated to Member States as a proxy for what the financial and operational support in case of instrumentalisation could be. The latest Multiannual Financial Framework (MFF) allocates more resources to migration support and border procedures compared to the precedent period (2014-2020): (i) the Asylum, Migration and Integration Fund (AMIF) has more than tripled, from EUR 3.1 billion to EUR 9.9 billion in 2021-2027 and (ii) the Border Management and Visa Instrument (BMVI) was created, accounting for EUR 6.7 billion and offsetting the decreased resources given to the International Security Fund (ISF), from EUR 4.2 billion to EUR 1.9 billion. Moreover, the European Union Asylum Agency (EUAA) supports some of the Member States concerned, with a total of EUR 47 million for Greece, Spain, Italy, Bulgaria and Lithuania in 2023 (the last two were allocated only EUR 0.5 and EUR 0.8 million).

Table 16 provides a summary of the direct financial support planned in the 2021-2027 MFF under the most relevant funds and instruments, as well as of the indirect support provided as operational support by the EUAA. For each source of support, we consider that the annual average for each Member States could constitute the maximum level of financial and operational support leading to economic gains (cost savings) for national authorities. However, it should be noted that given a co-funding percentage in each fund, costs at the national level would not be fully covered with these resources. This seems coherent with the financial assistance the EU provided to Lithuania and Poland in 2021-2022 in the situation of instrumentalisation, when the two countries were granted EUR 55 million and EUR 67 million respectively.

Overall, considering all the sources together, the EU support could range from EUR 58 million (Lithuania) to EUR 306 million (Greece). The support which could be given by Frontex and Europol would be additional to these figures but cannot be quantified at this stage. Further details on each source are provided in the remainder of this section.

[356] Special report No 24/2019: Asylum, relocation and return of migrants: Time to step up action to address disparities between objectives and results (European Court of Auditors, 2019) | Special Report n° 15/2014: The External Borders Fund has fostered financial solidarity but requires better measurement of results and needs to provide further EU added value (European Court of Auditors, 2014) | How the European Commission ensures respect for fundamental rights in EU-funded migration management facilities in Greece (European Ombudsman, 2022) | Follow the Money – a critical analysis of the implementation of the EU Asylum, Migration & Integration Fund (AMIF) (European Council on Refugees and Exiles, 2018).

Table 16: Distribution of relevant EU support (€ million)

Source of support	Time period	EL	ES	IT	BG	LT	PL
Border Management and Visa Instrument (BMVI)	2021-2027 MFF	1,386.61	389.16	612.35	159.49	323.98	198.09
	Annual average	198.09	55.59	87.48	22.78	46.28	28.30
Asylum, Migration and Integration Fund (AMIF)	2021-2027 MFF	535.75	624.89	981.23	37.47	40.04	283.76
	Annual average	76.54	89.27	140.18	5.35	5.72	40.39
European Union Asylum Agency (EUAA) operational support	2023	22.78	4.13	18.82	0.46	0.82	0
Frontex operational support	2023	Frontex's financial operational reserve amounts to €9 million in 2023. The direct support provided to individual Member States cannot be quantified.					
Europol operational support	2023	The direct support provided to individual Member States cannot be quantified.					
TOTAL		**305.6**	**163**	**269.6**	**37**	**58.4**	**81.1**

Source: Authors' elaboration

The Border Management and Visa Instrument (BMVI) supports two specific objectives: ensuring a strong and effective European integrated border management at the Union's external borders and harmonising the visa policies. More specifically, the BMVI can be used to invest in infrastructure and equipment, systems and services, training, exchange of experts, deployment of immigration liaison officers, etc. In a situation labelled as 'instrumentalisation', the support provided by the EU under this instrument could therefore lower some of the costs borne by Member States for the management of the emergency asylum and return procedures. Accordingly, it could reduce some of the reception costs.

As an example, the Bulgarian government and the Commission launched in early 2023 a six-month Pilot Project to achieve 'more efficient border management' and 'more effective application of accelerated asylum and return procedures'. This is mostly done by increasing the digitalisation of procedures: 'Bulgaria is exploring the possibility of issuing a negative decision on international protection jointly with a return decision. The authorities are working on the digitalisation of the asylum and return systems, with the support of the EU Agencies and Commission services'[357].The Pilot Project also includes the deployment of standing corps, technical equipment, as well as return counsellors and interpreters The project received financial support of EUR 45 from the European Commission and operational support from the EUAA, Europol, and Frontex. The EU funding for investments carried out under the BMVI should not exceed 75 %, unless it falls under some exceptions which allow to increase it to 90 % or 100 %. In particular, the Union funding can be raised

[357] Migration management: Update on progress made on the Pilot Projects for asylum and return procedures and new financial (European Commission, 2023).

to 90 % for projects involving Frontex (enhanced cooperation or purchase of operating equipment) and to 100 % for emergency assistance[358].

The Asylum, Migration and Integration Fund (AMIF) aims at boosting national capacities and improving procedures for migration management, as well as to enhancing solidarity and responsibility sharing between Member States, in particular through emergency assistance and the relocation mechanism. Hence it could be used by States to reduce costs related to asylum procedures and actions aiming at countering irregular migration, especially for the countries most affected by migration and asylum challenges (in particular Spain and Greece) as it enhances responsibility sharing between the Member States. Like the BMVI, the AMIF can reduce the reception costs borne by frontline countries by shortening the length of migrants' stay through relocation in other EU countries. However, the Regulation does not envisage relocation as a form of solidarity between Member States under Article 5, meaning that a situation of instrumentalisation would not be a sufficient argument for using all the available funding.

On a different note, it is important to underline that, as a general rule, projects carried out under the AMIF can receive EU funding that should not exceed 75 %, which would force national authorities to bear at least 25% of the costs. However, in some specific situations the contribution from the Union budget may be increased to 90 % or even 100 %. Actions to develop and implement effective alternatives to detention and measures targeting vulnerable persons and applicants for international protection with special reception or procedural needs can receive EU funding of 90 %.

On the other hand, the emergency assistance can receive EU funding of up to 100 % and such assistance could be mobilised notably in the case of 'an exceptional migratory situation characterised by a large or disproportionate influx of third-country nationals into one or more Member States which places significant and urgent demands on those Member States' reception and detention facilities, and on their asylum and migration management systems and procedures' or 'an event of a mass influx of displaced persons'. This suggests that a situation of instrumentalisation would not be sufficient for a country to be granted EU emergency financial assistance as the relevant criteria would be the number of TCNs concerned[359].

In addition to these funds and instruments, the Frontex Agency also provides operational support to Member States. For example, under the joint operation 'Terra 2022', Frontex deployed 96 officers with 24 patrol vehicles and surveillance equipment at Bulgaria's external border with Turkey, Serbia and North Macedonia. Moreover, in March 2023, Frontex deployed 518 standing corps officers and staff, 11 boats and 30 patrol cars at the Greek external borders under the joint operation Poseidon[360]. In a broader perspective, Frontex helped in returning almost 25 000 people, rescued 53 000 people at sea and arrested almost 1 900 people smugglers in 2022[361]. It is relevant to note that Frontex's budget has been constantly increasing since its creation in 2004; it increased from EUR 693 million in 2022 to EUR 845 million in 2023, registering an increase of 22 %. The budget allocated to return activities is EUR 83 million (EUR 68 million in 2022), i.e. almost 10 % of the overall budget for 2023. In addition, Frontex's financial operational reserve – which can be used 'to cover needs arising until

358 REGULATION (EU) 2021/1148 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 7 July 2021 establishing, as part of the Integrated Border Management Fund, the Instrument for Financial Support for Border Management and Visa Policy. Refer to the case study on Bulgaria for more details.

359 Regulation (EU) 2021/1147 of the European Parliament and of the Council of 7 July 2021 establishing the Asylum, Migration and Integration Fund.

360 Case studies (Annex III).

361 2022 in Brief (Frontex, 2023).

the end of the year' [362] – amounts to around EUR 9 million in 2023 and we can assume that it could be used in case of instrumentalisation [363].

However, the operational support provided by EU agencies, including Frontex and EUAA, is not mandatory under the proposal; EU Member States *might* not request it in practice. Further, the financial support provided depends on the nature of every project or investment requested by Member States. Moreover, Frontex and EUAA operations are always conducted in cooperation with the competent authorities of Member States, meaning that they would also bear a cost.

5.3. Territorial impacts

This section provides an assessment of the territorial impacts expected from the application of the instrumentalisation proposal by the EU Member States concerned in the IA. First, it examines the impact of the proposal on the territorial integrity of EU Member States, and then assesses the various effects and consequences to be expected from the implementation of the proposal in relation to the diverse geography of the EU's external borders.

5.3.1. Territorial integrity

One of the fundamental objectives of the proposal is the protection of the territorial integrity of EU Member States, considered as one of the essential State functions that the instrumentalisation of migration by third countries can put at risk. [364] Nevertheless, in none of the instances that could have been characterised or declared as 'instrumentalisation of migration' in the case studies covered in this IA, was the primary goal of state actors using migration as a political tool the annexation of any part of an EU Member State's territory[365].

We have already discussed the ambiguity of the definition of instrumentalisation included in the proposal and the difficulty of identifying with certainty when a specific action by a third country aimed at facilitating or inciting the unauthorised movement of TCNs to the external borders can concretely undermine vital State activities. The risks of resorting to the 'weaponisation of migration' metaphor have been particularly discussed in *Section 2.2* where we have also demonstrated how the success of any strategy aimed at using migration as a foreign policy tool is largely influenced by the increasing political salience of migration and asylum policies in the EU's external relations[366]. To assess the territorial impacts of the proposal, it is, however, essential to start by delving specifically into the meaning of the reference to 'territorial integrity' included in the Commission's proposed definition of instrumentalisation.

The territorial impact of measures aimed at controlling unauthorised cross-border human movements may initially appear self-evident. Unauthorised migration seems to directly challenge the State's authority to regulate and control its borders, which is commonly considered as a fundamental dimension of the principle of territorial integrity. However, upon closer examination, the apparent link between measures aimed at the management of human mobility and the preservation of territorial integrity does not hold up.

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362 Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard.

363 Budget 2023 (Frontex, 2023). Amended budget for 2022, the initial budget was €754 million.

364 See Instrumentalisation Proposal, p. 8 and 10 and Recitals 1 and 10.

365 B. Garces (2022), Migration as a 'Threat', IEMed Mediterranean Yearbook, pp. 345-347.

366 But also refer to *Sections 4.2.2 and 4.3.1* of this Substitute IA for a comparison between the definition of the concept of 'instrumentalisation' and the definitions of 'crisis' and 'force majeure' included in other Commission proposals.

The principle of territorial integrity is indeed codified in international law as a corollary of the prohibition on the use of force[367]. This implies that the territorial integrity of a State may only be infringed upon directly by the armed forces of another state or indirectly by organising or encouraging the actions of other hostile actors, such as irregular forces or armed bands, to incite incursion or insurrection within the territory of another State. From this perspective, it is questionable whether migrations by themselves can pose a 'threat to territorial integrity' and, consequently, to the political independence of States.

Even when TCNs may be exploited by other State actors for political purposes or to further their interests on the international stage, it is important to note that they cannot be regarded as hostile actors. Migrations, as recognised in two landmark CJEU judgments repeatedly referenced in this Substitute IA[368], do not inherently carry any harmful or destabilising potential for the destination States[369]. Therefore, the reference to the need to protect the territorial integrity of EU Member States included in the proposal seems largely unjustified from an international law perspective. It can be considered as legally misleading, as there is no reasonable expectation of any significant impact on the protection of territorial integrity resulting from the instrumentalisation proposal.

5.3.2. Territorially related geopolitical implications

Another problematic aspect of the instrumentalisation proposal, from the perspective of its territorial impact, is that it seems to be conceived with a one-size-fits-all approach where the 'Commission initiative responds to an uneven problem but acts evenly on the territories of the EU[370]' by providing a common framework which could be activated by all EU Member States. The disregard for regional and territorial specificities is evident primarily at a purely geographic level and, secondarily, in the broader geopolitical implications of the proposal.

As highlighted in the academic literature[371], the physical characteristics of a border have far-reaching implications for border controls. However, the proposal does not appear to consider the varying nature of the EU's external borders. In particular, the concept of 'instrumentalisation' to which the proposal refers seems to be conceived exclusively with a scenario in mind where a third country actively encourages or facilitates the movement of TCNs to the external land borders. It is doubtful whether it would be suitable for managing similar situations that might occur at maritime borders.

While on land, TCNs crossing borders are (practically) always under the jurisdiction and authority of a single State, at sea the situation is significantly more complex, and TCNs often find themselves in a situation of (legal) limbo[372]. The inter-state nature of maritime space brings about increased contention and uncertainty concerning the respective rights and responsibilities of States when dealing with seaborne human mobility. In particular, in the case of unauthorised cross-border movements via the sea, it is more challenging to definitively establish the role of specific State actors in encouraging or facilitating the movement of people from outside the EU to its territory.

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367 S. Blay (2012), "Territorial integrity and political independence". In The Max Planck Encyclopedia of Public International Law. Volume IX. Oxford: Oxford University Press, pp. 859-870.

368 CJEU, C-72/22 PPU, 30 June 2022; and C-808/18, 17 December 2020.

369 See also: K. Koser (2011), When is Migration a Security Issue?, Brooking Commentary. https://www.brookings.edu/articles/when-is-migration-a-security-issue/

370 See Better Regulation Toolbox – Tool #34 (Territorial Impacts)

371 D. Lutterbeck (2021), 'Blue vs Green: The Challenges of Maritime Migration Controls.' *Journal of Borderlands Studies* 36(5), pp. 727-743.

372 D. Lutterbeck (2021), 'Blue vs Green: The Challenges of Maritime Migration Controls.'

The geography of the EU border also impacts on the effectiveness of the measures proposed by the Commission. Some of these measures, such as the intensification of surveillance[373] and the limitation of the number of open BCPs[374] and registration points[375], have less relevance in the geographical context represented by maritime borders.

In such a scenario, it is indeed possible to anticipate an escalation of surveillance activities, especially if the central role already played by the navies is considered[376]. Nevertheless, it is crucial not to overlook the intricate relationship between border enforcement and human security inherent in border surveillance activities carried out in the maritime domain[377]. In this domain, it is more challenging for States to fence themselves off from their legal responsibilities, as can be done in the context of land borders by intensifying border fortification[378]. Surveillance of maritime borders inherently involves the exercise of jurisdiction and, as a result, the assumption of legal obligations, including the responsibility for search and rescue operations concerning TCNs intercepted or rescued at sea[379].

Furthermore, the proposal allows Member States to limit the number of open BCPs on the assumption that TCNs can independently reach the open crossing points. A similar situation is clearly not conceivable along maritime borders. When TCNs are intercepted while attempting to cross the maritime border, it often triggers humanitarian obligations that necessitate their rescue and subsequent disembarkation at predetermined locations. Unless they successfully evade surveillance and reach the shores undetected, the selection of the disembarkation point is always determined by the authorities of the coastal State responsible for coordinating maritime surveillance or rescue operations.

As suggested by a growing body of scholarly literature[380], State borders, in their law enforcement function, cannot be effectively controlled through unilateral measures alone. Successfully preventing unauthorised cross-border movements necessitates collaboration on both sides of the border. As Longo has aptly put it, to be truly effective 21st century border control strategies should follow a cooperative approach where 're-bordering' largely means 'co-bordering', entailing joint or shared measures among neighbouring countries[381]. In light of this, it is important to analyse the geopolitical implications of the instrumentalisation proposal, assessing how this proposal could potentially affect international cooperation on migration control (Refer to *Section 5.4*. of this Impact Assessment). Surprisingly, however, the Commission's proposal does not appear to adequately consider the geopolitical implications of border control strategies, and this is in spite of the fact that, as demonstrated in *Section 2.2*, the proposal has a clear foreign affairs rationale.

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373 Article 1(3), SBC Proposal.

374 Article 1(2), SBC proposal.

375 Article 2, Instrumentalisation proposal.

376 R. Jones, Reece, and C. Johnson (2016), 'Border Militarisation and the re-Articulation of Sovereignty' Transactions of the Institute of British Geographers 41(2), pp. 187–200.

377 D. Lutterbeck (2021), 'Blue vs Green: The Challenges of Maritime Migration Controls.'

378 M. Paz (2017), 'The Law of Walls.' *European Journal of International Law*, 28(2), pp. 601-624.

379 See, among many, E. Papastavridis (2017) 'Rescuing migrants at sea and the law of international responsibility', in *Human Rights and the Dark Side of Globalisation: Transnational Law Enforcement and Migration Control*, London: Routledge, pp. 161-190.

380 See P. Andreas (2003), 'Redrawing the Line. Borders and Security in the Twenty-first Century' International Security' 28(2), pp. 78-111; R. Zaiotti (2012), *Cultures of Border Control. Schengen & the Evolution of European Frontiers*. Chicago: University of Chicago Press; G. Popescu (2011) *Bordering and ordering the twenty-first century: Understanding borders*. London: Rowman & Littlefield Publishers; J. Ackleson (2012), 'The Emerging Politics of Border Management: Policy and Research Considerations', in *The Ashgate research companion to border studies*. London: Ashgate Publishing, pp. 245-261; M. Longo (2016), *The politics of borders: Sovereignty, security, and the citizen after 9/11*. Cambridge: Cambridge University Press.

381 M. Longo (2016) The politics of borders, p. 188.

As demonstrated by the case studies attached to this Substitute IA, the situation at the EU's external borders is so geopolitically diverse that even the definition of 'instrumentalisation' would hardly be commonly acknowledged.

Some EU Member States, for instance, share a lengthy stretch of land border with Belarus. Although the number of unauthorised entries in this section of the border has never been particularly high, complicated diplomatic relations with Belarus have led to attempts to control cross-border movements through unilateral re-bordering measures. Conversely, countries like Greece or Spain traditionally experience a higher number of unauthorised arrivals and have, as a consequence, developed complex forms of cooperation with neighbouring countries over the years. Certainly, cooperative border management has occasionally been marked by acute political crises, such as those occurring along the land border segments that Greece and Spain share with Turkey and Morocco. However, as underlined in *Section 5.4.* below as well, these declared crises have been resolved mainly through international cooperation rather than unilateral re-bordering actions, which have remained limited in scope and duration.

Hence, it is more probable for a situation to be categorised as of 'instrumentalisation of migration' when cooperative border management becomes more difficult or even impossible. Unilateral re-bordering measures, in fact, carry the risk of undermining long-term border control strategies, thereby complicating cooperation with neighbouring countries[382]. The Member States that rely most heavily on cooperation with neighbouring countries for the management and containment of unauthorised cross-border movements are precisely those most exposed to unauthorised arrivals of TCNs. For countries like Spain, Greece, or Italy, implementing the measures envisaged in the instrumentalisation proposal would not only pose greater challenges due to their unique border geography, it would also prove profoundly counterproductive in terms of their diplomatic relations with neighbouring third States.

The territorial impact of the proposal could therefore potentially create a fundamental paradox. EU Member States located along the eastern external borders, traditionally less exposed to unauthorised entries by TCNs, might relatively easily invoke the exceptions to ordinary EU rules outlined in the proposal and apply fewer demanding standards. Conversely, such an option would be comparatively less accessible to countries located along the EU's southern external borders. The application of differentiated and potentially divergent asylum and return standards across different EU Member States would widen the differences between Member States based on their location and the nature of their borders producing a situation of selective policy disharmonisation within the EU.

5.3.3. Territorial unbalances at EU external borders

Many of the measures included in the proposal have the potential to further exacerbate the territorial imbalances already defining the geography of the EU's external borders. In particular, the case studies show that the external land borders of a majority of selected EU Member States are in fact to a very large degree all fortified[383], and that these EU Member States already have a very

[382] In 2020, Greece was unable to repatriate any of the TCNs who entered its territory through the Evros region due to Turkey's lack of cooperation. In the more recent 2022 crisis, Spain had to negotiate a solution with Morocco to repatriate at least some of the TCNs who had managed to reach Melilla. The case of Italy is particularly illustrative, where the imperative to enhance cooperation on migration control with Tunisia has compelled the government to exercise great caution in its official statements. Even in the face of a significant increase in sea arrivals in the first months of 2023, the Italian Government has refrained from making any suggestion about the potential instrumentalisation of migration by the Tunisian government. See the case studies annexed to this Substitute IA.

[383] A fortified border is a section of the political border that has been reinforced, in whole or in large part, to serve as a physical obstacle. In the EU, the vast majority of existing fortified borders have been established primarily to regulate unauthorised cross-border movements, rather than for military purposes. For a typology see R. Hassner and J.

limited or insufficient number of operating BCPs, with some of them having only one or two places designated for 'lawful entry' across their external borders.

The enhancement of border infrastructures would be the preferred solution for cases labelled as instrumentalisation of migration, with EU Member States incentivised to harden their border by expanding existing fences and barriers or upgrading them to a proper wall[384]. As a consequence, TCNs will face more barriers to mobility in certain sections of the EU external borders and, as demonstrated by the scientific literature on border fences and walls[385], this is likely to have the effect of redirecting human movements toward less guarded border areas, exposing TCNs to greater risks and unsafety.

The need to prevent the number of unauthorised entries from shifting to other border would likely create an incentive for the fortification of less-guarded border sections. The result could be a race toward border hardening, potentially transforming the entire land border of the EU into a walled border. This outcome not only contradicts the Commission's official stance on the use of walls and fences as a 'migration control tool'[386]. but could also have potential consequences in the medium to long term for Member States that, due to the nature of their borders, cannot effectively fence themselves off from unauthorised migration[387].

Another effect of the instrumentalisation proposal will be to encourage and incentivise EU Member States with external land borders to strategically limit the number of open BCPs to the absolute minimum. In doing so, this proposal effectively legitimises a practice that Member States have often employed in previous situations characterised as emergencies or allegedly involving the 'instrumentalisation of migration'[388].

This not only risks creating border control bottlenecks in specific locations due to an increased workload, significantly limiting effective, genuine and fast access to asylum[389], but will also incentivise the establishment of transit zones or border containment areas where TCNs will be subjected to the special asylum and return procedures outlined in the proposal and kept in detention-like condition for up to 20 weeks, with an additional 18 months in case of rejection of the

Wittenberg (2015), 'Barriers to Entry: Who Builds Fortified Boundaries and Why?' *International Security* 40(1), pp. 157-190.

384 Fences and barriers are more temporary as they can be erected quickly, they do not completely block the vision of the other side and are less expensive. Walls are more final, eliminate the line of sight across the border, and are more expensive. See S. Rosière and R. Jones (2012), 'Teichopolitics: Re-considering Globalisation Through the Role of Walls and Fences.' *Geopolitics* 17(1), pp. 217-234. While long stretches of the EU land border are already fenced, the number of kilometres that are properly walled is still limited. For more details, refer to the case studies in Annex III.

385 D.B. Carter and P. Poast (2017), 'Why do states build walls? Political economy, security, and border stability.' *Journal of conflict resolution,* 61(2), pp. 239-270; R. Jones (2016), 'Borders and Walls: Do Barriers Deter Unauthorized Migration?', https://www.migrationpolicy.org/print/15717

386 The Commission has repeatedly stated that, while not explicitly prohibited by EU law, physical barriers do not appear to be an effective and proportionate means of border control in its view. See European Parliament (2022), Parliamentary question, E-005263/2021(ASW). Answer given by Ms Johansson on behalf of the European Commission. However, this official position stands in contradiction with the existence of indirect EU funding to border surveillance infrastructures, including border fencing, in EU Member States such as for instance Bulgaria, Lithuania, Greece and Spain. Refer to the case studies covering these Member States.

387 The likelihood of such a scenario is demonstrated by the statements of the Lithuanian Interior Minister, who in December 2022 welcomed the shifting of migration pressure towards the southern borders of the EU as a success of the 'new border protection standards' adopted on the eastern land border. See Minister A. Bilotaitė (2022), "Lithuania has chosen effective solutions for migration management", available at: https://vrm.lrv.lt/lt/naujienos/ministre-a-bilotaite-migracijos-valdymui-lietuva-pasirinko-veiksmingus-sprendimus

388 The case studies reveal that among the EU Member States holding an external land border, only Bulgaria has never considered closing its BCPs with Turkey in the past.

389 See *Section 5.1.1.*

asylum application[390]. Similar conditions may also be replicated at the main points of disembarkation along the southern maritime borders, in facilities already managed under severe overcrowding and inadequate reception conditions[391].

The case studies also show how the selected EU Member States have handled critical situations or declared emergencies by subjecting portions of their territory to special and differentiated legal regimes. In such situations, the introduction of divergent asylum and return standards, entailing a significant limitation of access to asylum and the widespread utilisation of de facto or *de jure* detention measures for TCNs intercepted at the border, has coincided with the designation of selected border areas as militarised no-stay zones with restricted access. The combined effect of the measures envisaged by the instrumentalisation proposal (border hardening, reduction of the number of open BCPs, and confinement of TCNs in situation of instrumentalisation near border areas) would further incentivise these EU Member State practices, multiplying the militarised 'anomalous zones' of migration and asylum management and detention along the EU borders[392].

In addition to the impact this would have on the fundamental rights of TCNs[393], there is a high risk that based on the specific circumstances that the Member States are experiencing, different border management, asylum and return regimes can be put in place at the same time in different portions of the border. This would unduly alter the uniform and consistent application of EU law within Member States' territory, generating an uneven distribution of outcomes and impacts also within Member States. It seems reasonable to assume that the measures implemented in a situation framed as 'instrumentalisation of migration' would only lead to *enhanced localisation processes* by shifting the administrative strain and workload to one or a few parts of the country, increasing the possibility that the impact related to the implementation of border hardening measures and of the exceptional asylum and return procedures will be borne only by one or more specific border regions and their local residents.

5.4 EU external relations

The main problem as identified and defined by the Commission – i.e. instrumentalisation – fundamentally lies in the area of foreign affairs as it involves the actions by a non-EU state in relation to individual EU Member States or the EU as a whole. While the Commission sees the instrumentalisation proposal as an instrument exclusively dealing with questions of asylum and returns, *Section 3* has shown that an *implicit* overriding objective of the proposal is to indirectly influence the behaviour of relevant third states and TCNs themselves. However, the instrumentalisation proposal can be expected to have very limited or no impacts on the behaviour of the responsible third countries' authorities.

According to the Commission, the derogations contained in the instrumentalisation proposal would be activated along with other diplomatic tools. In the Joint Communication of the Commission and

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390 As highlighted in *Section 4.1.4*, the Proposal lacks clarity regarding the maximum detention periods in the case of emergency return management procedures. However, it is likely that in situations characterised as instrumentalisation of migration the implementation of returns will be extremely challenging due to the lack of cooperation from transit countries. As highlighted in *Section 5.2.* dealing with the economic impacts. This could potentially result in the Member States involved extending the detention periods for TCNs awaiting return.

391 See the case studies on Greece and Italy.

392 According to Neuman, 'anomalous zones' are geographical areas "in which certain legal rules, otherwise considered to embody fundamental principles of the broader legal system, are temporarily suspended locally"'. G.L. Neuman (1996), 'Anomalous Zones.' *Stanford Law Review,* 48(5): p. 1201.

393 *See Section 5.1.*

the High Representative of the Union for Foreign Affairs and Security Policy of November 2021[394], on top of the Extraordinary Measures to the Benefit of Latvia, Lithuania and Poland proposed under Article 78(3) TFEU, the Commission included sanctions on 'individual and entities organising or contributing to activities that facilitate illegal crossing', the suspension of the Visa Facilitation Agreement with Belarus, diplomatic efforts with the countries of origin and transit of the TCNs, efforts against disinformation and engagement on social media with information and awareness-raising campaigns aimed at dissuading TCNs from travelling to Europe, humanitarian support in Belarus and return flights from Belarus.

In the proposal itself, there is no specific measure that would have direct impacts on the conduct of the third countries engaging in the 'instrumentalisation of migrants'. Aside from the war-like language (e.g. 'hybrid threats', 'the EU is under attack'), the Commission only mentions that the extension of the border procedure to all applicants aims at '[limiting] 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'[395]. The limitations on the access to EU territory for the TCNs affected and the application of border procedures to all applicants are used to send a message to the relevant third state. As interviewees and the stakeholders' workshop have underlined, however, it is unclear how the adoption of this legal instrument would stop the actions of third countries using migration for political purposes[396]. In the absence of such impact, the instrumentalisation proposal would not be addressing the problem identified by the Commission.

While the concrete derogations show limited direct impacts on the actions of third countries, key EU stakeholders have underlined that invoking the notion of 'instrumentalisation' could have significant negative repercussions on the diplomatic relations between the EU and the third country associated with such actions[397]. By invoking the notion of 'instrumentalisation', in fact, the concerned Member State and/or the EU would be accusing the country of a hostile act or an act of aggression, which would qualify as a *casus belli,* in international law. In the case of Belarus, the use of such language was allegedly justified on the blatant nature of the national authorities and the country's already-compromised relations with the EU. However, it is expected that Member States would be reluctant to expressly use the term 'instrumentalisation of migrants' in relation to third countries with which they share strong bilateral diplomatic relations and common interests beyond 'migration management'. This has been confirmed by the case studies covering Italy or Spain, where a foreign affairs approach and an emphasis on the need for constructive collaboration with countries like Tunisia or Morocco has prevailed[398]. This also shows the above-mentioned point regarding the possible double standards in assessing whether a given situation amounts to 'instrumentalisation of migrants' or not.

Further negative impacts of the proposal concern the international standing and credibility of the EU and its Member States. Several stakeholders and interviewees have underlined the inherent incoherence between the EU's criticism of third countries' using 'migration' for political purposes, and the EU and national migration policies, as well as the dominant discourse surrounding migration and asylum[399]. Some national and EU policymakers have referred to 'migration' as an

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394 European Commission and High Representative of the Union for Foreign Affairs and Security Policy, Joint Communication, Responding to state-sponsored instrumentalisation of migrants at the EU external border. Strasbourg, 23.11.2021. JOIN(2021) 32 final . https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020JC0004

395 Instrumentalisation Proposal, p. 5.

396 Interview with ECRE; Interview with an academic.

397 Interview with EEAS representative.

398 Annex III, the case study on Italy, Section 6.2. and the case study on Spain, Section 5.2.

399 Stakeholder workshop, 12 June 2023; Interview with ECRE; Interview with IOM representative.

existential threat to public order, national security and territorial integrity without any evidence substantiating such claims. These claims, however, have permeated the policy domain with the increasing curtailing of TCNs and asylum seekers' rights at the external borders, which is well exemplified by the instrumentalisation proposal.

The increased focus on strengthening the external borders and migration management at the expense of asylum seekers' rights can be perceived as a signal that the EU is backsliding in the sphere of human rights[400]. The EU has significant influence internationally and such a backsliding in the protection space can have a ripple or chilling effects around other world regions[401]. This is happening at the same time as the EU is demanding that other countries in its periphery receive and contain asylum seekers and is pushing for more cooperation on returns and readmission without effectively addressing some of the factors that cause these movements in the first instance, or the role of its own policies in co-creating irregularity (See *Section 2.2.7.* of this study above)[402].

This intrinsic incoherence between the proposal and fundamental rights and the rule of law can thus further harm the EU's credibility and global influence internationally, with the EU falling in what has been called a 'hypocrisy trap'.[403] This same incoherency undermines the EU's role and commitment to faithfully implementing the United Nations Global Compact on Migration (GCM) and the Global Compact on Refugees (GCR), and the GCR call for responsibility-sharing and not for responsibility-shifting[404]. In accordance with Article 21 TFEU, the Union's action in the international scene shall be guided by 'the rule of law, the universality and indivisibility of human rights and fundamental freedoms'[405].

That notwithstanding, the proposal's fundamental rights' impacts can be expected to negatively impact the consistency between EU internal and external relations regarding human rights protection as required by the third paragraph of this Treaty provision[406]. Furthermore, there are similar inconsistencies between the envisaged derogations in the instrumentalisation proposal and the disproportioned expectations from the EU on countries like Bulgaria to accede to the Schengen area. The case study on Bulgaria concludes that border procedures and exceptions such as those envisaged in the proposal raise the risks of further increasing current human rights' violations at its external borders and can be expected to negatively affect bilateral relations with Turkey[407].

Based on the above analysis, it is possible to conclude that the instrumentalisation proposal cannot be expected to have significant direct geopolitical impacts on the actions of the third country accused of 'instrumentalising migrants'. The main expected consequence of the stricter border, asylum and return measures in the instrumentalisation proposal is a severe infringement of the

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400 Interview with IOM representative.

401 Interview with UNHCR.

402 Ibid.

403 According to Rasche "Implementing the Instrumentalisation Regulation would increase the risk of the EU and its member states falling into a "hypocrisy trap" – a situation in which its maltreatment of migrants can easily be exploited by states that accuse the EU of being hypocritical about championing of human rights while failing to adhere to them on its own territory". L. Rasche (2022), *The Instrumentalisation of Migration: How should the EU respond?*, Hertie School and Jacques Delors Centre, page 7.

404 Interview with UNHCR. Refer to S. Carrera, L. Vosyliute, L. Brumat and N.F. Tan (2021), *Implementing the united nations global compact on refugees?: Global asylum governance and the role of the European Union*, Policy Briefs, 2021/26, Migration Policy Centre, EUI, Florence.

405 Article 21.2 TFEU emphasis that 'The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to: (a) safeguard its values…; (b) consolidate and support democracy, the rule of law, human rights and the principles of international law'.

406 Article 21.3 TFEU states that 'The Union shall ensure consistency between the different areas of its external action and between these and its other policies.'

407 The case study on Bulgaria, Sections 4.3.4. and 4.3.8. in Annex.

fundamental rights of TCNs at the EU external borders and not a change of course in the third state's actions. On the other hand, invoking the notion of 'instrumentalisation' can be expected to have significant negative repercussions, and in some cases even escalate diplomatic tensions, in the external relations between relevant EU Member States, the EU and concerned third states.

Table 17: Overview of the impacts of the instrumentalisation proposal

Proposal **Provisions**	**Item**	**Expected Consequences**	**Fundamental Rights and Social Impacts** [408]	**Economic and Territorial Impacts**
Articles 2, 3 and 6	**Emergency migration and asylum procedures**	Increase use of border procedures allowing for extending registration deadline – *de facto/de jure* detention, and prioritising registration for applications 'likely to be well-founded' or by 'minors and their families' Expedited assessment on admissibility and merits for all nationalities irrespective of positive recognition rate across the EU – unfair asylum procedures Substandard and non-suspensory appeals – not qualifying as effective remedy Unfeasibility of foreseen expulsions due to legal, practical / technical reasons related to identification and third country of origin non-cooperation	Negative impacts/limitations on the right to asylum****;** the right of liberty and security (detention)******; violation of the principle of *non-refoulement****;** rights of the child, unaccompanied minors, women and families; and lack of effective remedies****** Uncertain positive impact of promoting minimal procedural guarantees – right to information – envisaged in Article 6, due to high probability of non-accessibility in practice, unclear positive consequences for individuals, and not qualifying as due process.	Costs of increased *de facto or de jure* detention Reception costs to ensure '*basic needs and in full respect of human dignity*' (See Article 3 of the proposal) Costs due to low quality / unfairness of asylum assessment / procedure and higher number of appeals (including right to legal assistance and representation), even if non-suspensory in nature (deterrence effect to appeal no expected for people with international protection claims), including *high costs* due to increase in number of cases before the Strasbourg or Luxembourg Courts

[408] Some fundamental rights included in this Table are absolute in nature and accept no derogation by EU Member States or EU law. They are identified with a *****. Other rights may not be absolute in nature but their absolute compliance conditions the very effectiveness and essence of absolute rights. These are identified in this Table as ******.

Proposal **Provisions**	**Item**	**Expected Consequences**	**Fundamental Rights and Social Impacts** [408]	**Economic and Territorial Impacts**
Article 4	**Emergency return procedures**	More forced returns from border crossing points Ineffective enforcement of expulsions due to legal, administrative/technical barriers related to identification and third country of origin non-approval – leading to more *de facto / de jure* detention and substandard reception conditions Increase use of force, violence/pushbacks by national authorities to enforce non-entry and forced returns	Violations of *non-refoulement* and collective expulsions prohibitions*, and lack of effective remedies** Deprivation of liberty (detention); and inhuman and degrading treatment** due to substandard reception conditions Negative impacts of use of force on right to asylum**; physical integrity and right to life*; human dignity**	Costs of forced returns compared to voluntary returns Costs related to detention due to non-practical / legal and operational feasibility of expulsions
Articles 2 and 4	**Limiting the number of designated official external border crossing points** for authorised	Limited effective and non-discriminatory accessibility to registrations, procedures and individual and vulnerability assessments; individuals facing more barriers based on national / ethnic origin Restricting effective and genuine avenues for authorised entry from	Negative impacts on the right to asylum**; non-discrimination on the basis of national / ethnic origin*; and on the prohibitions of *non-refoulement* and collective expulsions*	Costs to enhance border infrastructures and surveillance tools / staff – including quasi-military and military - in designated border crossing points and across all external land/sea borders

Proposal **Provisions**	**Item**	**Expected Consequences**	**Fundamental Rights and Social Impacts** [408]	**Economic and Territorial Impacts**
	entry and registrations	abroad; Creation of border controls bottlenecks in specific locations due to increased work-load Disproportionate enhancement / investments in border surveillance and 'infrastructures' across a larger scope of external borders to prevent unauthorised entry / practice of illegal pushbacks by national authorities Overexposure of specific border regions and local authorities/cities – territorial unbalances within the country and across the EU		Territorial unbalances across EU external borders due to increased border hardening likely to redirect human movements toward less guarded border areas
Articles 2 and 4	**Use of border procedures** and **legal fiction of non-entry** in territory	Increase use of de *facto / de jure* detention at border crossing points or at the proximity of the borders Substandard material reception conditions before/after entry	Negative impacts of more detention on the right to liberty and security**, and inhuman and degrading treatment**;** human dignity**; rights of the child, women and families.	Costs inherent to *de facto* and *de jure* detention Costs of reception to meet basic needs (including Strasbourg Court standards) and due to legal and practical reasons/obstacles to expulsions Territorial unbalances within a country, where the impact related to the implementation of border procedures will be borne only by one or more specific border regions and their local residents.

Proposal **Provisions**	**Item**	**Expected Consequences**	**Fundamental Rights and Social Impacts** [408]	**Economic and Territorial Impacts**
Article 7	**EU authorization procedure**	More EU supervision / monitoring; Increase accountability and enforce time-bound derogations	Impact on the right of good administration, including EU Charter Fundamental Rights and EU values compliance by EU Member States and EU agencies	Potential benefits in ensuring consistency and EU supervision of all EU Member States, (Commission role mainly coordination and EU agencies' roles); yet costs due to the lack of independent monitoring mechanism making *conditional* that support and assistance on fundamental rights and rule of law compliance
Articles 5 and 8	**EU support, cooperation and assessment**	Increasing use of EU Funds; Lack of transparency of use and re-purpose of funds by States Lack of robust methodology for independent fundamental rights monitoring EU Agencies (EUAA, Frontex and Europol) support only *optional,* not obligatory, for EU Member States and weak/non-existing independent monitoring mechanism.	Negative impacts expected at times of effectively and comprehensively ensuring compliance with the Horizontal Enabling Conditions on Fundamental Rights (including rights of absolute nature) for EU Home Affairs Funds.	Benefits of EU financial support to relevant EU Member States; however, the proposal's expected support to EU Member States by reducing workload and responsibility for remains unclear and unproven, as the expansion of border procedures along with the first irregular entry criterion under the EU Dublin Regulation – and no intra-EU relocations - means higher responsibility and administrative burden for these same Member States.

Source: Authors' elaboration.

6. Assessment of the effectiveness and efficiency of the proposal

Key findings

- The proposal shows an intrinsic inconsistency between the identified problem and the proposed objective and course of action and is expected to have little to no effect on the conduct of third-country authorities. The effectiveness of the measures proposed is highly questionable as the proposal cannot be expected to achieve its objectives in a manner that is in line with fundamental rights and the principle of proportionality. It would deepen current implementation gaps and risk normalising a culture of exceptions and non-compliance with the law among EU Member States' authorities, instead of giving preference to the effective and timely enforcement of EU law and the rule of law.
- As regards efficiency, the implementation of the proposal would not be cost-efficient. The results of the economic assessment suggest that a majority of Member States would see a relevant increase in costs at the national level for compliance with and enforcement of the instrumentalisation proposal. Possible benefits are difficult to assess and expected to be very limited in practice (see Section 5.2). Assuming that EU financial and operational support will be implemented for Member States facing instrumentalisation, this would be sufficient to cover emerging costs for three out of six Member States included in the analysis.

This section assesses the effectiveness and efficiency of the instrumentalisation proposal, as stipulated by the criteria laid down in the Commission's Better Regulation Guidelines[409]. Would the proposal effectively and efficiently address the problem identified and achieve its stated objective (address situations of instrumentalisation of migrants) in a proportionate way? Would derogations from asylum, reception and return standards be more effective than foreign affairs and diplomatic avenues?

As regards effectiveness, the analysis carried out in *Section 5.1.* shows that the proposal has far-reaching negative impacts on fundamental rights and rule of law standards which are the basis of the EU's founding principles enshrined in Article 2 TEU. Some interviewees have emphasised the inherent sensitivity characterising the instrumentalisation proposal because the suggested exceptions to the EU *acquis* imply a significant lowering of existing human rights legal standards[410]. Furthermore, the proposal impacts some fundamental rights which accept no derogation or exception by state authorities – even at times of declared emergencies or crisis, and which do not exonerate them from international responsibility in cases of international wrongful acts and human rights violations. This finding, according to the Better Regulation Toolbox #29, should have led the Commission to directly discard the proposal irrespective of further issues related to effectiveness and efficiency.

[409] European Commission, Better regulation: guidelines and toolbox (2017), https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/better-regulation-why-and-how/better-regulation-guidelines-and-toolbox_en

[410] Interview with the German Permanent Representation to the EU.

Despite the fact that one of the key objectives of the proposal is to respect fundamental rights, based on the assessment outlined in *Section 5.1* above, the essence of key fundamental rights at stake – the rights to asylum and effective remedies – would be severely undermined by the derogations envisaged by the proposal, which runs contrary to Article 52.1 CFREU. Overall, the proposal has focused on the 'law in the books' but has failed to consider 'the law in practice'[411] in light of current EU Member States' practices such as those described in the case studies, and the negative practical impacts that the envisaged derogations can be expected to have on rights, justice and more generally the rule of law as studied in *Section 4.1.* of this IA.

The proposal raises concerns about its compatibility with EU primary law. It has been considered to be unconstitutional in light of its lack of compliance with relevant EU Treaty provisions in *Section 4* of this Study above. The proposal unduly alters the hierarchical relationship between primary and secondary law in the EU legal system, according to which secondary legislative proposals are subordinate to and must not reform provisions holding a higher constitutional legal value as they are enshrined in the EU Treaties – such as those related to EU rule of law-related principles under Article 2 TEU, the EU fundamental right to asylum, the *common* nature of EU asylum and migration policy, access to justice (effective judicial protection and effective remedies), legal certainty, the legally distinct nature of the EU Schengen and Dublin *acquis*, and the solidarity / fair sharing of responsibility principle.

Furthermore, based on the experiences gathered during the 2021 political crisis with the Belarusian regime, the overall effectiveness of the proposal's focus on limiting the number BCPs has been questioned by some of our interviewees. During these events, the majority of TCNs attempted unauthorised entry or were pushed towards the Lithuanian green borders, and they had no way to reach and have effective access to apply for asylum at the designated BCPs.[412] Additionally, as explained in *Section 5.3.2.* on territorial impacts, the proposed designation of BCPs can be expected to have less relevance, and therefore be ineffective, in the geographical context represented by maritime borders.

The proposal can be expected to have very limited or no external relations and geopolitical impacts on the behaviour of third-country authorities, and therefore fails to effectively address its implicit foreign affairs objective. It shows an intrinsic inconsistency and incoherency between the identified problem and the proposed course of action and objectives by the Commission. As shown in *Section 2* and *5.4.*, the problem as identified and defined by the Commission fundamentally lies in the area of foreign affairs as it involves the actions by a non-EU state actors in relation to individual EU Member States or the EU as a whole. Based on this and the expected impacts illustrated in *Section 5*, it is clear that derogations from EU asylum, reception and return standards are not only detrimental in such situations, but also ineffective at addressing the identified problem.

The proposal's objective to support and ensure stability in relevant EU Member States facing these situations can be expected not to be met in practice, as the implementation of the envisaged procedures will in fact raise or increase EU Member States' responsibilities and workload at the external borders, which would deepen current implementation gaps and reception and procedural incapacities across EU external borders. The *derogations in chain* approach driving this proposal risks normalising a culture of exceptions and non-compliance with the law among EU Member States' authorities, instead of one giving preference to the effective and timely enforcement of EU law and the rule of law.

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411 Interview with UNHCR.

412 Frontex FRO representatives Interview underlined that "In similar scenarios, at the green border in particular, where this modus operandi will be used by hostile countries, this will not be effective, I'm afraid."

In short, the effectiveness of the measures proposed is highly questionable as the proposal cannot be expected to achieve its objectives in a manner which is in line with fundamental rights and the principle of proportionality. The profound negative impacts on fundamental rights of the proposal show that the European Commission has failed to guarantee policy options which are less onerous or restrictive[413]. The EPRS Horizontal IA on the Pact on Migration and Asylum concluded that the 2020 proposal on crisis and Force Majeure was ineffective based on the fact that 'The impact on migrants' and asylum seekers fundamental rights are significant here and can hardly be justified on account of the need to ensure procedural efficiency'[414]. It also concluded that it is not clear why a separate instrument on 'crisis' was actually required, instead of including the relevant derogations in the specific legal instruments themselves[415]. Similar conclusions can be reached regarding the instrumentalisation proposal in light of the assessment provided in *Sections 4 and 5* of this Substitute IA.

The effectiveness of the instrumentalisation proposal is also negatively affected by its overall lack of quality. First, it is not possible to read the legislative proposal as a self-standing piece of legislation. For a full understanding of the scope of the derogations and their impacts, one needs to continuously refer to the APR[416] and amended APR[417] proposals, the rRCD proposal[418], the rRD proposal[419], and the proposed 2021 SBC amendment[420]. Second, further issues emerge from its unclear relationship with the crisis and force majeure regulation proposal[421]. The possible simultaneous application of the two proposals is not accompanied by a thorough explanation of how the different measures would apply at the same time, and the proportionality of such a scenario.

While *Section 4.2.2*. above has attempted to sketch two possible scenarios based on our analysis of the two proposals, significant legal uncertainty still remains. Based on a broad interpretation of the *lex posterior derogat legi priori* principle, one could assume that EU Member States would have to abide by the time limits and procedures foreseen by the legislative instrument they implement last. It is impossible to consider that border procedures could apply for a total of 36 weeks, as this would

413 The Proposal puts excessive burden and interferences to key fundamental rights when considering the public objectives pursued. For an examination of the proportionality test assessment in EU migration policy refer to S. Carrera (2008), *In Search of the Perfect Citizen? The Intersection between Integration, Immigration and Nationality in the EU*, Martinus Nijhoff Publishers: Leiden, pp. 365-368.

414 Page 158 of the EPRS Horizontal IA on the Pact on Migration and Asylum.

415 Ibid.

416 European Commission, Proposal for a Regulation establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU. COM(2016) 467 final. 13.7.2016. https://www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/com/2016/0467/COM_COM(2016)0467_EN.pdf

417 European Commission, Amended Proposal for a Regulation establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, COM(2020) 611 final. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2020%3A611%3AFIN

418 European Commission, Proposal for a Directive laying down standards for the reception of applicants for international protection (recast), COM(2016) 465, 13 July 2016. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016PC0465&from=EN

419 European Parliament/Council of the EU, Directive 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals. OJ L 348, 24.12.2008, pp. 98-107. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32008L0115&qid=1688566809666

420 European Commission, Regulation Amending Regulation (EU) 2016/399 on a Union Code on the Rules Governing the Movement of Persons across Borders. COM(2021) 891 final, 14 December 2021. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52021PC0891

421 European Commission, Proposal for a Regulation addressing situations of crisis and force majeure in the field of migration and asylum (Text with EEA relevance), COM(2020) 613 final. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2020%3A613%3AFIN

raise profound illegality issues from the perspective of necessity, proportionality and legitimacy, and fundamental rights impacts (See *Sections 5.1 and 7.3.2*).

Third, formal mistakes can be identified inside the text: for example, in Article 2, the Commission cites Article 41(11) APR, which does not exist, instead of referring to Article 41(11) of the amended APR proposal. Fourth, the imbalance between the provisions contained in the Explanatory Memorandum and Recitals with the actual operational part of the legislative text produces further confusion and limits legal certainty (See *Section 4.3.1*). As explored in *Section 4.3.2*, the overall lack of clarity and low quality of the proposal goes against the 2016 Interinstitutional Agreement on Better Law-Making [422] and undermines its own effectiveness.

When it comes efficiency, from an economic standpoint and based on the analysis in *Section 5.2*, the implementation of the proposal would not be cost-efficient. The proposal is expected to generate the following typologies of costs and benefits for Member States: First, direct compliance costs – *adjustment costs*– and enforcement costs – *information and monitoring costs* due to increased reception and detention; Second, direct compliance costs – *adjustment costs* – and enforcement costs – *information and monitoring costs* – to enhance border infrastructures; Third, direct compliance costs – *adjustment costs* to upgrade existing reception facilities to meet minimum requirements; Fourth, enforcement costs – *information and monitoring costs* related to increased legal/reception expenses due to increased number of appeals; and fifth, direct benefits – *cost savings* due to increased support from the EU.

Overall, the results of the economic assessment suggest that 5 out of 6 Member States, despite starting from different national contexts, would see a relevant increase in costs at the national level (for compliance and enforcement with the measures of the proposal) in cases framed as 'instrumentalisation', which are mainly due to the application of Articles 2, 3 and 4 of the proposal. Possible benefits are instead difficult to assess and expected to be very limited. While Article 5 does not provide sufficient indications on which economic gains could be expected by EU Member States facing these situations, the available evidence suggests that EU institutions and agencies could still provide some relevant financial and operational support, which will, however, be very unlikely able to outweigh the costs.

[422] Interinstitutional Agreement Between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making Interinstitutional Agreement of 13 April 2016 on Better Law-Making. *OJ L 123/1*. 12.5.2016. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016Q0512(01)

7. Review of the subsidiarity and proportionality of the proposal

Key findings

- The instrumentalisation proposal creates significant problems with regard to legal certainty and clarity. The legal bases (Articles 78(2)(d) and (f) and 79(2)(c) TFEU) are correctly identified. However, some issues can be identified in the missing reference to Article 80 TFEU, the implicit foreign affairs objective of the proposal and the separation of the definition of 'instrumentalisation' and related measures between the instrumentalisation proposal and the SBC.
- The assessment of the subsidiarity of the proposal concluded that the problem identified is of Union relevance. Nonetheless, there still remain concerns related to the inherent geographical diversity of EU external land and maritime borders across EU Member States. Even less clear is the added value of the proposal: while CJEU case law made clear that Member States would not be able to derogate from the asylum and return *acquis* on their own initiative, the inconsistencies and overlaps with other proposals and the nature of the envisaged derogations do not show a clear added value. Accordingly, the proposal does not comply with the principle of subsidiarity.
- The measures enshrined in the instrumentalisation proposal do not comply with the principle of proportionality. The proposed derogations are not justified by the scale of the problem, are in direct opposition to the objectives of their legal bases and have considerable impacts on fundamental rights. This is concerning as 'the full respect of fundamental rights' is one of the objectives of the proposal itself. Additionally, flexibility is already available to Member States under the current *acquis* and the proposals undergoing negotiations.

This section assesses whether the instrumentalisation proposal respects the principles of subsidiarity and proportionality, in compliance with the Better Regulation Toolbox[423]. It examines the added value of the proposal compared to the current situation while taking into account the state of the negotiations on the proposals of the Commission's 2020 Pact on Migration. Some limitations of this assessment should be highlighted. First, some objectives of the new Pact have not been clearly defined, as highlighted in *Section 3*. Secondly, this IA does not explore alternative options to those presented by the Commission. Consequently, a full analysis of compliance with subsidiarity and proportionality is beyond the scope of this research.

7.1. Legal basis

The legal basis for the instrumentalisation proposal are Article 7(2)(d) and (f) and Article 79(2) point (c) TFEU. The former establishes that the Parliament and the Council 'shall adopt measures for a common European asylum system comprising (…) (d) common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status; (…) (f) standards concerning the

[423] Better Regulation Toolbox, Tool #5.

conditions for the reception of applicants for asylum or subsidiary protection'. Generally speaking, Article 78 is the basis for the CEAS.

Article 79(2)(c), instead, establishes that the co-legislators 'shall adopt measures in the following areas: (…) (c) illegal immigration and unauthorised residence, including removal and repatriation of persons residing without authorisation'. Article 79 – which is also the legal basis for the Return Directive – sets the ground for the establishment of return procedures.

In line with previous impact assessments on legislative proposals in the same policy area[424], it could be concluded that the legal bases are correctly identified by the Commission. However, the choice of legal basis raises a number of open considerations in relation to the following issues: First, the proposal includes a range of support and solidarity measures for EU Member States, yet it fails to make reference to Article 80 TFEU; Second, the implicit foreign affairs objective identified in *Section 2.2.4.* above unlocks further legal basis issues related to the proposal-seeking objectives falling under the Union's external action and its common foreign and security policy under Title V TFEU; Third, the split of the definition of 'instrumentalisation' and related provisions between the SBC and the instrumentalisation proposal raises further issues for legal clarity and the coherent application of the Schengen and asylum *acquis*.[425]

7.2. Subsidiarity

As per the Better Regulation Toolbox, the assessment of subsidiarity of proposed EU legislation should proceed in two steps: first, it should entail an assessment of the insufficiency of Member State action, sometimes referred to as *Union relevance of the problem*. Second, it should move to an evaluation of the *added value of the Union's action*[426].

7.2.1. Union relevance

In the Area of Freedom, Security and Justice (AFSJ), the EU shares competencies with Member States (Article 4(2)(j) TFEU). Based on this, this section will assess whether the EU intervention is relevant or if the Member States should act alone to address situations of 'instrumentalisation of migrants'.

In the Explanatory Memorandum, the Commission justifies compliance with the principle of subsidiarity based on the cross-border nature of the issue at hand. Based on the problem identified – which was critically assessed in *Section 2* – the Commission argues that the actions of a third country that are 'liable to put at risk essential State functions, including its territorial integrity, the maintenance of law and order or the safeguard of its national security, should be considered *as an attack on the EU as a whole* and therefore requiring EU solutions and support'[427]. The Commission

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[424] G. Cornelisse and G. Campesi (2021), The European Commission's New Pact on Migration and Asylum: Horizontal Substitute Impact Assessment. European Parliament Research Service (EPRS), p. 49. https://www.europarl.europa.eu/RegData/etudes/STUD/2021/694210/EPRS_STU(2021)694210_EN.pdf According to the Horizontal Substitute IA on the Pact, the legal basis of the 2020 Crisis and *Force Majeure* Proposal were identical to 'the legal bases for the instruments with regard to which it proposes derogations'. Therefore, it concluded, 'It is not clear how the establishment of a permanent mechanism to address crisis relates to Article 78.3 TFEU'. See p. 158. A similar comment can be made as regards the Instrumentalisation Proposal.

[425] The European Parliament's Rapporteur on the SBC proposal suggested in the LIBE Committee Draft Report that all provisions related to instrumentalisation should be removed altogether from the SBC proposal because instrumentalisation measures "serve a geopolitical goal with limited relevance for the rules governing the good functioning of the Schengen area". European Parliament, Draft Report on the proposal for a 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 borders (COM(2021)0891 – C9-0473/2021 – 2021/0428(COD)). 8.11.2022.

[426] Better Regulation Toolbox, Tool #5, p. 31.

[427] Instrumentalisation Proposal, p. 10.

finds that individual action by Member States 'cannot satisfactorily reply to the need for a common EU approach to a common problem'[428].

Notwithstanding the identified issues with the conceptualisation of the problem, the measures proposed by the Commission seem to be in compliance with the principle of subsidiarity. Articles 78 and 79 TFEU give the EU the competencies to establish common rules on asylum and returns. The instrumentalisation proposal would provide for derogations from existing secondary legislation which falls under EU exclusive competence.

Despite this, the solution proposed by the Commission fails to be an 'EU solution'. The assessment of the territorial impacts (*Section 5.3.* above) has shown that the 'one-size-fits-all' approach followed by the Commission does not take into consideration regional and territorial specificities – most importantly, the differences between land and maritime frontiers. The instrumentalisation proposal would 'Europeanise' the envisaged emergency procedures and measures devised for the Eastern EU external land borders with Belarus. However, due to their specific geography and geopolitical relations, the same measures would be inapplicable or even counterproductive for Member States located in Southern Europe and having maritime borders.

7.2.2. Union added value

To evaluate the added value of the proposal, it is necessary to identify the possible difficulties that EU Member States would encounter in situations framed as 'instrumentalisation' under the current *acquis,* and assess whether EU action can in fact provide more adequate tools. As the case studies show, some EU Member States have already responded to situations which would amount to 'instrumentalisation of migrants' or other similar 'emergency' situations. However, they have done so with national policies and practices that go against EU law. The most common argument is that, in situations of a large-scale influx of TCNs, EU Member States could derogate from the AFSJ provisions under Article 72 TFEU for the maintenance of law and order and the safeguarding of internal security.

As stated in various sections of this IA, as the CJEU clarified in *M.A. v Valstybės sienos apsaugos tarnyba* (Lithuania) and *Commission v. Hungary*[429], the mere existence of unauthorised cross-border human movements does not allow Member States to derogate from EU law on the basis of Article 72 TFEU. Member States cannot use these grounds as a general prevention policy without a case-by-case, evidence-based and individualised assessment as regards the extent to which a specific individual may pose such an alleged risk to the State. The CJEU also concluded that Article 72 TFEU must be interpreted strictly and that Member States can already count on the necessary tools in EU asylum and returns *acquis* to deal with their security interests. In light of this, EU action is the only possible course of action to provide for new derogations that Member States can request in situations of 'instrumentalisation of migrants', while respecting the *consistent and uniform* application of EU law. The individual Member States could not reach the same result legally through unilateral actions.

This notwithstanding, several interviewees and participants in the stakeholders' workshop have questioned the added value of the instrumentalisation proposal in relation to the existing and proposed secondary legislation[430]. As shown in *Sections 2, 3 and 4*, the instrumentalisation proposal shows substantial inconsistencies and overlaps with other legislative proposals, as well as extreme and often unjustified derogations compared to the scale and scope of the unauthorised entries of TCNs at issue. The additional flexibility – or derogations in chain model – granted to Member States would in fact undermine the spirit of the CEAS and negatively impact the rights of asylum seekers, instead of providing tools to withstand the actions of third-country governments. Current EU law

[428] Ibid.

[429] CJEU, Case C-808/18 *Commission v Hungary*, 17 December 2020.

[430] Stakeholders workshop; Interview with ECRE; Interview with PICUM.

already foresees the possibility for some degree of flexibility and exceptions if Member States' reception capacities are overstretched and in cases of declared emergencies. As examined in *Sections 2.2.3 and 4.2.1.*, this is the case of the APR and amended APR proposals, the rRCD and rRD.

Based on the above, it is possible to conclude that, while the legal bases and the intended effects of the proposal do comply with the principle of subsidiarity and despite EU action being the only effective way to introduce new derogations, the specific measures included in the proposal do not show a clear added value.

7.3. Proportionality

In the Explanatory Memorandum, the Commission claims that the instrumentalisation proposal 'sets out the exact conditions when specific asylum procedural rules can be applied as well as provide for the scope and time limit of applying such rules, and necessary safeguards'[431]. In the Commission's opinion, the proposal strikes the right balance between 'the immediate needs of the Member State facing instrumentalisation of migrants to manage the situation' and 'the need for legal certainty and uniformity in the application of derogations and specific rules and the necessary protection of the third-country nationals being instrumentalised'. The application of the border procedure to all applicants, as well as all other derogations, are also deemed proportionate based on the specificities of the situation at hand. Finally, the Commission identifies the temporal limitation on the applicability of the derogations (6 months) – plus the following extensions based on the monitoring and review by the Commission and authorisation by the Council – to be strictly necessary.

As already highlighted in *Sections 2 and 3*, the Commission's rationale for this proposal and the stated objectives are problematic and deficient. The instrumentalisation proposal is not in line with the principle of proportionality for several reasons. First, situations of 'instrumentalisation of migrants' do not necessarily entail large-scale entries of TCNs crossing the EU external borders. While their arrival might be concentrated in a short span of time and still require some contingency measures, the statistics identified in the case studies do not justify the need for the proposed extensive set of derogations.

Secondly, some of the measures appear to be in direct opposition to the objective of its legal basis, i.e. Article 78 TFEU, which is to create and maintain the CEAS. The instrumentalisation proposal risks dismantling the very idea of 'common' asylum procedures across the Member States and legitimising the differential treatment of applicants for international protection based on the circumstances of their arrival. Equally, the introduction of derogations available on a permanent basis in declared situations of 'instrumentalisation' would further endanger the stability and consistency of the CEAS as enshrined in EU primary law. Due to the absence of inter-EU relocations as part of the proposed 'solidarity' measures, the proposal also seems to be at odds with other objectives enshrined in EU primary law, such as the principle of equal solidarity and fair sharing of responsibility (Article 80 TFEU), and might fail to effectively support Member States as it sets itself to do.

Thirdly, as analysed in *Section 5*, the impacts on fundamental rights are considerable and appear to be in opposition to part of the identified objective in the proposal itself, that is, 'manage in an orderly, humane and dignified manner the arrival of persons having been instrumentalised by a third country, with full respect for fundamental rights'[432]. In addition to this, sufficient safeguards and exceptions are lacking in the proposal, particularly for minors and applicants with specific needs.

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[431] Instrumentalisation proposal, p. 10.

[432] Ibid., p. 2

As previously argued in *Section 6*, and unlike what the Commission claims, the proposal is not effective in ensuring the protection of the TCNs who may fall victim to the 'instrumentalisation' of a third country and who would now face double-victimisation of the derogations envisaged in the proposal. It rather provides far-reaching derogations from the existing and proposed standards on borders, asylum and returns with the aim of curtailing entries into the EU as much as possible, with little concern for the fundamental rights of the affected TCNs. This is also worsened by the fact that there is no specific measure in the proposal that would have any effects on the conduct of third states other than the extreme limitations on access to asylum procedures for the TCNs affected. Therefore, the proposal does not address the cause of the problem it identifies but still includes important limitations for access to EU territory, asylum procedures and reception conditions, and the essence of the right to asylum.

Fourthly, when considering the other pending legislative proposals that are currently being examined, it is unclear why new derogations are needed if the APR, rRCD and rRD already provide some degree of flexibility to Member States in the case of a disproportionate number of asylum seekers arriving at the same time and putting pressure on the national asylum systems (see *Section 4.2.1*). In addition, the crisis and force majeure proposal already foresees derogations that can be applied in the case of large-scale number of unauthorised entries. The significant extension of the deadlines for registration and examination of the applications for international protection – together with the extended use of detention – cannot be considered proportionate for achieving the objective of the proposal.

As regards the choice of instrument, the choice of a Regulation over other alternative regulatory methods is justified by the desired need for direct application, uniformity and effectiveness across all Member States. However, the instrument would still leave ample room for discretion to relevant EU Member States regarding the interpretation and application of some of its provisions and derogations, including the scope of application of key issues featuring in the Recitals and not the main text of the articles (As explained in *Section 3* above).

Furthermore, in this context, it must be highlighted that the Explanatory Memorandum provides no substantive evidence on how the proposed expedited procedures and derogations are 'fit for purpose' in the context of EU Member States with non-land external borders but instead sea (blue) borders. The specificities characterising the SAR and disembarkation dimension are absent from the proposal. The proposal leaves EU Member States' border surveillance activities carried out across the green and blue borders outside its scope of application. It pursues a model exclusively focused on compliance with the envisaged derogations to EU standards and fundamental rights at designated BCPs. Moreover, the case studies on Italy and Bulgaria illustrate that the existence of a common baseline scenario of relevance for all EU Member States responsible for the management of EU external borders remains questionable (refer also to *Section 5.3.* on territorial impacts).

Table 18: Subsidiarity and proportionality assessment of the proposal

Assessment question	Findings
Is the legal basis as indicated by the Commission adequate?	Yes – Articles 78(2)(d,f) and 79(2)(c) are the correct legal bases.
Are the problems addressed cross-border by nature?	Yes – The proposal deals with cross-border movements between third countries and EU Member States.
Does EU action provide benefits over Member State action?	Yes – Member States could not legally derogate from their EU law obligations on other grounds (e.g. Article 72 TFEU).
Are the proposed measures proportionate to the identified objectives?	No – The measures in the instrumentalisation proposal are in opposition to the objectives of Article 78 TFEU and show significant fundamental rights impacts (which goes against the objective of the proposal itself). It remains unclear why these derogations are needed if 'instrumentalisation' does not entail large-scale cross-border movement and flexibility is already available in existing EU law.
Is the choice of instrument proportionate?	Yes, but it does not fully take into consideration the specificities of Member States. It mostly provides instruments which can be applied at land borders, with no mention of how it would work at sea borders.

Source : Authors' elaboration

8. Monitoring and evaluation

This section assesses whether and how the monitoring and evaluation of the instrumentalisation proposal will be ensured, and whether the framework is sufficient to track progress in implementing the proposal to measure its success and assess its ultimate impacts on the ground.

Key findings

- The monitoring and evaluation of the instrumentalisation proposal is mainly entrusted to the Commission with the support of the EU Migration Preparedness and Crisis Management Network. The deployment of EU agencies and possible grant of EU funding would also entail additional monitoring mechanisms. The monitoring and evaluation is however limited in scope and lacks independence. It is insufficient to track the progress in the implementation of the proposal and Member States' compliance with fundamental rights.
- The proposed monitoring and evaluation tools should be complemented by the implementation of obligatory independent monitoring mechanisms (IMM) based on the FRA 2022 guidance and covering all border, asylum and return procedures, border controls and surveillance across all external borders in the Schengen area.

8.1. Monitoring and evaluation mechanisms in the proposal

Article 7(5) of the instrumentalisation proposal entrusts the Commission with the task of constantly monitoring and reviewing the declared situation of 'instrumentalisation' and – when appropriate – proposing to repeal or prolong the derogations. This assessment would be primarily based on the information provided by the Member States to the Commission, as well as their reporting through the EU Migration Preparedness and Crisis Management Network. This network includes the Member States, the Council, the Commission, the EEAS, and EU agencies, i.e. EUAA, eu-LISA, Europol, FRA and Frontex.

The information collected by the Migration Preparedness and Crisis Management Network would be used by the Commission to monitor the evolution of trends at the external borders and make the initial proposal for a Council decision to trigger the Instrumentalisation Regulation (Monitoring and Preparedness Stage, *Stage 1*). Once the measures are in place, this information would be used to share information and support a rapid, efficient and coordinated EU response (Migration Crisis Management Stage, *Stage 2*)[433].

Article 8(2) also foresees close cooperation with UNHCR and relevant partner organisations 'to determine the modalities for support to applicants in the instrumentalisation situation'[434]. In addition to the serious concerns regarding the proposal's negative impacts on the civil society space explained in *Section 5.1.7.* above, this Article does no, however, expressly specify or lay down an express obligation for EU Member States to fully and effectively allow UNHCR and relevant partner organisations to carry out their monitoring or watchdog role regarding Member States' compliance with refugee and asylum seekers' rights.

[433] European Commission, Recommendation (EU) 2020/1366 of 23 September 2020 on an EU mechanism for preparedness and management of crises related to migration (Migration Preparedness and Crisis Blueprint). OJ L 317/26. 01.10.2020. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32020H1366

[434] Instrumentalisation proposal, Article 8(2).

A particularly important point for monitoring the implementation of the measures allowed for by the instrumentalisation proposal regards the operational support by the EUAA, Europol and Frontex. Member States can ask for the support of these EU Agencies, though the latter can also propose their support on their own initiative. However, EU Member States would be ultimately the ones deciding whether EU Agencies would be deployed or not, and as regards what specific scope of activities. The deployment of EUAA and Frontex staff comes with their own fundamental rights monitoring and complaint mechanisms, which would apply to all operations carried out by the agencies in the Member States, including joint operations with national authorities[435]. These would not however apply to the operations carried out exclusively by the Member States' authorities.

With regard to the EUAA, some limitations should be highlighted. The full monitoring powers of the Agency are not yet fully active. A condition for the agreement on the EUAA Regulation in 2021 was the introduction of a 'sunrise clause' that would delay the full implementation of the monitoring mechanism of the agency[436]. Its implementation is set to unfold in two different phases: a first phase – mainly consisting of fact-finding missions – will begin by the end of 2023 and be fully implemented by January 2024; a second phase comprising the activities of analysis and the issuing of recommendations will take place once the Pact has been approved and the Dublin Regulation replaced[437]. In May 2023, the Management Board of the EUAA appointed its first Fundamental Rights Officer; this officer will oversee the deployment of the Agency's fundamental rights strategy, including the investigation of fundamental rights violations under the complaint mechanisms[438].

Additional monitoring would also arise from the use of EU funds by the Member States affected by a declared situation of 'instrumentalisation of migrants'. During the events at the border with Belarus, the three affected Member States, i.e. Latvia, Lithuania and Poland, requested EUR 383 million and were granted EUR 185 million in the form of a specific action[439] under the Border Management and Visa Instrument Fund (BMVI)[440]. In addition, Lithuania had already received EUR 15 million for emergency assistance from the Internal Security Fund-Borders (ISF-Borders)[441]. In the instrumentalisation proposal, the Commission states that the measures proposed 'would complement other assistance to be provided to the Member State facing instrumentalisation of migrants that might be taken outside the framework that this proposal intends to create, such as (…) financial support including under the European Asylum, Migration and Integration Fund (AMIF) or the Border Management and Visa Instrument (BMVI)'[442]. The Commission also confirmed that, in

[435] Both Frontex and the EUAA have the possibility to suspend their operations if upon consultation with the FROs, the respective Executive Directors consider that there are violations of fundamental rights or international protection obligations by the host Member States. See EUAA Regulation, Article 18(6) and EBCG Regulation, Article 46.

[436] J. Barigazzi (2021), EU at long last agrees on reform of asylum agency. *POLITICO* Europe. 29 June 2021. https://www.politico.eu/article/after-5-years-eu-finds-deal-to-launch-asylum-agency/

[437] Interview with EUAA staff, 11 July 2023

[438] https://euaa.europa.eu/news-events/european-union-agency-asylum-appoints-its-first-fundamental-rights-officer

[439] 'Specific actions' means transnational or national projects that bring Union added value in accordance with the objectives of the Instrument for which one, several or all Member States may receive an additional allocation to their programmes. See European Parliament/Council of the EU, Regulation (EU) 2021/1148 of the European Parliament and of the Council of 7 July 2021 establishing, as part of the Integrated Border Management Fund, the Instrument for Financial Support for Border Management and Visa Policy. PE/57/2021/INIT. OJ L 251, 15.7.2021, Article 2(8).

[440] European Commission, DG for Migration and Home Affairs, Note to the Members of the Home Affairs Funds Committee, Ref.: HOME-Funds/2023/15 Subject: Outcome of the call for expression of interest for the Specific Action under BMVI: ¨Support for Border Management" BMVI/2021/SA/1.5.8.

[441] See also the case study on Lithuania (Annex III, Section 1.3.8).

[442] Instrumentalisation proposal, page 7.

such situations, it would consider offering support through funding in the form of a specific action or as emergency assistance[443].

For the ordinary thematic programming, which includes the BMVI, AMIF and ISF funds, Member States must show compliance with the horizontal enabling conditions laid out in the Common Provisions Regulation (CPR)[444]. Horizontal enabling condition number 3 refers specifically to the compliance of the programmes with the CFREU and an assessment of the reporting arrangements for cases of non-compliance and individual complaints. If the conditions are not met, the Commission only issues pre-financing but does not process any request for reimbursement from the Member States in question[445]. In the case of incidents or reports of fundamental rights violations by civil society or the media, the Commission would ask for clarification from the Member State, but the possible investigations would be carried out at the national level through the framework identified through the horizontal enabling conditions. PICUM and ECRE have, however, noted that there are significant barriers to the effective use of the existing national complaint mechanisms for fundamental rights violations, such as the lack of public knowledge about their existence[446].

The case of Poland is particularly relevant for this IA: despite failing to meet the horizontal enabling condition on fundamental rights and thus being unable to receive EU funds for the approved programmes, Poland still received EU funds to address the events at the border with Belarus in the form of a specific action. While not directly related to the Home Affairs funds, it is also important to mention that Poland is undergoing a rule-of-law crisis which might make the country ineligible to receive funds under the EU budget. The fact that Poland shows significant issues related to the rule of law, and particularly to the independence of its judiciary system, also raises questions regarding possible investigations carried out at the national level on the possible misuse of funding and whether compliance with fundamental rights can be effectively monitored in such contexts.

8.2. Extended monitoring and evaluation

The monitoring and evaluation measures proposed by the Commission would be significantly strengthened by the implementation of independent monitoring mechanisms which would cover all border, asylum and return procedures, including when EU agencies are not involved. The Screening proposal already foresees the establishment of an independent monitoring mechanism. However, this is limited to the specific phases of the screening and to BCPs and does not apply in the context of border surveillance at green and sea external borders. Similarly, the EU agencies' monitoring and complaint mechanism exclusively covers the operations and area of the borders where the agencies' staff are present. As advanced in *Section 2.2.6.*, the case studies show that EU Member States that have declared emergencies or instrumentalisation-related events have made use of military, quasi-military actors, armed forces and in the case of Greece paramilitary groups in the practical implementation of these policies. This has come along with very limited accountability

443 Interview with DG HOME, Home Affairs Funds, 14 July 2023.

444 Regulation (EU) 2021/1060 of 24 June 2021 laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund and the European Maritime, Fisheries and Aquaculture Fund and financial rules for those and for the Asylum, Migration and Integration Fund, the Internal Security Fund and the Instrument for Financial Support for Border Management and Visa Policy. PE/47/2021/INIT. OJ L 231, 30.6.2021, p. 159–706. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2018%3A375%3AFIN

445 Currently, Cyprus, Hungary and Poland are the only Member States that have failed to meet the horizontal enabling conditions for the thematic programmes.

446 PICUM and ECRE, *Fundamental rights compliance of funding supporting migrants, asylum applicants and refugees inside the European Union*. Policy Note. March 2023. https://picum.org/wp-content/uploads/2023/03/Fundamental-rights-compliance-of-funding-supporting-migrants-asylum-applicants-and-refugees-inside-the-European-Union.pdf

and monitoring regimes raising further issues in relation to upholding the rule of law and human rights[447].

The limited scope of the current EU mechanisms leads to disparities between different Member States: while some countries can rely on extensive monitoring and complaint mechanisms in their national legislation (i.e. ombudspersons, ex-ante and ex-post evaluations, whistleblower mechanisms, governmental investigations)[448], the absence of strong EU mechanisms leaves too many gaps for actions that do not comply with EU law and fundamental rights, particularly at the green or blue borders.

Independent Monitoring Mechanisms (IMM) should be effective and follow the FRA 2022 Guidance on 'Establishing national independent mechanisms to monitor fundamental rights compliance at the EU external borders'. IMM should be made mandatory and conditional for EU Member States if they are to be granted EU funding on issues related to border management[449].They should include follow-up procedures, including unannounced visits / inspections, internal disciplinary provisions and judicial investigations when cases of non-compliance with fundamental rights are identified by the monitoring mechanism[450]. These mechanisms should involve civil society actors, independent national human rights institution (i.e. ombudspersons) and independent experts. In recent years, the EU has also financed IMMs in Croatia and Greece which extend beyond the BCPs and the screening phase and also cover border controls and surveillance across all external borders[451]. However, previous research has concluded that these IMMs are still characterised by some operational limitations and are not always fully transparent and effective.[452]

In light of the severe fundamental rights impacts identified in *Section 5.1*. above, the absence of such mechanisms is particularly worrying in cases where extensive derogations and flexibility would be offered to EU Member States – be it for 'instrumentalisation' situations, crisis or other exceptional situations falling under Article 78(3) TFEU. Their establishment would significantly strengthen the monitoring and evaluation of the national policies and practices applied in such situations and their compliance with EU law.

[447] Refer to the case study on Lithuania (Section 1.2.), Poland (Section 2.1.), Greece (Section 3.2.), Bulgaria (Section 4.2.1. and 4.2.2), and Spain (Section 5.3.) (Annex III).

[448] Interview with a Finnish Border Guard representative, 24 August 2023.

[449] Carrera et al., An Assessment of the State of the EU Schengen Area and its External Borders, p. 14.

[450] Ibid., p. 90.

[451] Ibid., pp. 91-92

[452] This relates for instance to their linkages with national investigative authorities or their role at times of activating national investigations by relevant authorities, or their relations with national monitoring mechanisms such as ombudspersons. Carrera et al., An Assessment of the State of the EU Schengen Area and its External Borders, pp. 91-95.

9. Conclusions

This substitute impact assessment concludes that the problem and objectives identified by the Commission in the instrumentalisation proposal are not adequately articulated according to the EU Better Regulation Guidelines. It remains unclear how the proposed derogations to EU asylum, border and returns legal standards, and lowering of third-country nationals' rights, would contribute to addressing the problem at stake – i.e. instrumentalisation as defined by the proposal – and supporting EU Member States potentially facing such situations, while fully respecting the fundamental rights of the TCNs affected and EU rule of law. The derogations in the instrumentalisation proposal are disproportionate and would have significant negative impacts on fundamental rights, including absolute and non-derogable rights. These measures are also contrary to EU primary law and raise serious issues of unconstitutionality with regards to the EU Treaties.

More broadly, the instrumentalisation proposal would add an extra layer of complexity to the EU migration, asylum and return *acquis* and contribute to the disharmonisation and hamper the consistent and effective application of the CEAS and the SBC. The European Commission put forward the instrumentalisation proposal before an agreement was reached on the very proposals from which the former would derogate (i.e. the APR and amended APR proposals, rRCD proposal and rRD proposal) and without a proper assessment and evaluation of the current *acquis*, its implementation and enforcement. This is a significant challenge to democratic accountability and the role of the European Parliament as co-legislator. It also runs contrary to EU Better Regulation Guidelines and the Interinstitutional Agreement on Better Law-Making. Additionally, significant doubts and legal uncertainty remain regarding the possible overlaps and simultaneous application of the instrumentalisation proposal with other legislative initiatives – most importantly, with the 2020 crisis and force majeure regulation proposal.

Problem definition

The notion of 'instrumentalisation' as defined by the European Commission proposal lacks conceptual clarity and precision. The definition is based on three constitutive elements: a) a third country actively encouraging or facilitating 'irregular' cross-border movement into the EU; b) its intention to destabilise the Union or a Member State; and c) a risk for essential State functions including territorial integrity, the maintenance of law and order and the safeguard of national security. These elements are too broad and vague and raise fundamental challenges for any objective, non-politicised and scientifically rigorous assessment. Furthermore, it is based on an (in)security and defence-driven framing that dehumanises the people affected and the identified problem, and raises profound issues related to its compliance with EU principles laid down in Article 2 TEU, and the consistency of EU foreign affairs policy with the latter under Article 21 TFEU.

The instrumentalisation proposal does not acknowledge the scale of the identified problem and fails to justify how unauthorised border crossings – which are not necessarily large in scale, or of a sudden or unforeseeable nature – should be presumed to affect EU Member States' essential functions and their capacity to implement and faithfully deliver current EU legal standards and the CFREU. Furthermore, the proposal is not based on a previous evaluation of the effectiveness of the existing EU legal acts and does not adequately justify the necessity for a new legal instrument.

There is a fundamental disconnect and incoherency between the problem identified and the policy solutions advanced in the instrumentalisation proposal. The Explanatory Memorandum fails to provide evidence on how the proposed derogations to EU asylum and return procedures are expected to address the suggested concept of 'instrumentalisation of migration'. The expansion of fast-track border procedures to all applicants, including groups requiring specific reception and procedural needs, is acknowledged as a tool of deterrence against the third country supposedly responsible for such events. Moreover, no evidence is provided to illustrate how the proposed

procedures, derogations and solidarity measures would actually lighten responsibilities and alleviate the administrative burden and workload from the affected EU Member States in practice.

The substitute IA has identified two additional problems that are not expressly mentioned or considered in the Explanatory Memorandum. First, the widespread systematic non-application of, and lack of compliance with existing EU border, asylum and return legal standards, and more generally the backsliding in several EU Member States on rule-of-law principles. Second, the misuse of emergency and national security grounds by some EU Member States to justify not delivering EU asylum law on the ground, which has been rejected by the CJEU in recent case law, e.g., Case C-72/22, *M.A.* v *Valstybės sienos apsaugos tarnyba* (Lithuania) and Case C-808/18, *European Commission* v *Hungary*. The substitute IA has also identified two drivers behind the main problem. First, the EU policy of migration management externalisation and increasing 'issue linkage' in EU external policies have empowered or given incentives to third countries' governments to use migration policy for their own political interests in their relations with specific EU Member States and/or the EU. Second, there is a wide-spread absence of effective and genuine legal pathways to the EU and a lack of effective and genuine legal access to asylum and justice in cases of human rights violations across EU external borders.

Review of the objectives

The substitute IA found that the proposal provides no evidence on how the envisaged derogations are relevant and might actually help to support and create 'stability' across relevant EU Member States by sharing and decreasing responsibility and administrative workload. The analysis concludes that the proposal would in practice increase Member States' uneven responsibilities. Despite claiming the protection of fundamental rights as one of its objectives, it fails to include an assessment of how the proposal would interfere with some crucial fundamental rights enshrined in the charter, including non-derogable rights. The instrumentalisation proposal comes along with an implicit external relations objective of influencing the conduct of third countries' authorities and those of TCNs seeking asylum in the EU.

Legal assessment

The instrumentalisation proposal provides for derogations from the APR and amended APR proposals, the rRCD proposal and the rRD proposal: it extends the scope and application of border asylum and return procedures and derogations from material reception conditions. The proposal must be read in parallel with the 2021 proposal amending the SBC, which includes the formal definition of 'instrumentalisation of migrants', as well as instrumentalisation-related provisions for border management. Its extensive links with the 2016 CEAS reform proposals and the proposed 2020 new pact on migration and asylum, and the envisaged derogations in chain model, create a situation of 'hyper-complexity'. Specifically, one of the main issues relates to the relationship or linkages between the proposal and the crisis and force majeure regulation proposal, their possible overlap and the lack of clarity on their possible simultaneous application. Further risks to legal certainty derive from the fact that the instrumentalisation proposal derogates from secondary legislation which already provides for flexibility in emergency situations. Hence, this would lead to the co-existence of exceptions – a derogations in chain model - in the ordinary *acquis* and different proposals that derogate from it in exceptional situations.

The proposal does not comply with primary EU law and presents high risks of unconstitutionality, posing serious challenges to EU Treaty provisions, including the CFREU and more generally the rule of law and effective judicial protection. In particular, it runs against the harmonisation objective behind the CEAS under Article 78 and the common immigration and return policies under Article 79 TFEU, and it would infringe on key rule of law principles, such as effective judicial protection and effective remedies (Article 2 and 19(1) TEU, and Article 47 CFREU), as well as the principle of solidarity and fair sharing of responsibility stipulated in Article 80 TFEU. The proposal is also at odds with recent CJEU rulings on Article 72 TFEU. Its introduction by the Commission during the negotiations

of other proposals jeopardises the principle of mutual sincere and loyal cooperation between institutions under Article 13(2) TEU and the 2016 Interinstitutional Agreement on Better Law-Making.

The IA identifies the risk that this embedded unclarity may lead to EU Member States engaging in automatic refusals of entry without respecting the safeguards envisaged in the Schengen Borders Code (SBC), the *non-refoulement* principle and key guarantees foreseen in the recast Returns Directive proposal (rRD), such as those covering TCNs requiring special reception and procedural needs. The instrumentalisation proposal and the related measures included in the 2021 proposal amending the SBC prove the increasing blurring of boundaries between the Schengen and asylum *acquis* which results in legal incoherency.

The proposal can be expected to lead to unbalanced and unequal responsibilities among EU Member States that have external borders as it does not envisage relocation of asylum seekers as one of the proposed solidarity measures. Moreover, it advocates for a derogations-based understanding of the EU solidarity principle which is questionable when it is considered that this principle must be subordinated to the CFREU and Article 2 TEU values.

Impacts

The instrumentalisation proposal would have major negative impacts on the fundamental rights of the TCNs affected. The right to asylum and the principle of *non-refoulement* would be severely affected by the limitation of registration and BCPs, the extension of registration deadlines, the accelerated asylum and return procedures and the legal fiction of non-entry. Similarly, the proposal raises serious risks of collective expulsion and pushbacks and would lead to increased rates of de facto detention, including for minors and their families.

The IA demonstrates a fundamental contradiction in the instrumentalisation proposal. Under the proposed Commission definition, declaring a situation as 'instrumentalisation' would actually imply official recognition that a third-country regime is actually mistreating TCNs, in violation of the absolute prohibition of inhuman and degrading treatment. Obstructing legal access to EU territory would mean that, by default, there are substantial grounds for believing that the immediate denial of lawful entry and access to territory would effectively mean sending them back to an unsafe non-EU state.

Material reception condition standards are reduced to so-called 'basic needs' of the applicants without providing for clear modalities to be followed and not meeting adequate standards. This would leave too much discretion to EU Member States and might raise incompatibility issues with EU law and international socio-economic human rights standards, i.e. ICESCR. However, at the same time, the proposal would require EU Member States to uphold the human dignity – as enshrined in the CFREU – of the TCNs concerned who ask for a high level of protection. The possibility to limit BCPs and concentrate TCN applicants in selected places, could all lead to the creation of bottlenecks at external borders and overcrowding and inhuman and degrading treatment.

The instrumentalisation proposal would significantly affect rule of law standards, such as the right to effective remedies. The non-suspensive effect of the appeal against an expulsion decision and a negative asylum decision goes against CJEU case law and Article 47 CFREU. Further issues emerge in relation to freedom of association and civil society spaces. Evidence clearly shows that human rights defenders, have been policed, intimidated and criminalised across several EU countries, and their access to external borders has been restricted during situations of declared 'instrumentalisation'. This is in violation of Articles 2 TEU and 12 CFREU and international legal standards like the UN Declaration on Human Rights Defenders and the ICCPR.

With regard to the economic impacts, all EU Member States concerned are expected to experience an increase in costs generated by the implementation of the regulation in cases of

'instrumentalisation'. Possible benefits are difficult to assess and expected to be very limited in practice.

Regarding costs, the assessment envisages an increase in costs related to increased reception costs and the use of de jure /de facto detention. Moreover, costs may increase also as a result of enhancing border infrastructure at specific BCPs and along land borders in the scope of border surveillance. Furthermore, the IA finds that closing BCPs in a given EU Member State would be estimated to have little impact since most arrivals would still occur through unauthorised entries across green borders. There is no evidence that the envisaged possibility to reduce registration and BCPs would bring economic gains in the handling of border procedures. In addition, there would be an increase in costs owing to higher legal expenses resulting from an increase of appeals because of the faster and lower quality procedures

Regarding benefits, the assessment estimates that they would mainly derive from increased financial and operational support from the EU. This support may partially mitigate the increase in costs in cases where Member States apply larger derogations during the implementation phases. Assuming that all the EU support will be fully used by Member States, it could help to cover the quantifiable costs envisaged above only in three countries: Spain, Italy and Lithuania. However, the analysis underlines that it is challenging to ascertain (i) how this would happen while upholding the lawfulness of their actions, and (ii) to what extent these costs would be reduced in practice. For Greece, Poland and Bulgaria these benefits will not be sufficient to outweigh the quantifiable costs estimated in the previous sections

The IA has identified significant territorial impacts of the proposal. The reference to territorial integrity in the instrumentalisation proposal seems largely unjustified from an international law perspective. The proposal is based on a one-size-fits-all approach that disregards regional and territorial specificities, particularly between land and sea external borders across the EU. EU Member States located along the eastern external borders might relatively easily invoke the exceptions to ordinary EU rules outlined in the proposal and apply fewer demanding standards. Conversely, such an option would be comparatively less accessible to countries located along the EU's southern external borders. In addition, the proposal is expected to increase territorial imbalances between EU Member States. It would lead to border hardening and construction of border fences, the reduction of the number of open BCPs and the creation of border control bottlenecks, the unlawful confinement of TCNs near border areas where differentiated asylum and return standards would be applicable and, consequently, the multiplying of militarised 'anomalous zones' of migration and asylum management along EU external borders. The IA finds that the proposal would lead to enhanced localisation processes by shifting the administrative strain and workload to one or a few parts of an affected EU country, with impacts mostly felt and experienced in specific border regions and among their local residents.

Regarding EU external relations, the proposal would not have significant direct geopolitical impacts on the actions of the third country potentially accused of 'instrumentalising migrants'. Nonetheless, invoking the notion of 'instrumentalisation' can be expected to have negative repercussions, and even escalate diplomatic tensions, in the external relations between the relevant EU Member States, the EU and the non-EU countries concerned. More broadly, the proposal could be perceived as a sign of backsliding in the sphere of human rights and further harm the EU's credibility and global influence internationally. The proposal challenges the EU Treaties obligation under Article 21 TFEU to ensure consistency between its external actions and its founding principles, including the rule of law and human rights. This would also complicate the EU's role in faithfully implementing international obligations and commitments, such as those enshrined in the United Nations Global Compacts on Migration and Refugees.

Effectiveness and efficiency

The effectiveness of the measures proposed is highly questionable as the proposal cannot be expected to achieve its objectives in a manner that is in line with fundamental rights and the principle of proportionality. The proposal shows an intrinsic inconsistency between the identified problem and the proposed objective and course of action and it is expected to have little to no effect on the conduct of third-country authorities. The derogations in chain model proposed by the Commission present a high risk of normalising exceptions and non-compliance with the law culture among EU Member States' authorities, instead of prioritising effective and timely enforcement of the law.

As regards efficiency, all EU Member States concerned are expected to experience an increase in costs generated by the implementation of the regulation in cases of 'instrumentalisation'. Possible benefits are difficult to assess and expected to be very limited in practice (see Section 5.2). Assuming that EU financial and operational support will be implemented for Member States facing instrumentalisation, this would be sufficient to cover emerging costs for three out of six Member States included in the analysis.

Subsidiarity and proportionality assessment

The legal bases (Articles 78(2)(d) and (f) and 79(2)(c) TFEU) are correctly identified. However, the chosen legal bases raise open considerations regarding the non-explicit mention of Article 80 TFEU, the proposal's implicit foreign affairs objectives, and the separation of the definition of 'instrumentalisation' and related measures between the instrumentalisation proposal and the SBC. Overall, the instrumentalisation proposal creates significant problems with regard to legal coherency and clarity.

The subsidiarity assessment concluded that the problem identified is generally of Union relevance, yet it does not take into consideration the inherent specificities and geographies of EU external borders and regions. The overall added value is even less clear. While CJEU case law has confirmed that Member States cannot derogate from the asylum and return *acquis* on general grounds under Article 72 TFEU without a case-by-case, evidence-based and individualised assessment, the inconsistencies and overlaps with other proposals and the nature of the envisaged derogations do not show clear added value. Accordingly, the proposal does not comply with the principle of subsidiarity.

The measures contained in the instrumentalisation proposal do not comply with the principle of proportionality either. The proposed derogations are not justified by the scale of the problem, are in direct opposition to the objectives of their legal bases and have considerable impacts on fundamental rights. This is concerning as 'the full respect of fundamental rights' is one of the objectives of the proposal itself. Additionally, flexibility is already available to Member States under the current *acquis* and the proposals undergoing negotiations.

Monitoring and evaluation

The monitoring and evaluation of the instrumentalisation proposal is mainly entrusted to the Commission with the support of the EU Migration Preparedness and Crisis Management Network. The deployment of EU agencies such as Frontex and EUAA, which would not be obligatory for EU Member States, and the possible granting of EU funding would also entail additional human rights and rule of law monitoring mechanisms. The proposed monitoring and evaluation mechanisms are however very limited in scope and insufficient to track the progress in the implementation of the proposal and Member States' compliance with fundamental rights. They envisage a weak role for the Commission and leave gaps for potential actions that would not comply with EU values, particularly along EU green and blue external borders outside designated BCPs.

The proposed monitoring and evaluation tools should be complemented with the implementation of mandatory independent monitoring mechanisms (IMM). They should follow the FRA's 2022 guidance on IMMs at the external borders, which should be made mandatory and conditional for EU funding, and should cover all border, asylum and return procedures within the scope of both external border controls and surveillance activities.

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Court indicates interim measures in respect of Iraqi and Afghan nationals at Belarusian border with Latvia and Poland, Press Release, ECHR 244 (2021), 25 August 2021.

D.A. and Others v. Poland, Application no. 51246/17, 8 July 2021.

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M.H. and Others v. Croatia, Nos. 15670/18 and 43115/18, 4 April 2022.

M.S.S. v. Belgium and Greece [GC], no. 30696/09, § 293, ECHR 2011.

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Shahzad v. Hungary, No. 12625/17, 8 November 2021.

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Annex I: Interviews and stakeholders' workshop

Date	Institution/Organisation
12 June 2023	Unit C.3 (ASYLUM), DG HOME, European Commission
12 June 2023	Unit C.5 (MIGRATION PREPAREDNESS), DG HOME, European Commission
16 June 2013	Representative of Bulgarian State Agency for Refugees (SAR)
22 June 2023	Academic, University of Gothenburg
28 June 2023	EU Agency for Fundamental Rights (FRA)
28 June 2023	Representative of the Lithuanian Government, Ministry of the Interior
28 June 2023	Representative of Bulgarian Government, Directorate Migration.
29 June 2023	PICUM
29 June 2023	ECRE
3 July 2023	Permanent Representation of Poland
5 July 2023	Fundamental Rights Office staff, Frontex
6 July 2023	ICMPD
10 July 2023	Permanent Representation of Greece
11 July 2023	EUAA staff
12 July 2023	Global Detention Project
14 July 2023	Unit E.3 (HOME AFFAIRS FUNDS - North, West & Central Europe), DG HOME. European Commission
8 August 2023	UNHCR
17 August 2023	Representative of the Finnish Government, Ministry of the Interior
21 August 2023	EEAS
23 August 2023	IOM
24 August 2023	Border Guard, Finland
30 August 2023	Permanent Representation of Germany
Stakeholders' workshop participants - 12 June 2023	
	Centre for Legal Aid, Bulgaria
	Amnesty International
	Commissioner for Human Rights (Ombudsman), Poland
	European Council on Refugees and Exiles (ECRE)
	Global Detention Project

	Ilustre Colegio de la Abogacía de Madrid, Spain
	International Rescue Committee, Greece
	Lithuanian Red Cross, Lithuania
	Médecins Sans Frontiéres
	Refugee Support Aegean, Greece
	Rule of Law Institute Foundation, Poland

Annex II: Notes on calculations

This section presents a detailed description of the data underpinning the calculations presented in *Section 5.2.*, and an explanation of the methods and assumptions that were used to calculate the costs for the selected EU Member States.

Adjustment and enforcement costs related to increased reception and detention

Increased reception costs

The implementation of Articles 2(a), 2(c) and 4 will generate additional enforcement costs (recurrent) due to increased reception, as reported in *Section 2.1*. The following calculation was conducted:

C = Additional enforcement costs in one country

=

C_1 (total costs expected with the Regulation in force) – C_0 (total costs in the status quo)

Where

C_1 = P (Cost of reception costs per day, per individual) X Q (Number of arrivals generating instrumentalisation situation) X D_1 (number of days needed for registration and emergency procedure for asylum application with the Regulation in force)

C_0 = P (Cost of reception costs per day, per individual) X Q (Number of arrivals generating instrumentalisation situation) X D_0 (number of days needed for registration and emergency procedure for asylum application in the status quo)

Key sources:

- P is retrieved from the EPRS Study on the Costs on Non-Europe in Asylum Policies and equals EUR 34/day per asylum seeker.
- Q is retrieved from the case studies, considering number of arrivals / asylum seekers when state of emergency or instrumentalisation was officially declared by national authorities.
- D_0 amounts at 10 days for registration and 28 days for emergency procedures
- D_1 amounts at 28 days for registration and to 112 days for emergency procedures

Key assumptions and limitations:

- We assume all asylum applications are registered and processed using all days available.
- We assume Q as a valid proxy of the number of arrivals to be managed in case of instrumentalisation.

Increased detention costs

Article 4 of the Regulation could lead to an increased number of TCNs to be detained for an average duration of 12 months, which may generate costs (recurrent) due to increased detention. The following calculation was conducted:

C (Additional costs)

=

C_1 (total costs expected with the Regulation in force) – C_0 (total costs in the status quo)

Where

C_1 (Total costs with the Regulation) = Q_1 (Number of persons with a return order who are in pre-removal detention) X P (Cost of detention, per day, per detainee) X D (Average number of days of detention)

C_0 (Total costs with the status quo) = Q_2 (Number of persons with a return order who are in pre-removal detention) X P (Cost of detention, per day, per detainee) X D (Average number of days of detention)

Where

We assume a scenario in which Q_2 is 10 p.p. higher than Q_1

Key sources:

- Q_1 is retrieved from the case studies with the exception of Lithuania, where we used the Amnesty report: 'Lithuania: Forced out or locked up – Refugees and migrants abused and abandoned' (p. 23) available at: https://www.amnesty.org/en/documents/eur53/5735/2022/en/ and for Spain, where we used the 'Country Report: Spain" 'of the European Council on Refugees and Exiles (2023).
- Q_2 is assumed in a scenario in which the share of pre-removal detention on return orders is 10 p.p. higher than Q_1.
- Return orders are retrieved from Eurostat – *Third-country nationals ordered to leave – annual data (rounded)* (online data code: MIGR_EIORD).
- P is retrieved from The Cost of Non-Europe in Asylum Policy (EPRS, 2018).
- D is calculated as the average number of days between 6 months and 18 months.

Adjustment costs to enhance border infrastructures

Estimated extra cost to fully fence the border

The implementation of Article 2 of the Regulation, together with Article 1(2) of the Schengen Border Code proposal, could generate one-off costs of EUR 371.43 million for Greece, EUR 71.5 million for Bulgaria and EUR 406.14 million for Poland. The following calculation was conducted:

C (One-off cost of fully fencing the border)

=

Q (Length of the border with relevant third-country without a fence, in kilometres)

X

P (Cost of one Km of border fence)

Where

Q = Q_0 (Total length of the border) - Q_1 (Length of the fence including fences currently being constructed, in kilometres)

P = P_0 (Cost of the fence recently constructed or being constructed) / P_1 (Length of the fence recently constructed or being constructed, in kilometres)

Key sources:

1. Q_0 is retrieved from the following sources:
    - Greece: 'Greece plans to extend fence along Turkish border' (InfoMigrants, 2020).
    - Spain and Bulgaria: 'Walls and fences at Eu borders' (EPRS, 2022).
    - Lithuania: 'Barefoot migrants pushed by Belarus across Lithuanian border' (Euronews, 2022).
    - Poland: 'Poland to build Belarus border wall to block migrant influx' (BBC, 2021).
2. Q_1 is calculated considering that:
    - Greece: 'Athens releases EUR 100 million to extend Turkish border wall' (The Brussels Times, 2023).
    - Lithuania: Lithuania's 550-km border fence reported by Euronews, 2021.
    - Poland: 'Poland completes 186-kilometre border wall with Belarus after migration dispute' (Euronews, 2022).
3. P_0 and P_1 are calculated considering:
    - Greece: 'Greece expands border fence with Turkey and urges EU support' (InfoMigrants, 2023).
    - Lithuania: the case study.
    - Poland: 'Poland begins work on $400m Belarus border wall against refugees' (AlJazeera, 2022).

Key limitations:

- The total length of the borders can diverge by a few dozen kilometres from one source to another, we rounded it to the nearest ten.
- For Bulgaria, sources diverge on the length of the existing border fence. Some say it is 235 km while others say it is 130 km or 160 km. We assume this is due to the nature of the fence, which in some portions is only composed of barbed wire that migrants can easily overcome. We therefore took the figure used in 'Walls and fences at EU borders' (EPRS, 2022), i.e. 235 km.

Adjustment costs to upgrade existing reception facilities to meet minimum requirements

Cost to comply with minimum accommodation standards

The implementation of Article 3 would require Member States to update existing reception facilities in order to ensure basic needs in material reception and human dignity, which would generate one-off costs to comply with minimum accommodation standards. The following calculation was conducted:

C (One-off costs of compliance with minimum accommodation standards)
=

P (Cost per asylum seeker to replace / upgrade existing facilities) X Q (Assumed number of asylum seekers in inadequate reception facilities)

Where

Q (Assumed number of asylum seekers in inadequate reception facilities) = Q_0 (Number of arrivals generating instrumentalisation situation) X Q_1 (Share of places not considered to be compliant)

Key sources:

- P is retrieved from 'The European Commission's New Pact on Migration and Asylum. Horizontal Substitute impact assessment' (EPRS, 2021)
- Q_0 is retrieved from the case studies, assuming that the number of arrivals in case of instrumentalisation equals the number of arrivals / asylum seekers when state of emergency or instrumentalisation was officially declared by national authorities
- Q_1 the case studies and 'The European Commission's New Pact on Migration and Asylum. Horizontal substitute impact assessment' (EPRS, 2021)

Key limitations:

- Cost per asylum seeker to replace / upgrade existing facilities: it is not clear in the 'The European Commission's New Pact on Migration and Asylum. Horizontal substitute impact assessment (EPRS, 2021)' whether they are recurrent. We considered them to be one-off.

Enforcement costs related to increased legal/reception expenses due to increased number of appeals

Cost of legal/reception expenses due to increased number of appeals

The implementation of Article 2(c) is expected to increase the number of appeals, which is an annual cost. The following calculation was conducted:

C (additional costs of appeals)

=

C_1 (Cost of appeals with the Regulation) - C_0 (Cost of appeals with the status quo)

Where

C_1 (Cost of appeals with the Regulation) = Q_0 (Estimated number of appeals with the Regulation) X P (Cost of 1 appeal for MS)

C_0 (Cost of appeals with the status quo) = Q_1 (Estimated number of appeals without the Regulation) X P (Cost of 1 appeal for MS)

And where

Q_0 (Estimated number of appeals with the Regulation) = S_1 (Number of return orders with the Regulation) X R (Appeal rate)

Q_1 (Estimated number of appeals without the Regulation) = S_0 (Number of return orders in the status quo) X R (Appeal rate)

Key sources:

- P is retrieved from The Cost of Non-Europe in Asylum Policy (EPRS, 2018).
- S_0 is retrieved from Eurostat – Third-country nationals ordered to leave – annual data (rounded) (online data code: MIGR_EIORD.
- R is retrieved from Eurostat asylum statistics. It is computed as the average % in the last 5 years of the number of final decisions as a share of rejected first instance decisions [online data code: MIGR_ASYDCFSTA].

Key assumptions:

- R equals the average of the last 5 years in case of instrumentalisation
- For $S_{1\,I}$ it is assumed a scenario in which it is 10% higher than $S_{0.}$

Annex III: Case studies

1. Lithuania

Laurynas BIEKSA, Mykolas Romeris University

Ilona SALTE, Mykolas Romeris University

1.1. Background

In 2021, the Republic of Lithuania experienced a 'mass influx' of third-country nationals (TCNs) crossing the Lithuanian-Belarus border. These movements were widely believed to be caused deliberately by Aleksandr Lukashenko's regime in Belarus to pressure the European Union[453]. Since 2021, more than 4 000 TCNs and asylum seekers were registered by the State Border Guard Service (SBGS)[454]. The Seimas (Lithuania's Parliament) and the Government of the Republic of Lithuania (hereinafter the Government) presented this crisis as a 'hybrid attack' on the Republic of Lithuania by Lukashenko's regime, and TCNs as tools of its aggression[455]. This provided a justification to conduct pushbacks and arbitrarily detain TCNs and asylum seekers. According to the information provided on the SBGS website, 20 456 TCNs were refused entry into the Republic of Lithuania between the start of the declared crisis and 2 June 2023[456].

1.2. Policies

The Government declared a state-level emergency on 2 July 2021 in an attempt to manage the situation[457]. At first, the Head of State-Level Emergency Operations Minister of Internal Affairs Agnė Bilotaitė issued an order on 2 August 2021 that allowed pushbacks of asylum seekers at the border[458]. The order stated that asylum seekers who are crossing the state border not in the designated places will not be allowed into the territory of Lithuania and will be redirected to the nearest external border checkpoint or diplomatic institution. Later, on 3 May 2023, the pushbacks were established in the Republic of Lithuania Law on the State Border and its Protection Article 4 Paragraph 13 by the Seimas[459].

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453 European Parliament, Instrumentalisation in the field of migration and asylum, 22 November 2021, https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2022)739204; European Commission, Statement by President von der Leyen on the situation at the border between Poland and Belarus, 8 November 2021, https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_21_5867

454 State Data Agency, State data management information system, accessed on 6 June 2023, https://ls-osp-sdg.maps.arcgis.com/apps/dashboards/9b0a008b1fff41a88c5efcc61a876be2

455 Seimas of the Republic of Lithuania resolution of 13 July 2021 No. XIV-505 '*On Countering Hybrid Aggression*', https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/1a84e440e49c11eb866fe2e083228059?jfwid=110vuma1t4

456 SBGS, statistics of irregular migrants that were not permitted to enter the territory of Lithuania, 2 June 2023, https://vsat.lrv.lt/lt/naujienos/neileistu-neteisetu-migrantu-statistika

457 Government of the Republic of Lithuania decision of 2 July 2021 No. 517 declaring a state-level emergency due to mass influx of migrants, https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/ad73a4c1dc0011eb866fe2e083228059/asr

458 Minister of Interior and the Head of State-Level Emergency Operations decision of 2 August 2021 No. 10V-20 regarding the management of the mass influx of foreigners and the strengthening of state border protection, (https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/6c0ea3a0f42811ebb4af84e751d2e0c9?jfwid=-19h0wlp20z)

459 Seimas of the Republic of Lithuania Law of 25 April 2023 No. XIV-1891 amending the Republic of Lithuania Law on the State Border and its Protection of 9 May 2000 No. VIII-1666, https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/ff701250e35a11eda305cb3bdf2af4d8?jfwid=110vum9zqb

The Lithuanian authorities reacted to the 'crisis' by collectively expelling asylum seekers and TCNs and designating them as 'weapons'. In her public statements, Minister of Internal Affairs Agnė Bilotaitė described the crisis as a 'hybrid attack' in which TCNs are used as 'weapons'[460]. On 13 July 2021, the Seimas adopted a resolution on 'countering hybrid aggression'[461].

These restrictions of TCNs' and asylum seekers' rights were justified as a 'threat to public safety and national security'. In the 9 November 2021 state of emergency declaration Article 1 paragraph 2, the Seimas stated that the threat to public order due to the 'mass influx of TCNs' cannot be eliminated without restrictions of certain rights and freedoms. In the preamble of the state of emergency declaration of 10 March 2022, the Seimas emphasised that Lukashenko's regime may become more active in using 'TCNs as tools of hybrid aggression' against the Republic of Lithuania and this is a 'threat to Lithuania's national security'. Threats to national security were also echoed in the Government's explanatory note of the proposal to amend the Law on the State Border and its Protection[462].

The Government referred to Article 72 of the Treaty of the Functioning of the European Union (TFEU) before the CJEU in the case C-72/22 PPU[463], but the CJEU rejected the Government's arguments that the restrictions of asylum seekers rights were necessary to ensure public order.

On 9 November 2021, the Seimas declared a state of emergency on the entire external borders with the Republic of Belarus, five kilometres inside the territory of the Republic of Lithuania and in the foreigners' accommodation centres inside Lithuania[464]. On 7 December 2021, Seimas extended the state of emergency until 14 January 2022[465]. Due to the war in Ukraine, the Seimas declared a state of emergency on 10 March 2022 in the entire territory of Lithuania[466]. Article 3 of that declaration stated that persons who are crossing the border not in the designated areas will not be permitted into the territory of the Republic of Lithuania (except for persons fleeing persecution and war). The state of emergency declared by the Seimas ended on 2 May 2023[467], although the state-level emergency due to 'mass influx of foreigners' declared by the Government on 2 July 2021 is still in force.

The military has been deployed during the multiple states of emergency declared by the Seimas[468]. Since the state of emergency declared by the Seimas ended, the Minister of National Defence of the Republic of Lithuania has ordered the military to assist the SBGS with border control until 3 August

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460 Government of the Republic of Lithuania statement of 12 July 2021, https://vrm.lrv.lt/lt/naujienos/a-bilotaite-neteiseta-migracija-pasitelkiama-kaip-hibridines-agresijos-pries-lietuva-ginklas

461 Seimas of the Republic of Lithuania resolution of 13 July 2021 No. XIV-505 on countering hybrid aggression, https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/1a84e440e49c11eb866fe2e083228059?jfwid=110vuma1t4

462 Government of the Republic of Lithuania explanatory note on amendment proposals XIVP-2383, XIVP-2384, Paragraph 2.9., Paragraph 4 Subparagraph 2, 13 January 2023, https://e-seimas.lrs.lt/portal/legalAct/lt/TAK/e0a69ea0930c11edb55e9d42c1579bdf?jfwid=110vum9zqb

463 CJEU, C-72/22 PPU, 30 June 2022, *M.A. v Valstybės sienos apsaugos tarnyba*.

464 Seimas of the Republic of Lithuania resolution of 9 November 2021 No. XIV-617 declaring a state of emergency, https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/dd1e40a2417111ecac25bd9c0b3391dc?jfwid=-1cefbqu9c8

465 Seimas of the Republic of Lithuania resolution of 7 December 2021 No. XIV-733 declaring a state of emergency, https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/e6418713575a11ec86bdcb0a6d573b32?jfwid=-1cefbqu9c8

466 Seimas of the Republic of Lithuania resolution of 10 March 2022 No. XIV-932 declaring a state of emergency, https://www.e-tar.lt/portal/lt/legalAct/f4bf0230a07111ec966fd5047f7e7091

467 Seimas of the Republic of Lithuania resolution of 14 March 2023 No. XIV-1789 declaring a state of emergency, https://www.e-tar.lt/portal/lt/legalAct/92569570c25511ed97b2975f7dad7488

468 Seimas of the Republic of Lithuania resolution No. XIV-617, Article 4; Seimas of the Republic of Lithuania resolution No. XIV-733, Article 4; Seimas of the Republic of Lithuania resolution No. XIV-932 Article 4; Seimas of the Republic of Lithuania resolution No. XIV-1789, Article 3.

2023[469]. According to the order of the Minister of National Defence of the Republic of Lithuania, 60 troops are designated to support the SBGS[470]. It is important to note that the order does not provide any specific accountability mechanism for unlawful conduct at the border beyond a reference to the standard criteria for the use of military force.

1.3. Effects

From 1 January 2021 to 2 August 2021, the SBGS registered 4 577 'irregular migrants'[471]. Most of these were the result of the new arrivals from Belarus. Most of them absconded to other EU Member States as soon as they were no longer in detention[472]. In 2021 the Migration Department received 4 214 first-time asylum applications[473], which shows that most of the people who arrived during the crisis were asylum seekers and not 'illegal migrants'. Since the pushback policy's establishment on 2 August 2021 (coming into force on 4 August 2021) and 31 December 2021, 8 106 TCNs have not been allowed to enter the Republic of Lithuania. In 2022 11 211 TCNs, and 1 176 in 2023, were not allowed to enter. According to official Government statements, the number of unauthorised entries of TCNs have been declining in Eastern Europe because of the chosen policy, as opposed to the Western Balkan and Central Mediterranean routes where the number of arrivals is increasing[474].

1.3.1. Border crossing points and legal fiction of non-entry

During the 'migration crisis', TCNs access to the external border checkpoints has been severely limited[475]. The indicated reason why TCNs were not able to access the border checkpoints was the lack of a passport and a visa of the Republic of Lithuania[476]; and it is well known that Belarus border guards force asylum seekers to cross the border in places that are not designated for these purposes[477]. Until 1 August 2022 (i.e. within one year after establishing the pushback policy) 53 TCNs submitted applications at the border checkpoints on the external borders with Belarus (only 5

469 Minister of National Defence of the Republic of Lithuania order of 8 May 2023 No. V-369 on the use of the Lithuanian Armed Forces to provide assistance during an emergency, https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/ad0e4550ed9f11edb649a2a873fdbdfd?jfwid=-1cefbqu9c8

470 Minister of National Defence of the Republic of Lithuania order of 8 May 2023 No. V-369 on the use of the Lithuanian Armed Forces to provide assistance during an emergency, https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/ad0e4550ed9f11edb649a2a873fdbdfd?jfwid=-1cefbqu9c8

471 State Data Agency, State data management information system, accessed on 6 June 2023, https://ls-osp-sdg.maps.arcgis.com/apps/dashboards/9b0a008b1fff41a88c5efcc61a876be2

472 Lithuanian Red Cross Society, *Monitoring Report of 2022*, 2022 September, https://redcross.lt/wp-content/uploads/2022/09/LRC-Monitoring-Report-2022.pdf

473 Migration department, Migration yearbook 2021, https://migracija.lrv.lt/uploads/migracija/documents/files/2021%20m_%20migracijos%20metra%C5%A1tis_skelbimui(3).pdf

474 Minister of Internal Affairs of the Republic of Lithuania, Minister A. Bilotaitė: Lithuania has chosen effective solutions for migration management, 14 December 2022, https://vrm.lrv.lt/lt/naujienos/ministre-a-bilotaite-migracijos-valdymui-lietuva-pasirinko-veiksmingus-sprendimus

475 Lithuanian Red Cross Society, Thematic report on access to the asylum procedure at the diplomatic missions of the Republic of Lithuania abroad and at the border checkpoints of the SBGS, December 2022, https://redcross.lt/wp-content/uploads/2022/09/Access-to-the-asylum-procedure-at-the-diplomatic-missions-and-at-the-BCP-EN.pdf

476 Biekša, L. and I. Ivašauskaitė (2021), „Lietuvos reakcija į prieglobsčio prašytojų antplūdį tarptautinės ir Europos Sąjungos teisės kontekste", Lietuvos teisė 2021: esminiai pokyčiai, Mykolas Romeris University, 2021, pp.156-167: 163, https://cris.mruni.eu/server/api/core/bitstreams/c267dbaa-e4f5-4631-b2e4-d67cdaa73f78/content

477 Amnesty International, Lithuania: Forced out or locked up – Refugees and migrants abused and abandoned, 27 June 2022, p. 17-18, https://www.amnesty.org/en/documents/eur53/5735/2022/en/

applications - until 31 December 2021, and 48 applications - from 1 January 2022 until 1 August 2022)[478].

Since 1 May 2022, the passage through 13 border crossing points has been prohibited[479]. International border checkpoints operating on the Belarus-Lithuania borders and where asylum applications can be lodged are the following: Medininkai BCP, Lavoriškės BCP, Raigardas BCP, Šalčininkai BCP, Tverečius BCP, Šumskas BCP[480]. As of 17 August 2023, Šumskas BCP and Tverečius BCP are closed[481]. The distance from the furthest part of the Belarus-Lithuania border in the north to the nearest Lavoriškės BCP is around 150 km. The distance between Lavoriškės BCP and Medininkai BCP is 30 km. The distance between Medininkai BCP and Šalčininkai BCP is 40 km. The distance between Šalčininkai BCP and Raigardas BCP is 130 km[482].

During the crisis, asylum seekers and TCNs who entered Lithuania and were accommodated in reception centres were not considered to have entered into Lithuania's territory. The legal provisions established that the Migration Department permits the entrance of asylum seekers who have entered irregularly into the territory of Lithuania if the Migration Department has not made a decision in their asylum case after 6 months[483]. This meant that the legal fiction of non-entry was applied to asylum seekers for up to 6 months.

1.3.2. Access to asylum procedures

At the beginning of the crisis on 10 August 2021, the Seimas amended the Republic of Lithuania Law on the Legal Status of Foreigners Article 67 to restrict access to the asylum procedure during an emergency due to 'mass influx of TCNs'. This Article prescribed that during an emergency due to 'mass influx of foreigners' a person may lodge an asylum application in the territory of Lithuania only if he or she is staying in the country legally[484]. In a subsequent amendment of 23 December 2021, these provisions were moved to Article 140[12] Paragraph 2[485]. The policy of collective expulsions at the border, based on the decision of the Head of State-Level Emergency Operations together with

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478 Šaltė, I (2023), "Neteisėtai esančių užsieniečių grąžinimo teisinio reguliavimo problemos: non-refoulement principas ir užsieniečių apgręžimas", Doctoral dissertation, Mykolas Romeris university, 2023, pp. 197, https://www.mruni.eu/wp-content/uploads/2023/06/Ilona-Salte_MRUweb.pdf

479 Government of the Republic of Lithuania decision of 2 July 2021 No. 517 declaring a state-level emergency due to mass influx of migrants, Paragraphs 3.1 - 3.13, https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/ad73a4c1dc0011eb866fe2e083228059/asr

480 Data source: Information provided by Lithuanian Red Cross Border monitors to the authors.

481 Lietuvos nacionalinis radijas ir televizija (LRT), Uždaryti Šumsko ir Tverečiaus pasienio kontrolės punktai su Baltarusija, 17 August 2023, https://www.lrt.lt/naujienos/lietuvoje/2/2057864/uzdaryti-sumsko-ir-tvereciaus-pasienio-kontroles-punktai-su-baltarusija

482 It is important to note that the distances are relative: they vary depending on whether the distances are counted from the Belarus or Lithuanian side, taking into account the different road infrastructure and the mode of transportation. The distances depicted here are counted from the Lithuanian side, using an automobile. The map of border checkpoints can be found on the website of Directorate of Border Crossing Infrastructure Under the Ministry of Transport and Communications: https://pkpd.dedikuotas.lt/en

483 Republic of Lithuania Law on the Legal Status of Foreigners of 29 April 2004 No. IX-2206 (edition of 3 May 2023 – 6 June 2023), https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.232378/OTTAmMjhfL?jfwid=rwzi80i2e

484 Seimas of the Republic of Lithuania Law of 10 August 2021 No. XIV-515 amending the Republic of Lithuania Law on the Legal Status of Foreigners of 29 April 2004 No. IX-2206, 67 Paragraph 1[1] Subparagraph 2, https://www.e-tar.lt/portal/legalAct.html?documentId=1e963ae0faa211eb9f09e7df20500045 (English version: https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/5e3ef63a487911eca8a1caec3ec4b244?jfwid=-1h8whopdq)

485 Seimas of the Republic of Lithuania Law of 23 December 2021 No. XIV-816 amending the Law of the Status of Foreigners, https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/c67c9f5266e611ecb2fe9975f8a9e52e

these amendments to the Law on the Legal Status of Foreigners, created a situation that meant there was minimal or no practical access to the asylum procedure in Lithuania[486].

Following an investigation of the Ombudsman's office[487], positive national judicial practice[488] and the landmark decision of the CJEU in the case C-72/22 PPU that concluded that such provisions are contrary to European Union law[489], asylum seekers inside the territory of Lithuania were allowed to apply for asylum. Additionally, the requirement to lodge an asylum application 'immediately' was no longer applied[490]. In reaction to the CJEU decision in the case C-72/22 PPU, the Republic of Lithuania Law on the Legal Status of Foreigners Article 140[12] was amended[491]. These new provisions remove the requirement that only foreigners who are staying legally in Lithuania are eligible to apply for asylum. Article 140[12] Paragraph 1 states that, during the state-level emergency, a person has the right to lodge an asylum application at the border control checkpoint. If the applicant is inside the territory of Lithuania they can apply to the Migration Department and SBGS, and if outside the territory of Lithuania, through diplomatic and consular institutions[492].

Asylum seekers faced major difficulties in accessing asylum procedures at border checkpoints, since they would need to pass the Belarus side. That means they would need to present a valid travel document and prove that they were staying in Belarus legally and were granted permission to leave

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486 United Nations High Commissioner for Refugees (UNHCR), Observations on Draft Amendments to the Law of the Republic of Lithuania on Legal Status of Aliens, 27 September 2021, https://www.refworld.org/docid/615322844.html; UNHCR, Legal Observations on the Amendments to the Law of the Republic of Lithuania on Legal Status of Aliens, 28 July 2021, https://www.refworld.org/docid/610d26971a1.html; European Council of Refugees and Exiles (ECRE), Assessment of Recent Changes to Asylum Legislation in Lithuania and their Impact with Reference to Compliance with EU and international law, 2021, https://ecre.org/wp-content/uploads/2021/09/Legal-Note-11.pdf; Lithuanian Red Cross Society, *Monitoring Report of 2022*, 2022 September, https://redcross.lt/wp-content/uploads/2022/09/LRC-Monitoring-Report-2022.pdf

487 Seimas Ombudsman Office, Report on the complaint by x and y against the Migration Department and the SBGS, 15 April 2022, https://www.lrski.lt/documents/pazyma-del-x-ir-y-skundo-pries-migracijos-departamenta-prie-lietuvos-respublikos-vidaus-reikalu-ministerijos-ir-valstybes-sienos-apsaugos-tarnyba-prie-lietuvos-respublikos-vidaus-reikalu-ministerij/

488 Vilnius district administrative court decision in administrative case No. eI2-2624-872/2022, 21 March 2022; Vilnius district administrative court decision in administrative case No. eI2-2623-535/2022, 22 March 2022; Vilnius district administrative court decision in administrative case No. eI-3355-1066/2022, 24 May 2022, Vilnius district administrative court decision in administrative case No. eI2-3357-1161/2022, 1 June 2022, Vilnius district administrative court decision in administrative case No. eI2-3356-331/2022, Vilnius district administrative court decision in administrative case No. eI2-3358-426/2022, 7 June 2022, Vilnius district administrative court decision in administrative case No. eI2-3369-811/2022, 9 May 2022 (these cases are confidential so they are not publicly available).

489 The CJEU stated that *Article 6 and Article 7(1) of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection are to be interpreted as precluding legislation of a Member State under which, in the event of a declaration of martial law or of a state of emergency or in the event of a declaration of an emergency due to a mass influx of aliens, illegally staying third-country nationals are effectively deprived of the opportunity of access, in the territory of that Member State, to the procedure in which applications for international protection are examined* (CJEU, C-72/22 PPU, 30 June 2022, *M.A. v Valstybės sienos apsaugos tarnyba*).

490 Minister of Internal Affairs of the Republic of Lithuania Order of 25 February 2022 No. 1V-141 amending the Minister of Internal Affairs of the Republic of Lithuania Order of 24 February 2016 No. 1V-131, https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/e00fdd90967c11ec9e62f960e3ee1cb6?jfwid=spnhjd721; in the current edition of 10 May 2023 of the aforementioned order No. 1V-131, foreigners are not required to apply for asylum 'immediately', https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/0a918630dc0311e59019a599c5cbd673/eNfGeIYuLD?jfwid=k5bz8d29a

491 Seimas of the Republic of Lithuania Law of 20 April 2023 No. XIV-1889 amending the Law on the Legal Status of Foreigners of 29 April 2004 No. IX-2206, https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/03741072e01011eda305cb3bdf2af4d8?jfwid=-qfze6qmb0

492 Republic of Lithuania Law on the Legal Status of Foreigners of 29 April 2004 No. IX-2206, https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.232378/asr

by the Belarus border officers. Even if asylum seekers managed to exit the Belarus side, the SBGS may not accept their asylum applications. SBGS officers refused to register asylum applications at border checkpoints, claiming, for example, that TCNs could seek asylum in Belarus or in Poland, at the Lithuanian embassy in Minsk, or that the border checkpoint was undergoing repairs and had no place to accommodate asylum seekers[493].

The Law on the State Border and its Protection was amended on 3 May 2023 with Article 4 Paragraph 13 that institutes pushbacks. This provision states that TCNs who intend to cross the border at places not designated for that purpose, or at the designated places but who have violated the procedure for crossing the state border, and who are in the border area, are not permitted into the territory of Lithuania[494]. These amendments were widely criticised by international organisations. Amnesty International claimed that that legalising pushbacks gives a 'green light' to torture and UNHCR stated that the 'draft Amendments to the State Border Law establish a fiction of non-entry, which may prevent asylum seekers from exercising the right to seek asylum and lodging asylum applications with the State Border Guard Service on the territory of Lithuania, as provided for in proposed Article 140[12] of the Aliens Law. This guarantee may, therefore, become meaningless, as the persons concerned would be subjected to pushback practices in the first place, which may, consequently, lead to violation of the principle of non-refoulement'[495].

The text of Article 4 Paragraph 13 provides that the prohibition to enter the territory of Lithuania is applied individually and that persons fleeing persecution are exempt from expulsion at the border. However, there are no formal procedures carried out that lead to an administrative decision where the individual circumstances of each foreigner would be examined, thus rendering the individual assessment laid down in Article 4 Paragraph 13 completely arbitrary. The individual SBGS officers at the border area decide whether to expel the foreigner or not. Additionally, since expulsions are carried out without providing an administrative decision to the person being expelled, asylum seekers have no access to a judicial remedy.

Furthermore, the right to apply for asylum in the Lithuanian embassy in Belarus was practically non-existent. The possibility of lodging an asylum application in the Lithuanian diplomatic or consular institutions is regulated by an order of the Minister of Foreign Affairs of the Republic of Lithuania[496]. A major legal obstacle to applying for asylum in the Lithuanian diplomatic and consular institutions

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493 Lithuanian Red Cross Society, Thematic report on access to the asylum procedure at the diplomatic missions of the Republic of Lithuania abroad and at the border checkpoints of the SBGS, December 2022, https://redcross.lt/wp-content/uploads/2022/09/Access-to-the-asylum-procedure-at-the-diplomatic-missions-and-at-the-BCP-EN.pdf

494 Seimas of the Republic of Lithuania Law of 25 April 2023 No. XIV-1891 amending the Republic of Lithuania Law on the State Border and its Protection of 9 May 2000 No. VIII-1666, https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/ff701250e35a11eda305cb3bdf2af4d8?jfwid=110vum9zqb

495 UNHCR observations on the Draft Amendments to the Law of the Republic of Lithuania on Legal Status of Aliens (XIVP-2385) and the Draft Amendments to the Law of the Republic of Lithuania on the State Border and its Protection (No XIVP-2383), 20 March 2023, https://www.refworld.org/docid/6419b0ee4.html?_gl=1*r97bzq*_rup_ga*MTU4ODA5NjI0LjE2ODY1ODcyMjM.*_rup_ga_EVDQTJ4LMY*MTY4NjU4NzIyMi4xLjEuMTY4NjU4NzI1MS4wLjAuMA; UNHCR, UNHCR statement on amendments of State Border Law of Lithuania, 28 April 2023, https://www.unhcr.org/neu/98669-unhcr-statement-on-amendments-of-state-border-law-of-lithuania.html; Amnesty International, Lithuania: Legalizing illegal pushbacks gives green-light to torture, 20 April 2023, https://www.amnesty.org/en/latest/news/2023/04/lithuania-legalizing-illegal-pushbacks-gives-green-light-to-torture/

496 Minister of Foreign Affairs of the Republic of Lithuania order of 21 September 2021 No. V-393 regarding submission of applications for asylum by foreigners, https://www.amnesty.org/en/latest/news/2023/04/lithuania-legalizing-illegal-pushbacks-gives-green-light-to-torture/; and Minister of Foreign Affairs of the Republic of Lithuania order of 21 September 2021 No. V-392 regarding the approval of the description of the procedure for submitting applications for asylum by foreigners at diplomatic missions and consular offices, https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/7f7cdfe01ad111ecad9fbbf5f006237b?jfwid=-yvnrjnys6

abroad is that foreigners are required to provide a travel document and to prove that they are staying in the country legally. Also, the relevant legal act does not guarantee reception conditions while the asylum application is being examined[497]. There are significant delays in the examination of asylum applications at the embassy and asylum seekers are left in uncertainty, without any means to sustain themselves during the procedure. In one case, a Cuban national applied for asylum at the Lithuanian embassy in Minsk at the beginning of November 2021. In September 2022 he was deported to Cuba by the Belarus authorities because his right to stay in Belarus had expired[498].

Reports in the media also suggested that the Migration Department created conditions that made proper assessment of asylum applications extremely difficult[499]. Additionally, the state legal aid system for asylum seekers proved to be inadequate and inefficient[500]. The Migration Department terminated the agreement with the law firm, publicly stating that the legal services it provided were substandard[501]. State legal aid is now provided by a new law firm[502].

1.3.3. Access to material reception conditions

Most of the accommodation facilities in the first part of 2022 could not provide proper reception conditions. There were reports of overcrowding and lack of access to social and medical services[503]. There were also reports of abuse and deteriorating mental health due to prolonged detention[504]. The Seimas Ombudsman Office released reports stating that reception conditions in temporary accommodation centres and in the foreigners' centres of Kybartai and Medininkai amounted to inhumane and degrading human treatment[505]. The annual monitoring report for 2022 prepared by

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497 Minister of Foreign Affairs of the Republic of Lithuania order of 21 September 2021 No. V-392 regarding the approval of the description of the procedure for submitting applications for asylum by foreigners at diplomatic missions and consular offices, Paragraph 5, https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/7f7cdfe01ad111ecad9fbbf5f006237b?jfwid=-yvnrjnys6

498 Lithuanian Red Cross Society, Thematic report on access to the asylum procedure at the diplomatic missions of the Republic of Lithuania abroad and at the border checkpoints of the SBGS, p. 15, December 2022, https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/7f7cdfe01ad111ecad9fbbf5f006237b?jfwid=-yvnrjnys6

499 15min, Migracijos departamento darbuotoja: priimti teigiamą sprendimą dėl prieglobsčio – neįmanoma, 7 October 2021, https://www.15min.lt/naujiena/aktualu/lietuva/migracijos-departamento-darbuotoja-priimti-teigiama-sprendima-del-prieglobscio-neimanoma-56-1576076

500 Amnesty International, Lithuania: Forced out or locked up – Refugees and migrants abused and abandoned, 27 June 2022, p. 47, https://www.amnesty.org/en/documents/eur53/5735/2022/en/ and Delfi, Skandalinga pasipelnymo iš migrantų schema: šimtai tūkstančių eurų iš valstybės – į apsukraus teisininko kišenę, 15 May 2022, https://www.delfi.lt/news/daily/lithuania/skandalinga-pasipelnymo-is-migrantu-schema-simtai-tukstanciu-euru-is-valstybes-i-apsukraus-teisininko-kisene.d?id=90176489

501 Lietuvos nacionalinis radijas ir televizija, migrantai Lietuvoje nesulaukė teisinės pagalbos iš jiems paskirto advokato, 8 October 2022, https://www.lrt.lt/naujienos/lietuvoje/2/1795986/migrantai-lietuvoje-nesulauke-teisines-pagalbos-is-jiems-paskirto-advokato

502 Central public procurement portal (*Centrinis viešųjų pirkimų portalas),* Statement of purchase procedures, https://cvpp.eviesiejipirkimai.lt/ReportsOrProtocol/Details/2022-653790?formTypeId=1

503 Amnesty International, Lithuania: Forced out or locked up – Refugees and migrants abused and abandoned, 27 June 2022, p. 29, 33, https://www.amnesty.org/en/documents/eur53/5735/2022/en/

504 Medecins Sans Frontieres, People detained in Lithuania are experiencing abuse, violence and mental health distress, 6 May 2022, https://www.amnesty.org/en/documents/eur53/5735/2022/en/; Medecins Sans Frontieres, A 'hierarchy of suffering' exacerbates asylum seekers' mental health in Lithuania, 30 August 2022, https://www.msf.org/discriminatory-and-cruel-migration-practices-compound-suffering-lithuania

505 Seimas Ombudsmen Office, Report on ensuring the rights and freedoms of foreigners who have crossed the state border of the Republic of Lithuania with the Republic of Belarus in the places of temporary accommodation No. NKP-2021.1-3, page 34, 7 October 2021, https://www.lrski.lt/wp-content/uploads/2021/10/NKP-2021-1-3_2021-10-07.pdf; Seimas Ombudsman Office, Report on ensuring human rights and freedoms of foreign national in the Kybartai aliens registration centre under the Ministry of the Interior of the Republic of Lithuania, No. NKP-2021/1-4 24, January 2022, https://www.lrski.lt/wp-content/uploads/2022/02/Report-on-the-foreigners-rights-in-Kybartai.doc; Seimas

the Lithuanian Red Cross concludes that in all foreigners' centres, except for Jieznas, there was a lack of availability of certain services, and challenges regarding meal services and accommodation facilities[506]. The Committee Against Torture (CAT) reported on serious violations of reception standards[507].

1.3.4. Expulsions, pushbacks and detention

The pushbacks pose a threat to the lives of TCNs on the Lithuanian-Belarus border. The SBGS released a video of the expulsion of a group of Iranians during a winter storm[508]. There were reported cases of frostbites and amputations[509]. TCNs on the Belarus side faced beatings and being violently forced to re-attempt to cross the border. People in the 'exclusion zone', including families with small children, have been deprived of food, water, shelter and sanitation, and subjected to theft or extortion for bribes by the Belarusian security forces[510].

At the beginning of the declared crisis, the Republic of Lithuania Law on the Legal Status of Foreigners was amended with Article 113 Paragraph 4 Subparagraph 1^1 which allowed the detention of asylum seekers when they arrived in the country irregularly during an emergency due to 'mass influx' of asylum seekers[511]. This provision was abolished on 23 December 2021[512]. But the amendment of 23 December 2021 did not change the practice of detention, because TCNs and asylum seekers could still be detained by accommodating them without the right to freely move inside the territory of Lithuania according to Article 140^8 Paragraph 3 of the Law on the Legal Status of Foreigners.

During the peak of the 'migration crisis', around 4 000 TCNs (including about 1 000 children) were de facto detained. The practice of automatic detention of asylum seekers continued even after the CJEU decision of 30 June 2022, when the CJEU stated that asylum seekers cannot be detained merely on the basis that they are staying in the country illegally[513]. Prolonged and abysmal de facto

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Ombudsman Office, Report on ensuring human rights and freedoms of foreign national in the Medininkai Foreigners' centre of the State border guard service under the Ministry of the Interior of the Republic of Lithuania, No. NKP-2022/1-1, 7 July 2022, https://www.lrski.lt/wp-content/uploads/2022/07/Report-on-MFRC_1.pdf

506 Lithuanian Red Cross Society, Monitoring Report of 2022, 2022 September, https://redcross.lt/wp-content/uploads/2022/09/LRC-Monitoring-Report-2022.pdf.

507 Committee against Torture, *Concluding Observations on the Fourth Periodic Report of Lithuania (CAT/C/LTU/CO/4)*, 21 December 2021, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fLTU%2fCO%2f4&Lang=en

508 Lietuvos nacionalinis radijas ir televizija, Pasieniečių pasidalintame vaizdo įraše – keliolikos iraniečių bandymas neteisėtai patekti į Lietuvą, https://www.lrt.lt/naujienos/lietuvoje/2/1844633/pasienieciu-pasidalintame-vaizdo-irase-keliolikos-iranieciu-bandymas-neteisetai-patekti-i-lietuva, 14 December 2022; SBGS, Į Lietuvą neįleisti neteisėti migrantai pasakoja apie Baltarusijos pareigūnų elgesį su jais, 15 December 2022, https://www.youtube.com/watch?v=0S4qxfWpC0k

509 Medecins Sans Frontieres, People repeatedly repelled at Lithuania and Latvia borders face increased suffering, 15 December 2022, https://www.msf.org/people-repelled-lithuania-border-face-increased-suffering.

510 Amnesty International, Lithuania: Forced out or locked up – Refugees and migrants abused and abandoned, 27 June 2022, p. 17, https://www.amnesty.org/en/documents/eur53/5735/2022/en/

511 Seimas of the Republic of Lithuania Law of 13 July 2021 No. XIV-506 amending Republic of Lithuania Law on the Legal Status of Foreigners of 30 April 2004 No. IX-2206, https://www.e-tar.lt/portal/legalAct.html?documentId=a4780990eac111eb9f09e7df20500045

512 Seimas of the Republic of Lithuania Law of 23 December 2021 No. XIV-816 amending Republic of Lithuania Law on the Legal Status of Foreigners of 30 April 2004 No. IX-2206, https://www.e-tar.lt/portal/legalAct.html?documentId=0eee5e90696c11eca9ac839120d251c4

513 The CJEU concluded that *Article 8(2) and (3) of Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection must be interpreted as precluding legislation of a Member State under which, in the event of a declaration of martial law or of a state of emergency*

detention conditions of thousands of asylum seekers and TCNs in reception centres were reported by Amnesty International and the Seimas Ombudsman[514].

The mass detention of asylum seekers and TCNs gradually ended because of a positive shift in the practice of the Lithuanian Supreme Administrative Court[515]. Most people who were previously detained (in some cases for 12 months or more) absconded to other EU member states. The Lithuanian Supreme Administrative Court has also ruled that the measure established in Article 140^8 Paragraph 3 is de facto detention and is applied via an administrative act which can be challenged in court[516]. According to the CJEU decision in the case C-72/22, the measure such as the one prescribed in 140^8 Paragraph 3 amounts to detention (Paragraphs 40-42 of CJEU decision). On 20 April 2023, Article 140^8 was amended to include the possibility to appeal the measure prescribed in Paragraph 3 to the court (Article 140^8 Paragraph 9)[517].

In a landmark decision of 7 June 2023, the Constitutional Court of the Republic of Lithuania found that Article 140^8 Paragraph 3, to the extent that all asylum seekers must be accommodated (without the judicial decision or judicial review) in specified places, without giving them the right to move freely in the territory of the Republic of Lithuania, when such accommodation may last up to six months according to Paragraph 5 of this article, contradicts Article 20 of the Constitution of the Republic of Lithuania[518].

1.3.5. New developments on border fencing infrastructures

After the declared crisis in 2021, Seimas approved the building of a physical barrier with the Republic of Belarus[519]. The Government allocated up to EUR 152 million for the construction of the physical

or in the event of a declaration of an emergency due to a mass influx of aliens, an asylum seeker may be placed in detention for the sole reason that he or she is staying illegally on the territory of that Member State.

514 Amnesty International reported that an *overwhelming majority of people held in Lithuania's Foreigners' Registration Centres, detention facilities managed by the SBGS, are detained under the regime of 'temporary accommodation without freedom of movement', rather than under a formal detention order issued by a court. In 2022, the Migration Department issued 2 511 decisions on temporary accommodation for people who requested asylum (out of 2,647 detained across the country)*, 27 June 2022, p. 23, 24, https://www.amnesty.org/en/documents/eur53/5735/2022/en/; also see below the Ombudsman report of 24 January 2022 on de facto detention conditions in Medininkai; 7 July 2022 report on de facto detention conditions in Kybartai Foreigners' registration centre; 7 October 2021 report on ensuring human rights of foreigners in places of temporary accommodation.

515 Lithuanian Supreme Administrative Court decisions in administrative cases No. A-1805-756/2022, 31 March 2022; No. A-2306-662/2022, 28 April 2022; No. A-2307-822/2022, 28 April 2022; No. A-2414-881/2022, 05 May 2022; No. A-2595-602/2022, 19 May 2022; A-3177-881/2022, 30 June 2022; No. A-3163-815/2022, 30 June 2022; No. A-3419-502/2022, 20 July 2022; No. A-3605-502/2022, 10 August 2022.

516 Lithuanian Supreme Administrative Court decision in administrative case No. A-1289-602/2023, 19 January 2023, https://euaa.europa.eu/sites/default/files/publications/202303/2023_EUAA_Quarterly_Overview_Asylum_Case_Law_Issue1_EN.pdf

517 Seimas of the Republic of Lithuania Law of 20 April 2023 No. XIV-1889 amending Republic of Lithuania Law on the Legal Status of Foreigners of 29 April 2004 No. IX-2206, https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/03741072e01011eda305cb3bdf2af4d8?jfwid=-qfze6qmb0

518 The Constitutional Court of the Republic of Lithuania decision No. KT53-A-N6/2023, 7 June 2023, https://lrkt.lt/lt/teismo-aktai/paieska/135/ta2861/content; English version of the statement: https://lrkt.lt/en/about-the-court/news/1342/the-provisions-of-the-law-on-the-legal-status-of-foreigners-relating-to-the-temporary-accommodation-of-an-asylum-seeker-in-a-foreigners-registration-centre-during-a-state-of-emergency-were-are-in-conflict-with-the-constitution:553

519 Seimas of the Republic of Lithuania Law of 10 August 2021 No. XIV-513 on the construction of a physical barrier between the European Union external border and the Republic of Belarus, https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/4763ca32fa7211ebb4af84e751d2e0c9

barrier[520]. The construction cost almost EUR 145 million and was finished in December of 2022. The barrier is about 550 kilometres long[521]. On 2022 December the SBGS signed an agreement to finance the installation of border surveillance technology across the border with Belarus. The sum of the project was about EUR 40 million (with approximately EUR 36 million financed by the EU). Upon the completion of this project, the border surveillance system will cover one hundred per cent of the border with Belarus[522].

1.3.6. Impacts on fundamental rights

The amended laws and the practice of pushbacks were criticised by UNHCR and the Lithuanian Ombudsman, as well as other human rights organizations, such as ECRE, Amnesty International and Doctors Without Borders[523]. The CJEU found that national legislation that precluded illegally staying TCN's from lodging asylum applications in Lithuania violated European Union rules[524]. In addition, the Constitutional Court of the Republic of Lithuanian found that the national provisions that allowed automatic detention of asylum seekers without an individual assessment of their situation for up to 6 months was unconstitutional[525].

Right to asylum and non-refoulement

The CJEU concluded that the Lithuanian national legislation created conditions in which illegally staying TCNs were deprived of the opportunity to access asylum procedures[526]. Even though there were exceptions enumerated in the law that allowed some vulnerable people who were staying

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520 Government of the Republic of Lithuania decision of 23 August 2021 No. 680 on the implementation of the Law No. XIV-513, Paragraph 2.4, https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/bb251546040511ecb4af84e751d2e0c9?jfwid=-zcdu9s33k

521 Government of the Republic of Lithuania, Fizinio barjero įrengimas užbaigtas sėkmingai konstatavo projekto priežiūros komisija, 19 December 2022, https://lrv.lt/lt/naujienos/fizinio-barjero-irengimas-uzbaigtas-sekmingai-konstatavo-projekto-prieziuros-komisija

522 SBGS, Pasienyje su Baltarusija diegiama nauja sienos stebėjimo sistema, 16 January 2023, https://vsat.lrv.lt/lt/naujienos/pasienyje-su-baltarusija-diegiama-nauja-sienos-stebejimo-sistema

523 UNHCR observations on the Draft Amendments to the Law of the Republic of Lithuania on Legal Status of Aliens (XIVP-2385) and the Draft Amendments to the Law of the Republic of Lithuania on the State Border and its Protection (No XIVP-2383), 20 March 2023, https://www.refworld.org/docid/6419b0ee4.html?_gl=1*r97bzq*_rup_ga*MTU4ODA5NjI0LjE2ODY1ODcyMjM.*_rup_ga_EVDQTJ4LMY*MTY4NjU4NzIyMi4xLjEuMTY4NjU4NzI1MS4wLjAuMA; Seimas Ombudsmen Office, Report on ensuring the rights and freedoms of foreigners who have crossed the state border of the Republic of Lithuania with the Republic of Belarus in the places of temporary accommodation No. NKP-2021.1-3, page 34, 7 October 2021, https://www.lrski.lt/wp-content/uploads/2021/10/NKP-2021-1-3_2021-10-07.pdf; ECRE, EU Eastern Borders: Deadly Border Stand-off Claims More Than 20 Lives, Syrians Appeal for Protection, Iraqis Face Few Opportunities Back Home, Lithuania Offers Cash for Returns, Green Light Goes Europe-wide, 17 December 2021, https://ecre.org/eu-eastern-borders-deadly-border-stand-off-claims-more-than-20-lives-syrians-appeal-for-protection-iraqis-face-few-opportunities-back-home-lithuania-offers-cash-for-returns-green-light-goes-europ/; Amnesty International, Lithuania: Forced out or locked up – Refugees and migrants abused and abandoned, 27 June 2022, p. 17, https://www.amnesty.org/en/documents/eur53/5735/2022/en/; Medecins Sans Frontieres, People repeatedly repelled at Lithuania and Latvia borders face increased suffering, 15 December 2022, https://www.msf.org/people-repelled-lithuania-border-face-increased-suffering.

524 CJEU, C-72/22 PPU, 30 June 2022, *M.A. v Valstybės sienos apsaugos tarnyba*. https://curia.europa.eu/juris/document/document.jsf?text=&docid=261930&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=4092

525 The Constitutional Court of the Republic of Lithuania decision No. KT53-A-N6/2023, 7 June 2023.

526 CJEU, C-72/22 PPU, 30 June 2022, *M.A. v Valstybės sienos apsaugos tarnyba*. https://curia.europa.eu/juris/document/document.jsf?text=&docid=261930&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=4092

illegally to apply for asylum[527], there was no accompanying legal act that laid down the procedure to assess such vulnerabilities. Moreover, the Ombudsperson of the Rights of the Child concluded in a report that the authorities pushed back children without conducting a vulnerability and needs assessment and ignoring their status as children. They also raised concerns about the practice of the authorities maintaining that children with their parents are not vulnerable persons[528]. Article 4 Paragraph 13 provides exceptions when pushbacks do not apply[529], but there are no legal acts that set the rules and procedures when these exceptions apply – the decision to accept a person's asylum application is entirely left to the discretion of the SBGS officers at the border when they are conducting pushbacks.

Prohibition of collective expulsion

In at least two situations the SBGS expelled asylum seekers from the territory of Lithuania contrary to the decision of the European Court of Human Rights (ECtHR) granting interim measures. One case concerned a group of Afghani nationals, who were expelled despite an attorney in possession of the interim measure of the ECtHR being present at the scene[530]. Another case concerned a group of Cuban nationals being assisted by NGOs, which also directly provided the interim measure decision of the ECtHR to the officers of the SBGS[531].

Prohibition of torture and inhumane or degrading treatment

During the 'crisis', TCNs were accommodated in centres in degrading conditions (see the Seimas Ombudsman reports below). Serious breaches of international law were also reported by other

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527 Seimas of the Republic of Lithuania Law of 10 August 2021 No. XIV-515 amending the Republic of Lithuania Law on the Legal Status of Foreigners of 29 April 2004 No. IX-2206 provided that *the SBGS may accept applications for asylum from a foreigner who has illegally crossed the state border of the Republic of Lithuania taking into account the vulnerability or other specific circumstances of the foreigner. (Article 67 Paragraph 1[2])* (https://www.e-tar.lt/portal/legalAct.html?documentId=1e963ae0faa211eb9f09e7df20500045) (English version: https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/5e3ef63a487911eca8a1caec3ec4b244?jfwid=-1h8whopdq. Later on this provision was moved to Article 140[12] Paragraph 2 (Seimas of the Republic of Lithuania Law of 23 December 2021 No. XIV-816 amending the Law on the Legal Status of Foreigners of 30 April 2004 No. IX-2206, https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/c67c9f5266e611ecb2fe9975f8a9e52e. The Minister of Internal Affairs of the Republic of Lithuania Order of 24 February 2016 No. 1V-131 that set the rules of the procedure for granting and withdrawing asylum (edition of 2022-02-26 - 2022-12-28) Paragraph 22 established that *the SBGS, when evaluating whether a request for asylum can be accepted in the case specified in Article 140 Paragraph 2, takes into account the following circumstances: whether the foreigner is an unaccompanied minor; whether the foreigner comes directly from a state where he is threatened with persecution or there is a threat to his health, safety or freedom; whether there are other individual circumstances*, https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/0a918630dc0311e59019a599c5cbd673/ctkqYCllOX?jfwid=-9y2m34rni

528 Ombudsperson of the Rights of the Child, Report on the possible violation of the rights and interests of children not admitted to the territory of the Republic of Lithuania on 11/06/2021 and 12/01/2021, p. 11, 13, 20, 2022 January 13, http://vtaki.lt/lt/media/force_download/?url=/uploads/documents/docs/781_2d8fa94ba53368df8182c1a02d03c5bc.pdf

529 Article 14 Paragraph 13 of the Republic of Lithuanian Law on State Border and its Protection states that *this provision shall apply individually to each of the aliens in question. If it is established that a foreigner is withdrawing from the armed conflicts specified in the Government's decision, as well as from persecution, as defined in the Convention on the Status of Refugees or seeks to enter the territory of the Republic of Lithuania for humanitarian purposes, the provision on the refusal of foreigners to enter the Republic of Lithuania shall not apply*.

530 ECtHR, *Sadeed and Others v. Lithuania*, Application No. 44205/21.

531 Lietuvos nacionalinis radijas ir televizija, Nevyriausybininkai praneša apie į Lietuvą atvykusius kubiečius: tvirtina – nors turi teisę pasilikti, Lietuvos pasieniečių buvo apgręžti bent aštuonis kartus, April 9 2022, https://www.lrt.lt/naujienos/lietuvoje/2/1668799/nevyriausybininkai-pranesa-apie-i-lietuva-atvykusius-kubiecius-tvirtina-nors-turi-teise-pasilikti-lietuvos-pasienieciu-buvo-apgrezti-bent-astuonis-kartus

NGOs[532] and the Committee against Torture[533]. Pushed-back asylum seekers also faced serious breaches of human rights from the Belarus border guards and were at risk of chain-refoulement[534].

Right to an effective remedy

As mentioned above, irregular TCNs and asylum seekers at the border have no recourse to dispute the decisions of the SBGS officers on the ground refusing them permission into the territory of Lithuania, and even the ECtHR interim measures were not always effective. As for de facto detention measures, the right to appeal the automatic detention was only enshrined in law with the amendments of 20 April 2023 to the Law on the Legal Status of Foreigners

Effectiveness of ECtHR Rule 39

Asylum seekers also faced difficulties when trying to receive interim measures from the ECtHR, since the ECtHR requires confirmation and proof that they were on the territory of the Republic of Lithuania. While the ECtHR is making a decision on whether to apply interim measures, the applicants may already be pushed back. Even in cases when the interim measures are granted, it does not lead to access to the asylum procedure or guarantee of non-refoulement.

1.3.7. Debate or investigations at the national level

After the CJEU ruling of 30 June 2022, the Lithuanian Supreme Administrative Court renewed the case that was referred to the CJEU and confirmed the CJEU decision[535]. The Lithuanian Supreme Administrative Court also ensured that TCNs had the right to appeal the restrictions on their movement even if a state of emergency is declared[536]. Also see the 19 January 2023 decision mentioned in the detention part of this case study[537]. Finally, the Constitutional Court of the Republic of Lithuania ruled that the system of mass detention without evaluating the individual circumstances of each person contradicts Article 20 of the Constitution[538].

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[532] Red Cross EU office, The dignity and rights of people must be upheld at the EU's eastern border – News – Red Cross EU Office, 1 December 2021, https://redcross.eu/latest-news/the-dignity-and-rights-of-people-must-be-upheld-at-the-eu-s-eastern-border; Amnesty International, Lithuania: Forced out or locked up – Refugees and migrants abused and abandoned, 27 June 2022, https://www.amnesty.org/en/documents/eur53/5735/2022/en/; Medecins Sans Frontieres, People repeatedly repelled at Lithuania and Latvia borders face increased suffering, 15 December 2022, https://www.msf.org/people-repelled-lithuania-border-face-increased-suffering.

[533] Committee against Torture, *Concluding Observations on the Fourth Periodic Report of Lithuania (CAT/C/LTU/CO/4)*, 21 December 2021, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fLTU%2fCO%2f4&Lang=en

[534] ECRE, EU Eastern Borders: Deadly Border Stand-off Claims More Than 20 Lives, Syrians Appeal for Protection, Iraqis Face Few Opportunities Back Home, Lithuania Offers Cash for Returns, Green Light Goes Europe-wide, 17 December 2021, https://ecre.org/eu-eastern-borders-deadly-border-stand-off-claims-more-than-20-lives-syrians-appeal-for-protection-iraqis-face-few-opportunities-back-home-lithuania-offers-cash-for-returns-green-light-goes-europ/; Human Rights Watch, Die Here or Go to Poland, 24 November 2021, https://www.hrw.org/report/2021/11/24/die-here-or-go-poland/belarus-and-polands-shared-responsibility-border-abuses.

[535] Lithuanian Supreme Administrative Court decision in administrative case No. A-1091-822/2022, 28 July 2022.

[536] Lithuanian Supreme Administrative Court decisions in administrative cases No. AS-653-492/2021, 6 October 2021; No. A-4071-492/2021, 3 November 2021; No. A-4180-629/2021, 18 November 2021.

[537] Lithuanian Supreme Administrative Court decision in administrative case No. A-1289-602/2023, 19 January 2023, can be accessed: https://euaa.europa.eu/sites/default/files/publications/2023-03/2023_EUAA_Quarterly_Overview_Asylum_Case_Law_Issue1_EN.pdf

[538] By its ruling of 7 June 2023, the Constitutional Court recognised that the provisions of the Law on the Legal Status of Foreigners, according to which, in the event of a mass influx of foreigners during a declared extraordinary situation, a state of emergency, or a state of war, all asylum seekers were obliged to be accommodated in designated places without being granted the right to move freely within the territory of the Republic of Lithuania, where the duration

Lithuanian courts also ensured that illegally staying foreigners who were inside the territory of Lithuania and accommodated in reception centres had access to the asylum procedure[539]. In another case, the court essentially ruled that a Cuban national, who applied for asylum in the Lithuanian embassy in Belarus and who was deported by Belarus authorities to Cuba, could not enter Lithuania while his asylum application was being processed in the Migration Department[540].

A substantial majority of lawmakers in the Seimas (which consists of 141 members) approved amendments that conflicted with the Constitution and EU law: 84 lawmakers agreed with the amendments that allowed the mass detention of asylum seekers in 2021[541]; 87 lawmakers agreed that foreigners who arrived illegally may not apply for asylum (10 August 2021 amendment)[542]; and 86 lawmakers agreed on amendments to legalise pushbacks[543].

Numerous international organisations reported on the abuses of the Lithuanian and Belarus authorities[544]. The Seimas Ombudsman reported various incidents of malpractice by state institutions: conditions of foreigners (including vulnerable people and children) accommodated in temporary housing amounted to degrading treatment[545]; foreigners at the border were pushed back to Belarus without informing them of the proper procedure to apply for asylum, thus violating the right to seek asylum and without evaluating whether there was a risk of torture, inhumane or degrading treatment in Belarus[546]; reception conditions at the Kybartai Foreigners' registration

of such accommodation could be up to six months, in the absence of a decision by the competent authority that could be appealed to a court, had been in conflict with Article 20 of the Constitution. The Constitutional Court also recognised that paragraph 3 (set out in its new wording of 20 April 2023) of Article 140^8 of the same law, insofar as, according to that paragraph, all asylum seekers were obliged to be accommodated in designated places without being granted the right to move freely within the territory of the Republic of Lithuania, where the duration of such accommodation, according to paragraph 5 of that article, could be up to six months, was in conflict with the same article of the Constitution. (https://lrkt.lt/en/about-the-court/news/1342/the-provisions-of-the-law-on-the-legal-status-of-foreigners-relating-to-the-temporary-accommodation-of-an-asylum-seeker-in-a-foreigners-registration-centre-during-a-state-of-emergency-were-are-in-conflict-with-the-constitution:553).

539 Supreme Court of The Republic of Lithuania decision No. 2K-217-628/2021, Paragraph 18, 14 December 2021; Vilnius district administrative court decision in administrative case No. eI2-2624-872/2022, 21 March 2022; Vilnius district administrative court decision in administrative case No. eI2-2623-535/2022, 22 March 2022.

540 Lithuanian Supreme Administrative Court decision in administrative case No. eA-1663-789/2023, Paragraph 33.

541 Infomigrants, Lithuania passes new asylum laws to deter migrants, 14 July 2021, https://www.infomigrants.net/en/post/33596/lithuania-passes-new-asylum-laws-to-deter-migrants?preview=1626251116818

542 Seimas of the Republic of Lithuania, Voting results of the members of Seimas, https://www.lrs.lt/sip/portal.show?p_r=37067&p_k=1&p_kade_id=9&p_ses_id=123&p_fakt_pos_id=-501633&p_bals_id=-43313#balsKlausimas.

543 Seimas of the Republic of Lithuania, Seimas įstatymu įtvirtino neteisėtų migrantų apgręžimo galimybę pasienio ruože, 25 April 2023, https://www.lrs.lt/sip/portal.show?p_r=35403&p_k=1&p_t=284594.

544 Refer to the reports and investigations conducted by various organisations (Amnesty International, Human Rights Watch, Lithuanian Red Cross Society, Committee against Torture, etc.) mentioned in this case study.

545 Seimas Ombudsmen Office, Report on ensuring the rights and freedoms of foreigners who have crossed the state border of the Republic of Lithuania with the Republic of Belarus in the places of temporary accommodation No. NKP-2021.1-3, page 34, 7 October 2021, https://www.lrski.lt/wp-content/uploads/2021/10/NKP-2021-1-3_2021-10-07.pdf.

546 Seimas Ombudsmen Office, Report on ensuring the rights and freedoms of foreigners who have crossed the state border of the Republic of Lithuania with the Republic of Belarus in the places of temporary accommodation No. NKP-2021.1-3, page 34, paragraphs 10.11., 10.12., 7 October 2021, https://www.lrski.lt/wp-content/uploads/2021/10/NKP-2021-1-3_2021-10-07.pdf

centre[547] and at Medininkai Foreigners' registration centre[548] amounted to inhumane or degrading treatment; concluded that SBGS and the Migration department failed to comply with EU law by refusing to register the applicants' asylum applications even while they were in the territory of the Republic of Lithuania[549]; reported that the Migration Department failed to evaluate the applicant's asylum application in time[550].

1.3.8. Wider geopolitical implications and the EU involvement

Wider geopolitical implications

The controversies about TCNs movements were a part of a larger conflict between the EU, Lithuania and Belarus. It was the Belarusian regime's response to EU sanctions imposed following the regime's rigging of elections in 2020 and violent repression of civil society in 2021[551]. In a resolution 'on countering hybrid aggression', the Seimas mentioned the fact 'that on 23 May 2021, a civil aircraft with passengers on board was unlawfully seized in Belarus and other unlawful actions were carried out'. The Seimas also expressed 'concern that this hybrid aggression could be further developed and become the basis for threats of new nature in the context of ZAPAD, a large-scale military exercise'[552]. These statements suggest that the 'crisis' is perceived by the Government as a continuation of the conflict between Lithuania and Belarus.

EU involvement

On 12 July 2021 the European Border and Coast Guard Agency (Frontex) launched a rapid border intervention at Lithuania's border with Belarus to assist the Lithuanian authorities. The agency deployed Frontex's border guards together with officers from the Member States as part of the European Border and Coast Guard Standing Corps. Frontex had also sent patrol cars and specialised officers for conducting interviews with TCNs to gather information on criminal networks involved and support the exchange of operational information[553]. The European Union Agency for Asylum (EUAA) also provided operational support to Lithuania until 30 June 2022[554]. The European

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547 Seimas Ombudsman Office, Report on ensuring human rights and freedoms of foreign national in the Kybartai aliens registration centre under the Ministry of the Interior of the Republic of Lithuania, No. NKP-2021/1-4 24, January 2022, https://www.lrski.lt/wp-content/uploads/2022/02/Report-on-the-foreigners-rights-in-Kybartai.doc

548 Seimas Ombudsman Office, Report on ensuring human rights and freedoms of foreign national in the Medininkai Foreigners' centre of the State border guard service under the Ministry of the Interior of the Republic of Lithuania, No. NKP-2022/1-1, 7 July 2022, https://www.lrski.lt/wp-content/uploads/2022/07/Report-on-MFRC_1.pdf

549 Seimas Ombudsman Office, Report on the complaint by x and y against the Migration Department and the SBGS, 15 April 2022, https://www.lrski.lt/documents/pazyma-del-x-ir-y-skundo-pries-migracijos-departamenta-prie-lietuvos-respublikos-vidaus-reikalu-ministerijos-ir-valstybes-sienos-apsaugos-tarnyba-prie-lietuvos-respublikos-vidaus-reikalu-ministerij/

550 Seimas Ombudsmen Office, Report on the complaint by x against the Migration Department, 21 March 2023, https://www.lrski.lt/documents/pazyma-del-x-skundo-pries-migracijos-departamenta-prie-lietuvos-respublikos-vidaus-reikalu-ministerijos-9/

551 European Parliament, Instrumentalisation in the field of migration and asylum, 22 November 2021, https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2022)739204; European Commission, Statement by President von der Leyen on the situation at the border between Poland and Belarus, 8 November 2021, https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_21_5867

552 Seimas of the Republic of Lithuania resolution of 13 July 2021 No. XIV-505 on countering hybrid aggression, https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/1a84e440e49c11eb866fe2e083228059?jfwid=110vuma1t4

553 European Commission, Migration: EU helps channel humanitarian support to migrants in Lithuania, 23 July 2021, https://ec.europa.eu/commission/presscorner/detail/it/IP_21_3846

554 EUAA, Lithuania operating plan 2021-2022 ex post evaluation report, 2022 August, https://euaa.europa.eu/sites/default/files/publications/2022-11/2022_Evaluation_Report_OP_Lithuania_2021-22_EN.pdf

Commission made available EUR 36.7 million in emergency assistance under the Asylum, Migration and Integration Fund to help improve reception capacity in Lithuania [555].

1.4. Relevance of the Instrumentalisation proposal

The Instrumentalisation proposal provides for a mandatory border procedure for all asylum applicants for up to 16 weeks eroding the rights of asylum seekers as assessed in Section 5.1. of this IA. However, Lithuania would still be in violation of the proposed Instrumentalisation regulation, as in Lithuania the pushbacks have been officially established in national law. Lithuania is pushing back asylum seekers without individual examinations or decisions. It is noteworthy that the reason of the Lithuanian push-back policy is not related to the lack of time or resources as presumed by the instrumentalisation proposal. Therefore, the lower set of standards enshrined in the instrumentalisation proposal would not improve the compliance of the Lithuanian legal regulation and practice.

However, the legal fiction of non-entry, established in the instrumentalisation proposal, may be incompatible with the Constitution of the Republic of Lithuania, since the above decision of 7 June 2023 of the Constitutional Court of the Republic of Lithuania found a law allowing for all asylum seekers to be accommodated (without recourse to a judicial decision or effective remedy) in specified places, without giving them the right to move freely in the territory, when such accommodation may last up to six months, contradicts the Lithuanian Constitution.

[555] EU Commission, Commission approves EUR 36.7 million to support migration management in Lithuania, 2021 August 11, https://ec.europa.eu/commission/presscorner/detail/ro/mex_21_4181

2. Poland

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2.1. Background

As of August 2021, Poland has experienced a sharp increase in the number of third-country nationals irregularly crossing the EU external borders from the direction of Belarus. This is as a result of Aleksandr Lukashenko's regime aiming to exert political pressure on the EU[556]. The 'mass influx' consists of third country nationals from countries such as Syria, Iraq or Afghanistan, among whom are women, men and children, including unaccompanied children[557].

In response to 'the crisis', the Polish authorities adopted legal changes that allowed third-country nationals to be forcibly returned to Belarus in an accelerated manner. Returns are taking place outside of the official border crossings (in the forest area or through the border rivers), often without TCNs' identities being verified[558]. Access to asylum on Polish territory has been hindered and, according to the newest changes to the law, asylum applications lodged by those who cross the border irregularly might be left unexamined by the asylum authority.

Furthermore, the introduced legal changes restricted access to the border area and significantly limited fundamental rights and freedoms (such as freedom of movement, freedom of assembly and speech). The changes were accompanied by anti-migration statements from top-rank governmental officials[559] and narratives justifying the need to protect the Polish border[560] in times of 'hybrid war'[561]. The Polish government argued that 'the Belarusian state authorities cynically use migrants, organise dangerous provocations toward the Polish law enforcement officers and soldiers as well as run many aggressive information campaigns'. According to the Polish government 'Poland, Lithuania and Latvia [...] protect the EU from destabilisation'[562].

The restrictive policy of the Polish government prevented any full-scale humanitarian aid response – international or national humanitarian organisations were not allowed to enter the border area until July 2022 and humanitarian aid was provided mainly by civilians, society groups and organisations[563].

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556 See e.g. Evans J., Belarus dictator threatens to 'flood EU with drugs and migrants', The Week.

557 Andrius Sytas, Lithuania says Belarus is flying in migrants, plans border barrier, Reuters.

558 Górczyńska M., Czarnota K., Gdzie prawo nie sięga. Raport Helsińskiej Fundacji Praw Człowieka z monitoringu sytuacji na polsko-białoruskiej granicy, Helsińską Fundacja Praw Człowieka.

559 Tvn24.pl, Konferencja Kamińskiego i Błaszczaka w sprawie migrantów wzbudziła kontrowersje. Komentarze polityków, Rp.pl, Treści zoofilskie na konferencji. To stare nagranie z internetu, Sitnicka D., 'Krowa Kamińskiego' to stare nagranie z internetu. A w dodatku to klacz, Oko.press.

560 wPolityce.pl, Minister Kamiński: Musimy twardo bronić naszej granicy. Nie możemy dopuścić, by reżim Łukaszenki osiągnął swoje cele polityczne, PAP.pl, Szef MSWiA: musimy bronić naszych granic. Nie możemy ulegać naciskom.

561 Bodalska B., Morawiecki: Na granicy z Białorusią trwa wojna nowego typu, Europa zagrożona, Euractiv.pl.

562 Hybrydowa agresja Białorusi na UE, Serwis Rzeczypospolitej Polskiej.

563 Doctors Without Borders' statement: https://www.msf.org/msf-leaves-polish-border-after-being-blocked-assisting-migrants-and-refugees.

Military[564] and quasi-military formations[565], as well as the Forest Guard[566], were deployed to protect the border, some with unclear competencies.

Due to the lack of consistent data, the full scale of the crisis is difficult to assess. Compared to 129 irregular border crossings in 2020, the Border Guard reported that 33 781 people were prevented entry to Poland in 2021, 12 157 in 2022 and 5 574 between 1 January 2023 and 15 April 2023. However, the actual number of TCNs who entered or attempted to enter Poland from Belarus might be smaller. Since TCNs are usually not registered before being expelled to Belarus, the Border Guard most likely presents the figures for 'crossings' and not 'people'. According to media reports, around 50 people have died since August 2021 while trying to cross the Polish-Belarussian border[567].

The crisis on the Polish-Belarusian border occurred amid the long-lasting rule of law crisis in Poland. Among other things, the rule of law crisis weakens the independence of the courts (including the Constitutional Tribunal responsible for verifying the constitutionality of the laws), undermining the legal stability and respect afforded to the binding decisions of national and international courts[568]. In this context, none of the legislation adopted in response to the humanitarian crisis was subjected to the independent courts' control. Moreover, in the case *R.A. and Others v. Poland,* Polish law enforcement refused to acknowledge and implement interim measures imposed by the ECtHR for the benefit of the applicants[569].

2.2. Policies

Since 2021, in response to the humanitarian crisis on the Polish-Belarussian border, the Polish government has adopted several legal and policy changes.

First of all, the Minister of Interior and Administration amended the regulation on suspending the border movement at certain crossing points, including those between the Republic of Poland and Belarus (hereinafter Border Regulation). This Regulation was first adopted in March 2020 to prevent the spread of Covid-19. The Regulation introduced certain categories of third-country nationals who were exempted from the Regulation (e.g. foreigners married to a Polish citizen, holders of the Pole Card, foreigners entitled to permanent or temporary residence). In August 2021, the Regulation was amended. The new provisions provided for the possibility to 'escort to the border line' all third-country nationals who did not belong to any category of those allowed to enter Poland during the pandemic[570]. The new Regulation failed to provide any guarantees, such as conducting

564 Police, Polish Armed Forces, and additional Border Guard units were deployed.

565 One of the military formations deployed at the border were the Territorial Defense Forces: https://www.wojsko-polskie.pl/8bot/articles/lokalne-aktualnosci-brygady-j/zolnierze-z-regionu-chronia-granice-polsko-bialoruska/.

566 On 17 Novmeber 2021, the State Forests announced the mobilization of the Forest Guard officers to support the Border Guard, Police and the Polish Army protecting the border with Belarus: https://www.lasy.gov.pl/pl/informacje/aktualnosci/mobilizacja-strazy-lesnej.

567 Tomczak M., Syryjczyk zmarł w szpitalu w Białymstoku. Spadł z muru na granicy polsko-białoruskiej, Oko.press.

568 Szuleka M., The constitutional crisis in Poland 2015-2016, Helsinki Foundation for Human Rights, Grabowska-Moroz, Barbara, How Was the 'Rule of Law' Dismantled in Poland and What Does It Mean for the EU? (2022). La Unión Europea y el reto del Estado de Derecho (edited by Susana Sanz Caballero), Thomson Reuters Aranzadi 2022, pp. 277-294.

569 Website of the Republic of Poland, https://www.gov.pl/web/mswia-en/poland-provided-the-echr-with-its-position-on-the-order-for-interim-measures

570 Minister of Interior Affairs and Administration of 13 March 2020 on temporary suspension or limitation of the border movement at certain border crossing (Rozporządzenie Ministra Spraw Wewnętrznych i Administracji z dnia 13 marca 2020 r. w sprawie czasowego zawieszenia lub ograniczenia ruchu granicznego na określonych przejściach granicznych) amended by the Regulation of the Minister of Interior Affairs and Administration of 20 August 2021.

administrative proceedings concluded with a written decision. Instead, relying on the changed provisions, expulsion from Poland is based only on oral notification. There were no official data published by the Ministry that would provide for further explanation of this change.

Furthermore, in September 2021, the President of Poland introduced the Regulation on the state of emergency in the roughly three-kilometre area next to the Polish-Belarussian border[571]. The Regulation included, among other things, restrictions to the fundamental rights and freedoms such as freedom of movement (access to the zone was restricted), freedom of assembly and freedom of speech (restrictions concerning among other things photo or video documenting objects or places within the zone). The introduction of the state of emergency was justified by a 'particular threat to the citizens' security and public order related to the current situation on the border between the Republic of Poland and the Republic of Belarus'. During the parliamentary debate, Prime Minister Mateusz Morawiecki further justified the need to introduce the state of emergency by stating that 'protecting the borders, making sure they are secure and none crosses them in an illegal manner are our fundamental duties'[572].

The state of emergency was introduced for 30 days and extended in October 2021 for a further 60 days.

In the meantime, the Parliament adopted further changes in the Act on Foreigners and the Act on Granting Protection to the Foreigners[573]. The amended provisions provided for the procedure of expedited expulsion of foreigners apprehended immediately after unauthorised border crossing (quasi-legalising pushbacks). The introduced changes allowed for returning to the border, without a proper administrative procedure, a person who crossed or attempted to cross the border in an irregular manner. The new law provided that if a TCN was apprehended immediately after crossing the border in an irregular manner, the Chief of the local Border Guard Station would draft a protocol documenting the crossing of the border and issue a decision to leave the territory of the Republic of Poland. The decision includes an entry ban to Poland and other Schengen states. The person subjected to this decision has a right to appeal against it to the Commander-in-Chief of the Border Guard Headquarters, however, the appeal does not suspend the execution of the decision.

The changes were justified by the necessity to 'adapt the provisions of domestic law to the current migration situation at the external border' in order to 'prevent the abuse of the asylum institution by foreigners who, for purposes other than protection against persecution or suffering serious harm, by submitting an application for international protection obtain certain rights, including the right to cross the border and stay on the territory of the state'.

In November 2021, the Parliament adopted changes to the Act on the Protection of the National Border[574]. The changes introduced the possibility for the Minister of Internal Affairs and Administration to issue a regulation banning access to the border zone in order to protect security and public order. The Minister issued such a regulation on 1 December 2021 and it lasted until 30 June 2022.

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571 President of the Republic of Poland Regulation of 2 September 2021 on introducing the state of emergency in the part of Podlaskie and Lubelskie Voivodeships (Rozporządzenie Prezydenta Rzeczypospolitej Polskie z dnia 2 września 2021 r. w sprawie wprowadzenia stanu wyjątkowego na obszarze części województwa podlaskiego oraz części województwa lubelskiego).

572 Prime Minister Mateusz Morawiecki, Wypowiedzi na posiedzeniach Sejmu Posiedzenie nr 36 w dniu 06-09-2021 (2. dzień obrad).

573 Act of 14 October 2021 amending the Act on foreigners and certain other acts (Ustawa z dnia 14 października 2021 r. o zmianie ustawy o cudzoziemcach oraz niektórych innych ustaw).

574 Act of 17 November 2021 amending the Act on protection national border and certain other Acts (Ustawa z dnia 17 listopada 2021 r. o zmianie ustawy o ochronie granicy państwowej oraz niektórych innych ustaw).

Moreover, in August 2021, the Minister of the Interior and Administration amended the Detention Regulation[575] allowing lower standards of accommodation for third-country nationals in the detention centres. According to the amendment, if it is necessary to place a large number of foreigners in a guarded centre or a detention centre at the same time and there are no vacancies in residential cells, a foreigner may be placed in a room smaller than 4 sqm but no less than 2 sqm per foreigner (which is less than the minimum standard for prisons set in the Polish domestic law being 3 sqm).

In October 2021, the Parliament adopted an Act on the Construction of State Border Protection Installations. The law provided for constructing both the physical and technical (including electronic) barriers on the Polish-Belarusian border[576]. The provisions on public procurement, environmental protection and access to public information have been excluded from the Act.

Due to the overlapping rule of law crisis, none of the amended provisions was challenged in the proceedings before the Constitutional Court. In some cases the courts reviewed the constitutionality of the provisions. However, the outcomes of the proceedings influenced only the individual cases and did not result in changing the already adopted legislation or policy.

2.3. Effects

The response of the Polish government to the increased number of irregular border crossings was the militarisation of the Poland-Belarus border area, the erection of the border fence, and equipping the Border Guard with the competencies to return third-country nationals in an accelerated manner.

The state of emergency followed by the entry ban has effectively restricted access to the border area for journalists, civil society, UNHCR and independent monitors throughout the first year of the crisis. Until the entry ban was lifted the only institution allowed to visit the border was the Polish Ombudsman, whose reports were, however, classified. The Commissioner for Human Rights of the Council of Europe[577] and the EU Commission[578] pointed out the lack of transparency of the state actions at Poland's border with Belarus.

The introduced law amendments lack legal certainty. The expedited returns, introduced under new legislation, fall outside the scope of the Return Directive (i.e. the expedited return decision does not provide for voluntary departure and lacks basic safeguards provided to foreigners under regular return proceedings). They do not secure guarantees provided in Article 4(4) of the same Directive. Moreover, it is down to the discretion of the border authorities which of the two parallel legal frameworks in place is applied in each case. The statistics presented by the Border Guard show that in most cases the Border Regulation provisions are used, therefore, no written decision is issued[579].

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[575] Regulation of the Minister of Interior and Administration of 13 August 2021 amending the Regulation on secured detention and arrests for foreigners (Rozporządzenie Ministra Spraw Wewnętrznych i Administracji z dnia 13 sierpnia 2021 r. zmieniające rozporządzenie w sprawie strzeżonych ośrodków i aresztów dla cudzoziemców).

[576] Act of 29 October 2021 on the Construction of State Border Protection Installations (Ustawa z dnia 29 października 2021 r. o budowie zabezpieczenia granicy państwowej).

[577] Commissioner for Human Rights of the Council of Europe, *Commissioner calls for immediate access of international and national human rights actors and media to Poland's border with Belarus to end human suffering and violations of human rights,* 19 November 2021: https://www.coe.int/en/web/commissioner/-/commissioner-calls-for-immediate-access-of-international-and-national-human-rights-actors-and-media-to-poland-s-border-with-belarus-in-order-to-end-hu.

[578] EUObserver, *EU Commission: laws allowing Belarus pushbacks need changes,* 10 November 2021, https://euobserver.com/migration/153474.

[579] According to the statistics provided by the Border Guard to HFHR under public information access provisions, between 21 August 2021 (the date when the amended Border Regulation entered into force) and 31 December 2021, the number of third-country nationals escorted to the borderline with Belarus under the Border Regulation was

Polish authorities argue that if TCNs wish to apply for international protection they should lodge their claims at the official border crossings. However, the European Court of Human Rights (ECtHR) has already found that Poland does not ensure access to asylum at its border crossings, particularly those at the Poland-Belarus border (see, among others, ECtHR, *M.K. and Others v. Poland* and *D.A. and Others v. Poland*). Besides, the journeys of third-country nationals crossing the EU-Belarus border are partially to fully facilitated and controlled by the Belarusian authorities, who encourage or force them to choose irregular pathways to Poland[580].

Nonetheless, Polish authorities claim that third-country nationals who ask for asylum at the green border are not returned to Belarus but are allowed to enter the asylum proceedings. Since the beginning of the declared crisis, the number of asylum applications lodged in Poland has indeed increased[581]. According to a Report by the Helsinki Foundation for Human Rights, however, border guards routinely deny migrants access to asylum in violation of the non-refoulement principle and also return to Belarus those who explicitly claim the need for protection[582].

Despite huge expenditures on border protection, accelerated returns of migrants and far-reaching restrictions to civil liberties, Poland has not been successful in preventing irregular entries. Even after the erection of the fence, the Border Guard reports daily that dozens of people cross the border from Belarus, while human rights organisations conduct hundreds of humanitarian interventions each month to assist those affected by the border policy. Germany reports that, since August 2021, tens

32,177, while between 26 October 2021 (the date when the amended Act on Foreigners entered into force) and 31 December 2021, only 2 384 third-country nationals received the return orders. From 1 January 2022 to 31 December 2022, 12 157 third-country nationals were escorted to the borderline with Belarus under the Border Regulation, while only 2 552 third-country nationals received the return order. From 1 January 2023 to15 April 2023, 5 574 third-country nationals were escorted to the borderline with Belarus under the Border Regulation, while only 845 third-country nationals received the return order. According to the official position of the Polish Border Guards, border guards are obliged to draw up a report on a person who has been arrested for irregular border crossing and to issue an order to remove that person from Poland. However, if that same individual is apprehended again by the Polish Border Guard, the immediate return takes place under the Border Regulation and does not require that a legal procedure or a return order be initiated against the third country national for his/her removal from the territory. While many migrants have been pushed back and forth across the border multiple times, only the first removal is recorded and conducted under official procedures. See the findings of the UN Special Rapporteur on the human rights of migrants from his visit to Poland (A/HRC/53/26/Add.1), April 2023, available at: https://reliefweb.int/report/poland/visit-poland-report-special-rapporteur-human-rights-migrants-felipe-gonzalez-morales-ahrc5326add1.

580 See the findings of the UN Special Rapporteur on the human rights of migrants from his visit to Belarus (A/HRC/53/26/Add.2), 18 May 2023, available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G23/097/24/PDF/G2309724.pdf?OpenElement and statements of the Polish goverment blaming Belarus for 'fully controlling migrant groups attempting to enter Polish territory' as a part of a 'hybrid attack against the EU', for example here: https://www.dw.com/en/poland-says-belarus-fully-controls-migrants-after-attempted-breach/a-59753059. Due to the limited access to reliable information in Belarus, it is not clear to what extent the third-country nationals are currently under the control of the Belarusian border authorities when crossing the border. However, it is clear that Belarus effectively controls the whole border area, where only local residents and those allowed by the state can enter. The testimonies of migrants prove that they often have no chance of choosing the way of crossing the border but are instructed in that regard by Belarusians, see for example the findings of the Human Rights Watch monitoring mission to the border, 24 November 2021, available at https://www.hrw.org/report/2021/11/24/die-here-or-go-poland/belarus-and-polands-shared-responsibility-border-abuses.

581 Compared to 2 803 asylum applications lodged in 2020 (the relatively low number of applications likely resulted from the pandemic restrictions in the cross-border movement), 7,685 asylum applications were lodged in 2021 and 9 974 in 2022. Source: www.migracje.gov.pl.

582 Report of Helsinki Foundation for Human Rights, *Gdzie prawo nie sięga*, June 2022: https://hfhr.pl/upload/2022/12/raport_gdzie_prawo_nie_siega-hfpc-30062022_1.pdf.

of thousands of third-country nationals have reached the country after irregularly entering the EU via the Poland-Belarus border[583].

Since 2021, the number of reported irregular border crossings remains much higher than in previous years[584]. However, the actual number of third-country nationals trying to enter Poland from Belarus is likely much lower than presented statistics as individuals can be included in those figures multiple times when they repeatedly attempt to cross the border.

2.3.1. Impact on fundamental rights

The amended laws were criticised by UNHCR[585], ODIHR[586] and the Polish Ombudsman[587]. In at least fifteen judgments, the Polish administrative courts found that the complainants' right to seek asylum and the non-refoulement principle were violated[588]. The Supreme Court found that the state of emergency was introduced in violation of the Polish Constitution[589].

Human rights groups and international institutions assess that the introduced policies have negatively impacted the fundamental rights, not only of third-country nationals, but also of local residents and volunteers providing humanitarian and medical aid at the border. Restrictions introduced at the Poland-Belarus border and human rights violations that accompany them were condemned by, among others, the Commissioner for Human Rights of the Council of Europe[590], UN Special Rapporteur on the human rights of migrants[591], OSCE Parliamentary Assembly's Ad Hoc Committee on Migration and the Committee on Democracy, Human Rights and Humanitarian

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583 In 2021 alone, Germany reported that 11 000 migrants reached Germany via Belarus and Poland. See: https://www.infomigrants.net/en/post/37559/11000-migrants-reached-germany-in-2021-via-belarus-and-poland. Two German states have recently called for the temporary reintroduction of full border controls with Poland because they are finding it increasingly difficult to cope with the growing number of asylum seekers, see: https://notesfrompoland.com/2023/05/31/poland-and-germany-agree-to-strengthen-border-security-to-curb-irregular-migration/. More information can be found here: https://dserver.bundestag.de/btd/20/051/2005183.pdf and here: https://www.bundespolizei.de/Web/DE/04Aktuelles/01Meldungen/2023/08/230821_unerlaubte-einreisen_bp.html.

584 Statistics provided by the Border Guard to HFHR under public information access provisions.

585 UNHCR, *UNHCR observations on the draft law amending the Act on Foreigners and the Act on Granting Protection to Foreigners in the territory of the Republic of Poland (UD265)*, 16 September 2021, https://www.refworld.org/docid/61434b484.html.

586 OSCE ODIHR, *Urgent opinion on draft amendments to the Aliens Act and the Act on Granting Protection to Aliens on the Territory of the Republic of Poland and Ministerial Regulation on Temporary Suspension of Border Traffic at Certain Border Crossings*, 10 September 2021, https://bip.brpo.gov.pl/sites/default/files/2021-09/Opinia_ODIHR_10.09.2021_(jez.angielski).pdf.

587 Letter of the Polish Ombudsman to the Minister of the Interior and Administration, 25 August 2021, https://bip.brpo.gov.pl/sites/default/files/Wystąpienie%20RPO%20do%20MSWiA%2025.08.2021.pdf.

588 Helsinki Foundation for Human Rights, *Legal brief on judgements in cases involving the expedited returns of migrants to Belarus*, December 2022, https://hfhr.pl/upload/2022/12/hfhr-legal-brief-on-push-back-judgements-eng.pdf.

589 Supreme Court of the Republic of Poland, case no I KK 171/21.

590 Commissioner for Human Rights of the Council of Europe, *Commissioner calls for immediate access of international and national human rights actors and media to Poland's border with Belarus to end human suffering and violations of human rights,* 19 November 2021: https://www.coe.int/en/web/commissioner/-/commissioner-calls-for-immediate-access-of-international-and-national-human-rights-actors-and-media-to-poland-s-border-with-belarus-in-order-to-end-hu.

591 A/HRC/53/26/Add.1: Visit to Poland - Report of the Special Rapporteur on the human rights of migrants, Felipe González Morales, 21 May 2023, https://reliefweb.int/report/poland/visit-poland-report-special-rapporteur-human-rights-migrants-felipe-gonzalez-morales-ahrc5326add1.

Questions[592], UNHCR and IOM[593], the Polish Ombudsman[594], Human Rights Watch[595], Amnesty International[596] and Helsinki Foundation for Human Rights[597]. The UN Special Rapporteur on the situation of human rights defenders condemned Poland for the harassment and intimidation of the human rights defenders working at the border[598]. All allegations are denied by the national authorities[599].

Accelerated returns introduced under the amended law are in fact 'push-backs' as defined by the CoE[600]: migrants are forcibly returned to Belarus, without consideration for their personal circumstances and with no access to effective remedy. As a result, they often end up stranded in the forest with no access to shelter, food, drinking water or medical aid, which particularly in the wintertime puts their lives at risk. Vulnerable persons, such as unaccompanied children, pregnant women, and sick and disabled persons are neither identified nor provided with appropriate care. The violence was reported to be perpetrated by the state authorities of both states: Poland and Belarus[601].

Despite the harsh conditions in the border area resulting in injuries, cases of hypothermia and drownings of those who tried to cross, humanitarian organisations, such as the Red Cross[602] or Doctors Without Borders[603], were not allowed to operate at the border. The burden of providing humanitarian aid and conducting search and rescue operations rests on the shoulders of local residents and volunteers. Grupa Granica, one of the civil society coalitions which emerged in

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592 OSCE, *Migrants and locals are victims as human rights challenged in Belarus-Poland border area, say OSCE parliamentary leaders*, 18 October 2021, https://www.osce.org/parliamentary-assembly/501340.

593 UNHCR, *UNHCR and IOM Call for immediate de-escalation at the Belarus-Poland border*, 10 November 2021, https://www.unhcr.org/neu/70501-unhcr-and-iom-call-for-immediate-de-escalation-at-the-belarus-poland-border.html.

594 Polish Ombudsman, *Poprawić stan przestrzegania praw człowieka na granicy polsko-białoruskiej. Marcin Wiącek pisze od premiera - odpowiada MSWiA*, 20 September 2022, https://bip.brpo.gov.pl/pl/content/rpo-komisarz-praw-czlowieka-pushbacki-granica-odpowiedz.

595 Human Rights Watch, Violence and Pushbacks at Poland-Belarus Border, 7 June 2022, https://www.hrw.org/news/2022/06/07/violence-and-pushbacks-poland-belarus-border.

596 Amnesty International, Poland: Cruelty Not Compassion, at Europe's Other Borders, 11 April 2022, https://www.amnesty.org.pl/wp-content/uploads/2022/04/Amnesty-report-POLAND-CRUELTY-NOT-COMPASSION-AT-EUROPES-OTHER-BORDERS.pdf.

597 Report of Helsinki Foundation for Human Rights, *Gdzie prawo nie sięga*, June 2022: https://hfhr.pl/upload/2022/12/raport_gdzie_prawo_nie_siega-hfpc-30062022_1.pdf.

598 Poland: Human rights defenders face threats and intimidation at Belarus border – UN experts, 15 February 2022, https://www.ohchr.org/en/press-releases/2022/02/poland-human-rights-defenders-face-threats-and-intimidation-belarus-border.

599 The Washington Post, *Poland builds a border wall, even as it welcomes Ukrainian refugees*, 13 April 2022, https://www.washingtonpost.com/world/2022/04/13/poland-refugees-wall-belarus/.

600 'Push-backs' are defined by the Council of Europe as violent removals by force, without consideration for the personal circumstances of migrants, during their interception at sea, in transit zones at border crossings, at police and border guard stations, or following apprehension near land borders. See also: a letter of the Polish Ombudsman to the Minister of the Interior and Administration, 4 March 2022, https://bip.brpo.gov.pl/sites/default/files/2022-03/RPO%20do%20MSWiA%2004.03.2022.pdf.

601 A/HRC/53/26/Add.2: Visit to Belarus - Report of the Special Rapporteur on the human rights of migrants, Felipe González Morales, 18 May 2023, https://www.ohchr.org/en/documents/country-reports/ahrc5326add2-visit-belarus-report-special-rapporteur-human-rights.

602 International Federation of the Red Cross, *Action needed now to prevent further loss of life on the Belarus border – press release*, 15 November 2021, https://www.ifrc.org/press-release/action-needed-now-prevent-further-loss-life-belarus-border.

603 Medecins Sans Frontiers, *MSF leaves Polish border after being blocked from assisting people*, 6 January 2022, https://www.msf.org/msf-leaves-polish-border-after-being-blocked-assisting-migrants-and-refugees.

response to the crisis, reported in January 2023 that it has delivered humanitarian, medical and legal aid to at least 14 500 people since October 2021[604]. In numerous cases, members of the Polish Parliament, the Ombudsman and UNHCR have also intervened against the apprehensions and pushbacks of migrants.

So far, around 50 deaths have been reported at the Poland-Belarus border. However, the actual death toll is likely much higher. The main causes of death were hypothermia, drowning and dehydration[605]. In some cases, the criminal investigations are ongoing, while others were already closed with no one held responsible. Over 200 migrants are believed to be missing[606].

The ECtHR granted around 100 interim measures under Rule 39 obliging Polish authorities not to return migrants to Belarus and, in some cases, to provide them with appropriate medical and humanitarian aid[607]. This unprecedently high number of Court interventions confirms the systemic nature of the malpractices at the border. Around twenty cases have already been communicated by the ECtHR to the Polish government[608].

The number of detained third-country nationals has also increased significantly since 2021 compared with the previous years[609]. According to the report of the National Mechanism for the Prevention of Torture, the conditions in the detention facilities for migrants have significantly deteriorated during the crisis. In certain cases this has amounted to violations of Article 3 of the ECHR due to overcrowding, poor medical and psychological care, poor sanitary conditions, lack of privacy, improper age assessment procedures, and others[610].

The policies adopted at the Poland-Belarus border contrast significantly with the exceptionally generous treatment offered by Poland to Ukrainian nationals after 24 February 2022, which was highlighted by the UN Special Rapporteur on the human rights of migrants after his visit to Poland[611].

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604 Helsinki Foundation for Human Rights, *Periodic report of Grupa Granica on the situation at the Polish-Belarusian border*, 17 February 2023, https://hfhr.pl/upload/2023/02/report-of-grupa-granica-december-january.pdf.

605 TVN24, *Ciała migrantów na polsko-białoruskiej granicy*, 18 March 2023, https://tvn24.pl/polska/ciala-migrantow-na-granicy-polsko-bialoruskiej-6847387.

606 Helsinki Foundation for Human Rights, *Periodic report of Grupa Granica on the situation at the Polish-Belarusian border*, 17 February 2023, https://hfhr.pl/upload/2023/02/report-of-grupa-granica-december-january.pdf.

607 According to ECHR 051(2022), *Update on interim decisions concerning member States' borders with Belarus*, in the period between 20 August 2021 and 18 February 2022, ECtHR granted 61 interim measures obliging Poland not to remove applicants to Belarus.

608 In their applications, the applicants argue that Poland violated their right to life and freedom from torture and inhumane treatment, right to personal liberty and fair trial, right to effective remedy as well as freedom from the collective expulsion. See, among others, F.A and S.H. v. Poland, app no 54862/21 or I.A. and Others v. Poland, app no 53181/21.

609 Between 2015 and 2020, around 1 000 migrants were detained each year, while 4 052 in 2021 and 1 473 in the first half of 2022. Source: statistics provided by the Border Guard to HFHR under public information access provisions.

610 Commissioner for Human Rights, *Situation of foreigners in guarded centres during the Poland-Belarus border crisis – report on monitoring visits of the National Mechanism for the Prevention of Torture*, June 2022, https://bip.brpo.gov.pl/sites/default/files/2022-08/Situation%20of%20foreigners%20in%20guarded%20centres%20during%20the%20Poland-Belarus%20border%20crisis_0.pdf

611 See OHCHR, *UN expert praises generosity towards Ukrainian refugees by Poland and urges Belarus and Poland to end pushbacks*, 28 July 2022, available at: https://www.ohchr.org/en/press-releases/2022/07/un-expert-praises-generosity-towards-ukrainian-refugees-poland-and-urges.

2.3.2. Wider geopolitical implications and the EU involvement

Wider geopolitical implications

The EU-Belarus bilateral relations remain tense since fraudulent presidential elections in Belarus in August 2020 and the extremely brutal suppression of demonstrations that followed with up to 1500 political prisoners incarcerated in appalling conditions and exposed to ill-treatment and torture. After the forced landing of a Ryanair airplane in May 2021 and facilitating irregular migration to the EU, the regime of Alexandr Lukashenko is perceived by the EU as a threat to regional and international security[612]. Since October 2020, the EU has imposed five packages of sanctions in connection with the situation in Belarus, targeting a total of 233 individuals and 37 entities[613]. As of 24 February 2022, the regime became an accomplice in Russia's war of aggression against Ukraine, which further worsened the EU-Belarus relations. On account of the Russia-Belarus agreement on deploying Russian nuclear warheads on Belarusian territory and Wagner mercenaries' deployment in Belarus, the EU is worried about the destabilising effects of those policies in the region.

EU involvement

Unlike Lithuania and Latvia, Poland has never requested the assistance of the European Union in handling the crisis situation at the border. Neither the European Border and Coast Guard Agency (Frontex) nor the European Union Agency for Asylum (EUAA) have deployed their missions to Poland[614]. However, upon Poland's request, the EU agreed to allocate EUR 25 million for the protection of the border with Belarus in 2022[615]. Moreover, the EU has engaged in diplomatic actions aimed at terminating the crisis at the border and made a decision to impose the fifth package of sanctions on Belarus as well as sanctions on the airlines responsible for transporting third-country nationals to Belarus.

In December 2021, the European Commission presented the proposal for a Council decision on provisional emergency measures for the benefit of Latvia, Lithuania, and Poland. The proposal has never entered into force. According to the statement of the Polish government, 'the analysis of the proposed measures in terms of adequacy, effectiveness and the possibility of their application in a short time leads to the formulation by Poland of a generally critical assessment of the legislative proposal for a Council decision on temporary emergency measures for Latvia, Lithuania and Poland. Appreciating the efforts of the Commission in developing the presented proposal with the intention of helping the above-mentioned countries, the Government of the Republic of Poland is forced to state that the proposed measures are inconsistent with Poland's expectations, and considers their effectiveness questionable'[616].

Although not expressed explicitly in the opinion, the resistance of Poland was most likely due to the introduction by the Polish government of far stricter measures than those envisioned in the proposal. As stated by the Polish Permanent Representation during the interview carried out for the purposes of this IA, the Polish government did not perceive the proposal to be relevant or applicable to the Polish situation as the position of Poland is that the possibility to apply for international protection should be limited. Since the proposal leaves it entirely to the Member States to initiate a

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612 European Commission, https://neighbourhood-enlargement.ec.europa.eu/news/belarus-statement-high-representative-behalf-european-union-third-anniversary-fraudulent-2023-08-08_en.

613 European Council, https://www.consilium.europa.eu/en/policies/sanctions/restrictive-measures-against-belarus/.

614 Wyborcza.pl, 9 November 2021, *Poland Turns Down Help from Brussels Despite Worsening Crisis on Border with Belarus*: https://wyborcza.pl/7,173236,27785201,poland-turns-down-help-from-brussels-despite-worsening-crisis.html.

615 TVP World, https://tvpworld.com/56891595/ec-wants-to-allocate-eur-25-million-for-protection-of-border-with-belarus.

616 See Opinion of the Sejm (the lower chamber of the Polish Parliament) Research Bureau of the Chancellery of the Sejm on the proposal for a Council Decision on temporary emergency measures for Latvia, Lithuania and Poland (COM(2021) 752 final), no BAS-WAP/WAPM-14/22, 12 January 2022.

procedure, neither the Commission nor the Council could oblige Polish authorities to launch it. Therefore, the proposal might not meet its objectives in the case of Poland.

2.4. Relevance of the instrumentalisation proposal

Considering the position of the Polish government on the 2021 proposal for a Council decision on provisional emergency measures for the benefit of Latvia, Lithuania, and Poland, as well as non-engagement of the EU institutions, such as EUAA or Frontex, in responding to the declared crisis at its borders, it might be expected that the relevance of the instrumentalisation proposal for Poland will be limited. Although the Polish government does not oppose the idea of legislation preventing the so-called 'instrumentalisation of migration', it remains reluctant to implement already existing EU policies and any potential further Union legislation especially those related to, among others, a relocation system of asylum seekers. Taking it all into account, the Polish government might not be willing to apply the instrumentalisation proposal, but rather amend the domestic provisions instead.

3. Greece

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3.1. Background

Following the 2016 EU-Turkey Statement[617], which aimed to return asylum-seekers arriving on the Greek islands to Turkey in exchange for Turkey's commitment to preventing people from leaving its territory for Europe, Turkey has officially become the EU's partner in managing migratory movements in South-Eastern Europe and the Mediterranean. As a result, the EU as well as Greece as the direct adressee of the deal had stabilised expectations – stemming from international law – with regard to Turkey's role in halting migrant movements to Europe.

Contrary to these commitments, on 28 February 2020 and following bombings in Idlib, Syria, the Turkish President announced that the Turkish borders with the EU were to be opened, and that Turkey would stop preventing migrants from crossing to Greece[618]. In response, Greece violently refused entry to migrants arriving at the Evros land border, strengthened its border forces on the land, and requested help from the EU to 'protect the border'[619]. The measures taken by Greece to avert what according to the Greek government spokesman was 'an organised, mass, illegal attack of violation of its borders' have been fully endorsed by the Council of the EU[620].

Tens of thousands of third-country nationals were gathered along the Greece-Turkey land border across the Evros river[621], and there were instances of severe border violence, including tear gas, smoke grenades and rubber bullets[622]. Around 5,000 people are reported to have been pushed back to Turkey, while Human Rights Watch has gathered testimonies of severe ill-treatment against the returned individuals by Greek forces[623]. In addition, there are well-supported reports of at least two

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617 European Council (2016), Press release, EU-Turkey statement, 18 March.

618 This is a practice followed by Turkey under the EU-Turkey deal. One day before the incident, at least 33 Turkish soldiers were killed in Idlib in an air strike by Syrian government forces (Al Jazeera, '33 Soldiers killed in Syrian air raid in Idlib' (28 February 2020) accessed 21 May 2023, https://www.aljazeera.com/news/2020/2/28/33-turkish-soldiers-killed-in-syrian-air-raid-in-idlib .

619 On 28 February 2020, the Prime Minister of Greece tweeted that 'no illegal entries in Greece will be tolerated' (John Psaropoulos, 'Greece on the defensive as Turkey opens the border to refugees' (Al Jazeera, 1 March 2020) accessed 22 May 2023, https://www.aljazeera.com/news/2020/3/1/greece-on-the-defensive-as-turkey-opens-border-to-refugees

620 Council of the EU (2020), "Statement on the situation at the EU's external borders", Press Release 126/20, 4 March.

621 The Evros river is a natural border that separates Greece from Turkey on the mainland. For many years, people on migratory journeys have crossed the river from the Turkish shores to enter the EU. The incidents of March 2020, when large numbers of TCNs were allegedly shuttled by the Turkish government and gathered in the buffer zone between Turkey's Pazarkule and Greece's Kastanies border checkpoints, brought the protection of EU's external borders high on the political agenda. Since then, the Evros border has been transformed into a heavily militarised zone.

622 Amnesty International (2020), "Greece/Turkey: Asylum-seekers and migrants killed and abused at borders", 3 April available at www.amnesty.org/en/ latest/news/2020/04/greece-turkey-asylum-seekers-and-migrantskilled-and-abused-at-borders/ accessed 11 June 2023. See also, Ergin Ayse Dicle, 'What happened at the Greece-Turkey Border in early 2020?' (Verfassungsblog, 30 September 2020) accessed 22 May 2023 https://verfassungsblog.de/what-happened-at-the-greece-turkey-border-in-early-2020/.

623 Testimonies include experiences of migrants being kept in official or secret detention centres, being stripped off their clothes, money and belongings, mistreated through the use of electroshock and beaten up with sticks, before being pushed back to Turkey. Human Rights Watch, 'Greece: Violence Against Asylum Seekers at Border: Detained, Assaulted, Stripped, Summarily Deported' (17 March 2020) accessed 20 May 2023,

deaths by shooting from the Greek side[624]. The Greek government has denied all allegations of unlawful violence and expulsion practices, with Greece's Prime Minister stating that:

> 'What we are facing at the moment is a conscious attempt by Turkey to use migrants and refugees as geopolitical pawns to advance its own interests. The people trying to cross into Greece (…) receive the full support of the Turkish government, as it provides them with the means to transport them to the border, and of course Greece does what every sovereign state has the right to do: to protect its borders from illegal crossings.' [emphasis added][625].

The shift of the flows to the Aegean islands was also met with heavy patrols from the Hellenic Coastguard and Frontex, which resulted in many serious incidents of pushbacks at sea[626]. In March 2020, 2 927 people entered Greece via land and sea[627]. They were automatically and arbitrarily detained in abhorrent conditions/kept in closed facilities without effective judicial protection, including individuals who expressed their intention to lodge an asylum application[628]. Following the incident, the Greek Prime Minister thanked the Greek security forces (and civilians) for 'preventing 24 000 attempts of illegal entry'[629], although no publicly available evidence supports this estimation.

3.2. Policies

Following the March 2020 incident, Greece introduced an emergency legislative decree[630] for the suspension of the right to seek asylum for individuals entering Greece for a period of one month and for their immediate return to Turkey without prior registration[631]. On the basis of that decree,

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www.hrw.org/news/2020/03/17/greece-violence-against-asylum-seekers-border ; On the establishment of secret detention sites, see: Marina Stevis- Gridneff and Others "We are Like Animals': Inside Greece's Secret Site for Migrants' (The New York Times, 10 March 2020) accessed 20 May 2023, www.nytimes.com/2020/03/10/world/europe/greece-migrants-secret-site.html

624 'Forensic Architecture, 'The killing of Muhammad Al Arab' accessed 20 May 2023, https://forensic-architecture.org/investigation/the-killing-of-muhammad-al-arab ; Forensic Architecture 'The killing of Muhammad Gulzar' accessed 20 May 2023, https://forensic-architecture.org/investigation/the-killing-of-muhammad-gulzar

625 'Interview of Prime Minister Kyriakos Mitsotakis on CNN TV station and journalist Richard Quest' (*Hellenic Republic official website: The Prime Minister*, 6 March 2020) accessed 20 May 2023, www.primeminister.gr/en/2020/03/06/23497

626 AIDA Report Greece 2020 Update, June 2021, p 38 available at https://asylumineurope.org/wp-content/uploads/2021/06/AIDA-GR_2020update.pdf accessed 12 June 2023.

627 See UNHCR (2023), Mediterranean Situation: Greece, available at: https://bit.ly/2KbyVY9. Note that government statistics refer to 9,137 arrivals during the same period: Ministry of Migration and Asylum (2020), 'Μηνιαίο Ενημερωτικό Σημείωμα Υπουργείου Μετανάστευσης και Ασύλου (Μάρτιος)', 14 April 2020, available in Greek.

628 On this see Refugee Support Aegean (2020), *Rights denied during Greek asylum procedure suspension RSA's analysis of the impact of Greece's decision to suspend access to asylum in March 2020 on the rights of asylum seekers and on redress mechanisms at domestic and European level*, April 2020, available at https://rsaegean.org/wp-content/uploads/2020/05/RSA_LN_AsylumSuspension.pdf accessed 25 June 2023.

629 Daily Sabah (2020), Greek PM thanks armed forces, civilians for repelling migrants from Turkey. 3 March 2020. https://www.dailysabah.com/world/europe/greek-pm-thanks-armed-forces-civilians-for-repelling-migrants-from-turkey

630 Πράξη Νομοθετικού Περιεχομένου, Αναστολή της υποβολής αιτήσεων χορήγησης ασύλου, ΦΕΚ Α'45 (2020), 2.3.2020, Emergency Legislative Order (ΠΝΠ) as of 2 March 2020, Gov. Gazetta A/45/2 March 2020; Law 4681/2020 ratifying the Order of 2 March 2020 on the Suspension of asylum applications' submission; 'Deprivation of rights during the suspension of the asylum process in Greece' (Refugee Support Aegean, April 2020) accessed 20 May 2023. https://rsaegean.org/wp-content/uploads/2020/05/RSA_LN_ΑναστολήΔιαδικασίαςΑσύλου.-pdf.pdf.

631 According to recitals 2 and 3 of the Emergency Decree, "The extremely urgent and unpredictable need to face the asymmetrical threat against the security of the country" and the "the sovereign right[s]" of the country have been invoked in order to justify the issuance of the Order. On concerns voiced by the UNHCR on the lawfulness of the suspension of the asylum procedure and of possible breaches of international refugee law, see UNHCR (2020), "Statement on the situation at the Turkey-EU border", 2 March available at

all migrants who entered Greece in March 2020 faced blanket detention and deportation orders, without access to the asylum procedure.

The emergency decree was justified in the following terms: 'the extraordinarily urgent and unforeseeable need to respond to an asymmetrical threat to the security of the country, which supersedes the underlying international and EU law rules on the asylum procedure' in combination with the 'absolute objective incapacity to examine in a reasonable time the number of asylum claims that would result from the 'mass illegal entry of migrants' in the country', and 'the sovereign right and constitutional obligation of Greece to safeguard its integrity'. In a tweet, the Greek Prime Minister announced that the suspension of asylum derives from the invocation of Art. 78(3) TFEU[632].

The government followed a special legislative procedure for situations of emergency, through the signature of the President of the Republic. Greece strengthened its border forces on the land (police forces of border guards and military forces) and asked for further EU support for border protection. In Evros, the numbers of police, army and Frontex officials intensified. The presence was also observed of armed paramilitary groups or persons who participated in the patrols alongside the official authorities or independently of them[633]. Unidentified armed men are reported to have abducted migrants, detained them in secret sites and returned them to Turkey[634]. Additionally, a large number of civilians (some armed) reached the border and supported Greek forces in repelling the migrants[635]. Military hardware such as drones was deployed along the frontier[636].

The shift of the movements to the East Aegean islands was also met with heavy sea patrols from the Hellenic Coastguard and Frontex, which resulted in many serious incidents of pushbacks at sea. Greek citizens organised patrols themselves in order to deter NGO members from reaching Moria, or attacked refugee boats approaching the shore. The Greek police did nothing to stop these illegal activities[637].

Continuing its post-2016 restrictive policy on migration and asylum[638], the Greek Law 4636/2019 introduced radical changes with a focus on accelerating procedures at the borders and reduced access to asylum through the widespread use of the 'safe third country' concept. This has severely

www.unhcr.org/news/press/2020/3/5e5d08ad4/unhcr-statement-situation-turkey-eu-border.html accessed 11 June 2023. See also Greek National Commission for Human Rights, Reviewing asylum and immigration policies and safeguarding human rights at the EU borders, 5 March 2020, available at https://bit.ly/39HtXh3 accessed 12 June 2023.

632 https://twitter.com/PrimeministerGR/status/1234192922813267976

633 Amnesty International (2020) *Trapped in political games. Refugees in the Greek-Turkish borders pay the price for Europe's failure* available at https://bit.ly/3mEeHZI (in Greek) and HumanRights360 (2020) *During and After Crisis: Evros Border monitoring Report* (November 2019 - April 2020) available at https://www.humanrights360.org/during-and-after-crisis-evros-border-monitoring-report/ accessed 10 July 2023.

634 https://www.hrw.org/news/2020/03/17/greece-violence-against-asylum-seekers-border and https://www.nytimes.com/2020/03/10/world/europe/greece-migrants-secret-site.html

635 https://www.dailysabah.com/world/europe/greek-pm-thanks-armed-forces-civilians-for-repelling-migrants-from-turkey

636 https://www.voanews.com/a/europe_europe-locks-down-greece-border-blames-turkey-migrant-crisis/6185211.html

637 AIDA Report Greece (2020 Update) June 2021, p. 38.

638 Since 2015, Greece's asylum law and policies have undergone several reforms to reflect new legislative developments at the EU level. For instance, the Greek Law 4375/2016 enabled national authorities to adopt exceptional measures at the borders in line with the "hotspot approach", while the processing of asylum applications on the Greek islands as envisioned in the EU-Turkey Statement, has broadened the possibilities for declaring an asylum application inadmissible. This has considerably restricted the procedural guarantees available to asylum-seekers subject to border procedures contrary to European Courts case law (see ECtHR, *A.Y. v Greece*, Application no. 58399/11, 5 November 2015) and to the recast Asylum Procedures (e.g. Art. 35, 43) and Reception Conditions Directive (Art. 8).

limited people's access to fair and full asylum procedures in Greece[639]. In June 2021, a Joint Ministerial Decision issued by Greece deemed Turkey a safe third country for nationals from Afghanistan, Pakistan, Bangladesh, Somalia and Syria, and introduced expanded admissibility procedures (previously held only in cases of Syrian applicants in the Eastern Aegean islands) to applicants of these nationalities in the whole territory of Greece[640]. As Turkey has not been accepting returns from Greece since March 2020, people whose claims are rejected have been stranded in Greece in a legal limbo.

It should be noted here that the aforementioned changes were introduced in a system heavily impacted by the EU-Turkey Statement which, among other things, had led to a *de facto* dichotomy of the asylum procedures applied in Greece[641]. In particular, an exceptional, fast-track procedure has been applied in cases of applicants subject to the EU-Turkey Statement, that is, applicants who arrived on the Greek Eastern Aegean islands after 20 March 2016, whereas applications lodged by persons who entered through the Greek-Turkish land border are not examined under the fast-track border procedure[642]. As noted by several NGOs, while the fast-track border procedure was initially introduced as an exceptional and temporary measure, 'a derogation from standard procedural rules reserved for exceptional circumstances of "mass arrivals" and set up with a view to implementing the EU-Turkey Statement'[643], it became the rule for almost half of the country's applications caseload until the end of 2021[644]. The Greek Asylum Service is under constant pressure to accelerate the procedures on the islands, which was also one of the reasons invoked for the amendment of national legislation in late 2019[645].

Finally, contrary to the Greek Asylum Code's clear limits on the permissible assessments of asylum cases in border procedures, both the Greek Asylum Service and the EUAA systematically examine asylum claims on the merits in the border procedure even in the absence of grounds for applying

639 International Rescue Committee (IRC) (2023), 'Two years on: Afghans still lack pathways to safety in the EU', May 2023, p. 12.

640 Joint Ministerial Decision 42799/03.06.2021, "Gazette 2425/ B/7-6-2021" June 2021 available at https://bit.ly/3zbSojR accessed 10 July 2023. In 2022, Greece deemed 37.6% of asylum applications by Afghans inadmissible on the basis that Turkey would be safe for them (1 095 of a total of 2 908). See Refugee Support Aegean, "The Greek asylum procedure in figures in 2022, Analysis of main trends in refugee protection" March 2023 available at https://rsaegean.org/wp-content/uploads/2023/03/2023_03_RSA_AsylumStatistics2022_EN.pdf accessed 11 June 2023.

641 Submission of the Greek Council for Refugees to the Committee of Ministers of the Council of Europe in the case of M.S.S. v. Belgium & Greece (Appl. No 30696/09) and related case, 9 May 2019, available at https://bit.ly/2XYhHpj accessed 10 July 2023.

642 AIDA Report Greece (2021 Update) June 2023, p. 93. Asylum procedures are currently regulated by the new law on asylum (Asylum Code), L. 4939/2022. Article 95(3) Asylum Code foresees that the fast-track procedure can be applied as long as third country nationals who have applied for international protection at the border or at airport / port transit zones or while remaining in Reception and Identification Centres, are regularly accommodated in a spot close to the borders or transit zones.

643 Equal Rights Beyond Borders, HIAS Greece & Refugee Support Aegean, Report on *The state of the border procedure on the greek islands*, 11 October 2022, p. 4 and 8 available at https://rsaegean.org/wp-content/uploads/2022/10/BorderProcedure_Greek_islands_report.pdf accessed 10 July 2023. As noted in the report, according to the last relevant JMD (15996/2020, Gov. Gazette B' 5948/31-12-2020) issued under L. 4636/2019, the fast-track border procedure was to be applied until 31-12-2021. However, deadlines for asylum seekers did not change even under regular border procedure, in comparison to the fast-track procedure previously applied.

644 For statistical data see RSA, The asylum procedure in figures: most asylum seekers continue to qualify for international protection in 2021, March 2022, available at https://bit.ly/3IVqBro accessed 10 July 2023.

645 AIDA Report Greece (2021 Update) June 2023, p. 93.

accelerated procedures[646]. An increasing use of the accelerated procedure has been recorded, especially in cases of applicants coming from 'safe countries of origin'[647]. In fact, the number of applications declared inadmissible has been on the rise after June 2021, along with the number of 'manifestly unfounded applications' as more safe countries of origin have been introduced[648].

3.3. Effects

Below we identify two layers of impact: a) short-term, provisional effects in the immediate aftermath of the March 2020 'border crisis'); and b) long-term, permanent effects as a consequence of an established narrative of 'weaponised migration'.

3.3.1. Border crossing points and legal fiction of non-entry

The Greek migration policy is largely focused on the prevention of 'illegal entries' during all times (beyond emergency situations). There are no designated border crossing points that allow the entrance of asylum seekers. As noted earlier, subsequent to the March 2020 incident, the land border of the Evros region as well as sea borders were heavily patrolled – with the use of sophisticated surveillance equipment – and efforts were undertaken to prevent all entries. In the following years, border patrols have been intensifying, using, apart from the force of border guards, the national army: legal amendments were made in order to concentrate soldiers at the borders with Turkey[649], and there are civil society reports suggesting that soldiers of the national army are trained for and participate in operations of migration management.

As a result of such policies, a systematic use of pushback practices towards migrants and asylum seekers at Greek land[650] and sea borders[651] has been widely reported[652]. According to the Ministry

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646 See ibid Report on *The state of the border procedure on the greek islands*, 11 October 2022, p. 13. See also ECRE, The role of EASO Operations in national asylum systems, November 2019, 27, available at https://bit.ly/3PEUuQQ accessed 10 July 2023.

647 Article 88(9) and 92 of the Greek Asylum Code. The relevant list was composed through a Joint Ministerial Decision in December 2019, consisting of 12 countries (Ghana, Senegal, Togo, Gambia, Morocco, Algeria, Tunisia, Albania, Georgia, Ukraine, India and Armenia). In January 2021, Pakistan and Bangladesh were added on the list, as in February 2022, did Benin, Nepal and Egypt. In November 2022, Ukraine was removed from the list. For details see AIDA Report Greece (2021 Update) June 2023, p. 147.

648 https://migration.gov.gr/statistika/ ; https://rsaegean.org/el/statistika-asylou-2022/.

649 In 2021, the mandatory military service to the national army was increased in length from 9 to 12 months, and a provision was added to the law that prescribes the completion of the military service (for the whole duration) specifically in border regions: northern and eastern Aegean islands and Evros. See Joint Ministerial Decision at https://www.e-nomothesia.gr/kat-enoples-dynameis/koine-upourgike-apophase-ph421-4-1-322490-s-1493-2021.html.

650 WeMove Europe and Oxfam International (2020), "Complaint to the European Commission concerning infringements of EU law by Greece" available at https://reliefweb.int/report/greece/complaint-european-commission-concerning-infringements-eu-law-greece-behalf-wemove accessed 11 June 2023.

651 P. Kingsley and K. Shoumali (2020), "Taking Hard Line, Greece Turns Back Migrants by Abandoning Them at Sea", The New York Time, 14 August available at https://www.nytimes.com/2020/08/14/world/europe/greece-migrants-abandoning-sea.html accessed 11 June 2023.

652 See the statement by the CoE Commissioner for Human Rights on 3 March 2020: "I am alarmed by reports that some people in distress have not been rescued, while others have been pushed back or endangered", available at https://www.coe.int/nb/web/commissioner/news-2020/-/asset_publisher/Arb4fRK3o8Cf/content/urgent-action-is-needed-to-address-humanitarian-and-protection-needs-of-people-trapped-between-turkey-and-greece accessed 10 July 2023. A few months later, the UNHCR invited Greece to investigate complaints for illegal forced returns in the land and sea borders of the country: "UNHCR has continuously addressed its concerns with the Greek government and has called for urgent inquiries into a series of alleged incidents reported in media, many of which corroborated by non-governmental organizations and direct testimonies. Such allegations have increased since March and reports indicate that several groups of people may have been summarily returned after reaching Greek territory", available at

of Public Order, a total number of 256,000 persons were prevented from 'illegal invasion' in 2022[653]. Increasing evidence of active involvement by Frontex in these kinds of operations have induced the European Commission to request the Agency to investigate existing allegations of pushbacks in the Aegean Sea[654].

To defend against allegations of human rights violations regarding the legal fiction of non-entry, Greece consistently puts forward rhetoric in favour of the 'protection of borders' through the use of pushback practices against third-country nationals who try to enter irregularly. This is based on a misinterpretation of the *N.D. and N.T. v Spain* caselaw of the ECtHR as deeming collective expulsions permissible under States' prerogative to control migration, provided that certain entry criteria are fulfilled[655]. In this context, the rhetoric of instrumentalisation creates a dangerous climate of disregard for the applicable EU law guarantees to people seeking asylum[656].

It is noteworthy that the focus on the prevention of 'illegal entries' goes beyond national policy and is clearly depicted in the EU funding of Greece related to migration. In the period 2014-2020, only 20% of the EU financial support to Greece for purposes related to migration management was invested in border surveillance and technology. This percentage has strikingly risen to 70% for the period 2021-2027, with more than a billion euros being allocated to Greece for this purpose through the Internal Security Fund and the new Border Management and Visa Instrument fund[657]. This shift in EU policy can be attributed to the 'fragility' of the EU-Turkey Statement's implementation, as this was exposed by the incidents of March 2020 when it became evident that the EU could not rely exclusively on external partners who may themselves use migration to exert power and pursue their own agendas.

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https://www.unhcr.org/news/briefing-notes/unhcr-calls-greece-investigate-pushbacks-sea-and-land-borders-turkey accessed 10 July 2023. AIDA Reports states that in 2020 and 2021 'the established practice of illegal refoulements continued being utilised as a "front-line" tool of the country's migration policy, as a first option in order to halt the flows of refugees and deterring others from attempting to irregularly cross the borders. The practice is, according to the published reports, testimonies and media coverage of serious incidents, a permanent eventuality for the people attempting to cross the borders', AIDA Report Greece (2020 Update) June 2021, p. 37 and AIDA Report Greece (2021 Update) June 2023, p. 33.

653 Ministry of Public Order (2023), Press release on 7 January 2023, available at: https://bit.ly/3Ot1uCT .

654 See e.g., https://www.euractiv.com/section/justice-home-affairs/news/commission-calls-for-meeting-with-frontex-over-alleged-push-back-incidents/ , https://www.theguardian.com/global-development/2022/apr/28/revealed-eu-border-agency-involved-in-hundreds-of-refugee-pushbacks and https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/738191/EPRS_BRI(2022)738191_EN.pdf . Following the June 2023 shipwreck off Pylos -possibly the deadliest one in the Mediterranean in years, Frontex said the agency could suspend operations in Greece over 'chronic human rights abuses against migrants'. See https://www.nytimes.com/2023/06/27/world/europe/greece-migrants-eu.html , https://www.politico.eu/article/greece-migrant-tragedy-frontex-considers-suspending-activities/ and https://www.infomigrants.net/en/post/49993/frontex-mulls-exit-from-greece-as-reelected-government-vows-to-continue-migration-policy accessed 22 August 2023.

655 See, for example, the interview of Greek Migration Minister in CNN in November 2021, at https://twitter.com/CNNConnect/status/1456643481884143617. Contrary to the narrative identified in this and other official statements, in *N.D. and N.T.* the Strasbourg Court considered the collective expulsion of the applicants, who had entered the country irregularly, as compatible with the ECHR subject to a series of preconditions, one of them being the provision of genuine and effective means of legal entry to the applicants by the expelling Member State. Refer to *Section 5.1.* of this Impact Assessment for a detailed examination.

656 RSA (2021), 'The right to asylum in the context of 'instrumentalisation' – Lessons from Greece' (18 November 2021) 3.

657 https://home-affairs.ec.europa.eu/policies/migration-and-asylum/migration-management/migration-management-greece/financial-support-eu_en; https://home-affairs.ec.europa.eu/system/files/2019-10/201910_managing-migration-eu-financial-support-to-greece_en.pdf; https://home-affairs.ec.europa.eu/policies/migration-and-asylum/migration-management/migration-management-greece/financial-support-eu_en; https://migration.gov.gr/programmatiki-periodos-2021-27/.

3.3.2. Access to asylum procedures

In March 2020, severe delays were reported in access to asylum: migrants received referral notes in early April 2020 to appear before the Asylum Service for their asylum claim's registration, while delays of registration lasted until May 2021 (more than one year after their declared intention to seek protection)[658].

3.3.3. Access to material reception conditions

As stated earlier, following the incident in March 2020 there have been reports of the establishment of secret detention centres, abductions of migrants and widespread violence. The absence of dignified reception conditions appears to have since been the norm[659]. As repeatedly reported[660], the detention-like conditions in the so-called closed controlled access centres (CCACs)[661] including remote location, extensive surveillance, barbed wire fences, strict entry-exit restrictions, limitations to legal aid and support from civil society organisations, and a lack of safe accommodation for women, children, and LGBTQIA+ individuals, are inconsistent with EU and international standards on reception (Refer to *Section 5.1.* of this IA)[662].

3.3.4. Expulsions, pushbacks, and detention

The emergency decree of March 2020 triggered the policy of blanket detention of third-country nationals in inhumane conditions (unofficial sites, new sites)[663]. The Greek Administrative Court upheld the collective detention orders and in a number of cases ruled on the existence of an 'extraordinarily urgent and unforeseeable need to respond to an asymmetrical threat to the security of the country which supersedes the underlying international and EU law rules on the asylum

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658 Refusal and delays in registration resulted in the lapse of deadlines for sending 'take charge' requests under Dublin Regulation. The problem of arbitrary deprivation of the migrants' right to reunite with family in the EU have been raised by the Greek Ombudsman, Επείγουσα καταγραφή αιτήσεων διεθνούς προστασίας λόγω κινδύνου παρέλευσης προθεσμιών Κανονισμού (ΕΕ) αριθ. 604/2013, 280722/1/23.6.2020, pending before the ECtHR, see App No 40725/20.

659 Relevant in this regard is the EU ombudsperson's inquiry on the situation on the Greek islands in June 2023. See Decision in strategic inquiry OI/3/2022/MHZ on how the European Commission ensures respect for fundamental rights in EU-funded migration management facilities in Greece, Case OI/3/2022/MHZ - 07 June 2023, available at https://www.ombudsman.europa.eu/sv/decision/en/170792 accessed 10 July 2023.

660 See The International Rescue Committee (IRC) (2023), "Contribution to the Ombudsman's Strategic Inquiry relating to respect for fundamental rights in EU-funded migration management facilities in Greece." February 2023 available at https://www.rescue.org/eu/submission/ombudsmans-inquiry-fundamental-rights-ccacs accessed 11 June 2023.

661 According to Greek law, asylum seekers have the right to access employment only six months after filing their application for international protection, which makes them reliant on government-provided accommodation. Staying in state-funded accommodation also entitles them to modest cash assistance. This accommodation overwhelmingly consists of CCACs on the islands of Samos, Kos, Leros, and soon on Chios and Lesvos, as well as similar closed and closely surveilled facilities on the mainland. These centres are funded through the EU's Asylum, Migration and Integration Fund and became operational in Greece after September 2021. On this see Ibid IRC (2023) and Europe Must Act (2023), "Samos Situation Report: March 2022" June 2022 available at https://www.europemustact.org/post/samos-situation-report-march-2022 accessed 11 June 2023.

662 Law 4939/2022, in force since 10 June 2022, introduced extensive provisions on the detention of asylum seekers, threatening to undermine the principle that detention of asylum seekers should only be applied exceptionally and as a measure of last resort. See further Refugee Support Aegean. "Massive protests by islanders are challenging the government's narrative on new prison structures in the Aegean." January 2022 available at https://rsaegean.org/en/new-prison-structures-in-the-aegean/ accessed 11 June 2023. See also AIDA Report Greece 2022 Update, June 2023, p. 201 available at https://asylumineurope.org/wp-content/uploads/2023/06/AIDA-GR_2022-Update.pdf accessed 12 June 2023.

663 RSA Legal Note, 'Rights denied during Greek asylum procedure suspension', April 2020, available at https://rsaegean.org/wp-content/uploads/2020/05/RSA_LN_AsylumSuspension.pdf accessed 10 June 2023.

procedure'[664], without examining the compatibility of the detention orders with national or European law. Questions by the ECtHR and the Greek Ombudsman were addressed to the Greek government regarding cases of minors' detention that were brought before the ECtHR with the request of interim measures[665].

Similarly, the emergency decree triggered the policy of blanket deportation orders. There was no individual assessment of any kind prior to the issuance of return orders to Turkey, even against Turkish nationals claiming protection; no individual assessment (including for Turkish nationals, and unaccompanied minors or pregnant women who are expressly protected from removal, according to Greek law)[666]. The Council of State granted an interim order to suspend deportation in the case of two mothers facing removal pursuant to the emergency decree on the basis of their vulnerability[667]. No official deportations were conducted due to the non-cooperation of Turkey, and after the effect of the decree ended, a procedure to register the asylum claims of the migrants who had entered Greece in March 2020 started.

These policies, pursuant to RSA, show that 'applicant for international protection' status and the protections attached thereto are rendered illusory if the persons concerned lack official documents from the competent authorities to demonstrate that an asylum claim has been made[668]. The instrumentalisation proposal therefore undermines the objective of effective, simple and straightforward access to the asylum procedure[669], insofar as it encourages rather than prevents violations of asylum seekers' rights guaranteed by EU law. In this regard, a straightforward response from EU institutions is lacking: the European Commission refrained from replying to parliamentary questions on the compatibility of the emergency decree with EU Law[670]. Whereas, it is worth noting, Frontex informed Greek authorities of its opposition to assisting in the implementation of returns ordered under the decree[671].

3.3.5. New developments on border fencing infrastructures

Greece – and the EU – have been investing millions of euros to install ultra-modern surveillance equipment in the Evros region, including barbed wire fences, cameras and sound cannons, as well as drones, surveillance vehicles, thermal cameras, and other military equipment[672]. In addition, a 5m-

664 Ibid.

665 The ECtHR refused to grant interim measures in two such cases, on the ground that the government had already made commitments to ensure that the applicants would receive treatment in accordance with Art. 3 ECHR. The applicants' situation did not change for a long time, and not until repeated litigation procedures. See more at https://rsaegean.org/en/two-children-transferred-out-of-malakasa-protection-still-denied-to-many/

666 Article 79(1)(e) Law 3386/2005; Article 41 Law 3907/2011.

667 Greek Council of Refugees, 'Σχόλιο του ΕΣΠ σχετικά με την προσωρινή διαταγή του ΣτΕ' 31 March 2020, available at https://bit.ly/2KmLNe9 accessed 10 June 2023.

668 RSA Comments on the Commission proposal for a Regultion on "instrumentalisation" in asylum and Migration COM(2021) 890, January 2022 p. 5 available at https://rsaegean.org/wp-content/uploads/2022/01/RSA_Comments_Instrumentalisation.pdf accessed 12 June 2023.

669 On this see CJEU, C-36/20 VL v Ministerio Fiscal, 25 June 2020, para 82. On the incompatibility of blanket application of the border procedures to those in need of special procedural guarantees without individual examination see CJEU, C-808/18 Commission v Hungary, 17 December 2020.

670 European Commission, Reply to parliamentary question E-001547/2020, 16 June 2020. See also Reply to parliamentary question P-001342/2020, 19 June 2020 where the Commission welcomed the decision by Greece to end the suspension of asylum applications, noting Greece's 'difficult task in dealing with an exceptional situation' and the need to do this in compliance with fundamental rights.

671 Frontex (2020), Letter by Fabrice Leggeri, Executive Director, to RSA, ORD/ECRet/DiToAI/3007/2020, 27 April 2020

672 Detailed financial data can be found at https://migration.gov.gr/ma/programmata/isf-np1420-calls/ and https://migration.gov.gr/programmatiki-periodos-2021-27/

high steel wall, which began in 2020 and has since been increasing in length – is currently at least 38 km long. In fact, Greece has initiated a wall extension of 35 km at the Evros border, to be completed by the end of 2023, to 'the benefit of Greece, and the EU', according to Theodorikakos, Minister of Citizen Protection[673].

3.3.6. Wider geopolitical implications and the EU involvement

Both in the rhetoric of Greece at the time, and in the narrative put forward by the Commission in its proposal of the Crisis Regulation (September 2020), the incident of March 2020 is read as a 'political crisis', a 'hybrid attack' and a situation of force majeure (unforseeable and unpreventable). However, the incident can be seen as a predictable consequence of the political risk[674] taken by the EU through its extensive reliance on policies of externalisation, such as the EU-Turkey Statement[675]. In fact, the Turkish president had threatened to open borders and allow refugees to enter Europe eight times before the incident of March 2020[676].

It should be mentioned that the 2020 'border crisis' is tightly related with the war in Syria and the EU involvement there. Both the EU and Turkey are part of a US-led military coalition against the Syrian government. Turkey has been calling upon the EU (and NATO) to increase their military presence in Syria, arguing that it disproportionately carries the weight of the war, and of the resulting refugee flows[677].

Arguably, the perception of the incident as a 'hybrid attack' and a situation of *force majeure*, along with the resulting policies, has engendered a rule of law crisis. First of all, the space for humanitarian actors to provide assistance to those in need has been alarmingly limited by targeting civil society organisations and by criminalising solidarity[678]. Second, the portrayal of people in need of protection as 'illegal entrants' or security 'threats' has instigated xenophobia and racism across the EU, and in Greek society this has been reflected in actual physical attacks. This can be said to have had a snowballing effect; according to the IRC, recent efforts by Greece to conclude bilateral agreements with third countries, such as Pakistan and Bangladesh for establishing legal pathways to labour immigration have been hampered with implications for the country's economy[679].

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673 https://www.schengenvisainfo.com/news/greece-construction-of-evros-fence-to-be-completed-by-the-end-of-2023/ Thousands of people continue to risk their lives attempting to cross into Greece via Evros and although hard to identify the exact numbers, more than 60 people are reported to have lost their lives on the Greek side of the river alone in 2022. For details see https://www.infomigrants.net/en/post/35657/evros-frontier-a-militarized-nomans-land-where-no-one-can-access-migrants; https://www.infomigrants.net/en/post/48783/at-the-evros-border-the-bodies-mount-up; https://www.istanbulbarosu.org.tr/files/docs/IstanbulBarosuInsanHaklariMerkeziYunanistanMulteciRaporU032020.pdf and https://www.kathimerini.gr/politics/562005322/metanasteytiko-epektasi-toy-frachti-ston-evro accessed 7 July 2023.

674 Minos Mouzourakis, 'More laws, less law: The European Union's New Pact on Migration and Asylum and the fragmentation of 'asylum seeker' status' (2021) 26:3 ELJ 171-180.

675 RSA (2021), 'The right to asylum in the context of 'instrumentalisation' – Lessons from Greece' (18 November 2021) 4.

676 https://www.nytimes.com/2020/02/28/world/europe/turkey-refugees-Geece-erdogan.html

677 https://www.nytimes.com/2020/02/28/world/europe/turkey-refugees-Geece-erdogan.html.

678 See, e.g., Report of the Special Rapporteur on the situation of human rights defenders, Mary Lawlor - Visit to Greece (A/HRC/52/29/Add.1) Human Rights Council, Fifty-second session 27 February – 31 March 2023, 2 Mar 2023 available at https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fwww.ohchr.org%2Fsites%2Fdefault%2Ffiles%2Fdocuments%2Fhrbodies%2Fhrcouncil%2Fsessions-regular%2Fsession52%2FA_HRC_52_29_Add.1_AdvanceEditedVersion.docx&wdOrigin=BROWSELINK accessed 26 June 2023.

679 Information provided by the International Rescue Committee (IRC) in its presentation 'Instrumentalisation: Lessons learnt from Greece at the stakeholders' workshop, 12 June 2023.

3.4. Relevance of the instrumentalisation proposal

From the issues analysed above, the key considerations for assessing the relevance of the instrumentalisation proposal to the Greek migration policy can be summarised as follows: First, Greece showcases a migration management strategy focused on the prevention of 'irregular entries', on accelerated asylum examination procedures, and on expedited returns primarily to Turkey. Crucial to that strategy is the systematic use of pushbacks -both at sea and land borders- and the total absence of crossing points that would have allowed for the safe entry of protection seekers in Greek territory. Second, the Greek case offers an example of the fragility and uncertainty surrounding agreements and arrangements with non-EU countries as no returns of third country nationals including rejected asylum seekers to Turkey have been conducted since March 2020. Third, the number of asylum seekers who entered Greece from Turkey in March 2020, and the number of prevented entries of TCNs in the same month, do not represent a statistical anomaly compared to the months following the declared 'border crisis' of 2020. For this reason, the Greek example raises questions regarding the objective circumstances that would trigger the application of the proposal, given the uncertain baseline of the 'instrumentalisation' definition.

These considerations make the provisions of the proposal either inapplicable or superfluous in the case of Greece. As exhibited during and in the aftermath of the March 2020 events, there are serious concerns that the narrative of 'weaponised migration' promoted by the instrumentalisation proposal undermines the right to asylum and allows for the violation of TCNs' rights guaranteed by EU law.

4. Bulgaria

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4.1. Background

In 2022, Bulgaria witnessed a surge in unauthorised third-country nationals (TCNs) arrivals at its Turkish border, reminiscent of the so-called 'refugee crisis' in 2015. The border management and 'irregular immigration' measures implemented by the Bulgarian authorities to deal with it must be examined in light of the processes of accommodating national policies to the EU Schengen *acquis* and meeting the concerns of Austria and the Netherlands that resulted in their veto on Bulgaria's accession to the Schengen zone[680].

Although the steady increase in unauthorised arrivals began in 2020, it was in 2022 that Frontex reported a significant increase of 136 % in the overall number of irregular migrants entering the EU through the Western Balkan route, reaching 145 600, the highest since 2016[681]. Approximately 30 % of irregular migrants on the Western Balkan route passed through Bulgaria in 2022, with about half remaining unregistered[682]. The State Agency for Refugees (SAR) recorded a remarkable increase in applications for international protection in 2022 submitted by third-country nationals and stateless persons. The total number of applications reached 20 407, double that of 2021 (10 999). The applications for international protection registered in 2022 are the largest number since the establishment of SAR. Syrians accounted for the largest share at 42 %, followed by Afghans at 35 % and Moroccans at 8 %[683].

The steady increase in irregular border crossings began in 2020, with the onset of the Covid-19 pandemic, and persisted throughout 2021. The Bulgarian Minister of Interior, Boiko Rashkov, voiced concerns about the deliberate inaction of Turkish border guards in dealing with irregular migrants[684], reiterating them a year later[685]. The dramatic increase in unauthorised border entries was accompanied by severe incidents where smugglers disobeyed police orders and resisted apprehension. The escalation of these incidents culminated in the tragic killing of a Bulgarian border

680 Euronews.com (2022), Austria blocks Schengen accession of Romania and Bulgaria, while Croatia gets green light. https://www.euronews.com/my-europe/2022/12/08/austria-blocks-schengen-accession-of-romania-and-bulgaria-while-croatia-gets-green-light ; See also Carrera et al. (2023), *An Assessment of the State of the EU Schengen Area and its External Borders. A Merited Trust Model to Uphold Schengen Legitimacy*, European Parliament, Brussels.

681 FRONTEX, (2023), EU's external borders in 2022: Number of irregular border crossings highest since 2016. https://frontex.europa.eu/media-centre/news/news-release/eu-s-external-borders-in-2022-number-of-irregular-border-crossings-highest-since-2016-YsAZ29

682 Bezlov, T. (2023), The war in Ukraine and its impact on migrant smuggling in the Balkan region, CSD & GITOC (forthcoming).

683 SAR (2023), Report on the activities of the State Agency for Refugees under the Council of Ministers for 2022. https://aref.government.bg/sites/default/files/2023-03/%D0%94%D0%BE%D0%BA%D0%BB%D0%B0%D0%B4%D0%BD%D0%B0_%D0%94%D0%90%D0%91_%D0%BF%D1%80%D0%B8_%D0%9C%D0%A1_%D0%B7%D0%B02022_0_0.pdf

684 Segabg.com (2021), Rashkov wonders why Borissov went to Erdogan before the election. https://www.segabg.com/hot/category-bulgaria/rashkov-se-chudi-zashto-borisov-hodi-predizborno-pri-erdogan

685 Segabg.com (2022), Boyko Rashkov: More than 20,000 migrants are trying to enter from Turkey. https://www.segabg.com/hot/category-bulgaria/boyko-rashkov-poveche-20-000-migranti-opitvat-da-vlyazat-turciya

policeman on 8 November 2022 by two Turkish citizens suspected of smuggling people[686]. Turkey promptly apprehended the perpetrators, leading to renewed negotiations between Bulgarian and Turkish authorities, which resulted in increased cooperation to curb unauthorised border crossings[687].

Several factors contributed to this rise, including the crisis in Afghanistan after the Taliban takeover[688], the easing of pandemic measures[689], and economic and political developments in Turkey[690]. Bulgarian journalists and security experts have expressed concerns about Turkey instrumentalising irregular migrant flows since the initial refugee crisis in 2013-2014 to obtain financial compensation from the EU[691], to silence criticism against Turkey's President and to guarantee the arbitrary returns of President Erdogan's political opponents apprehended in Bulgaria[692]. However, no official statements or other evidence from either country directly support such claims.

4.2. Policies

The Bulgarian authorities responded to the significant increase in unauthorised arrivals by aligning their actions with the existing national strategic framework on border management, migration, and asylum. In particular, they followed the National Strategy for Integrated Border Management in the Republic of Bulgaria 2020-2025[693] and the National Migration Strategy of the Republic of Bulgaria 2021-2025[694] without introducing any new legislation.

Nevertheless, on 21 April 2022, the government activated the Action Plan in case of an emergency due to increased migration pressure at the border with Turkey, effectively declaring a state of emergency[695]. This plan is part of the measures outlined in the National Strategy for Integrated

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686 BBC.com (2022), Bulgarian policeman shot dead patrolling Turkish border for migrants. https://www.bbc.com/news/world-europe-63555609

687 Presidency of the Republic of Bulgaria (2022) Head of State Rumen Radev in Istanbul: Bulgaria and Turkey share common responsibility for the security, stability and prosperity of Southeast Europe, 9 December 2022. https://m.president.bg/bg/news6959/darzhavniyat-glava-rumen-radev-v-istanbul-balgariya-i-turtsiya-spodelyat-obshta-otgovornost-za-sigurnostta-stabilnostta-i-prosperiteta-na-yugoiztochna-evropa.html

688 FRONTEX (2022), Risk Analysis for 2022/2023. https://frontex.europa.eu/assets/Publications/Risk_Analysis/Risk_Analysis/ARA_2022_Public_Web.pdf

689 Krilić S.C., Zavratnik S. (2023). Structural Vulnerabilities and (Im)Mobilities Amidst the Covid-19 Pandemic: People on the Move along the Balkan Route, Posted and Agricultural Workers. Central and Eastern European Migration Review: 1-17. http://ceemr.uw.edu.pl/content/structural-vulnerabilities-and-immobilities-amidst-covid-19-pandemic-people-move-along

690 ICMPD (2022), Migration Outlook 2022 Western Balkans & Turkey. https://www.icmpd.org/file/download/57221/file/ICMPD_Migration_Outlook_WB%2526Turkey_2022.pdf

691 Cross.bg (2022). Vladimir Chukov: We have to look at our position, positions must be established and defended in Brussels. https://www.cross.bg/chykov-tyrtziya-vladimir-1709550.html

692 Svobodnaevropa.bg (2021), 'My faithful friend and brother Boyko'. How Borisov won Erdogan's sympathy. https://www.svobodnaevropa.bg/a/31345014.html; and Svobodnaevropa.bg (2020), The gifts for Erdogan. How Bulgaria hands over to Turkey every wanted enemy of the regime. https://www.svobodnaevropa.bg/a/30868338.html

693 National Strategy for Integrated Border Management in the Republic of Bulgaria 2020-2025. https://www.strategy.bg/StrategicDocuments/View.aspx?lang=bg-BG&Id=1325. The strategy is in line with REGULATION (EU) 2019/1896 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624. https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32019R1896

694 National Strategy on Migration 2021-2025. https://www.strategy.bg/StrategicDocuments/View.aspx?lang=bg-BG&Id=1566

695 The plan is not publicly available.

Border Management for such situations. Despite introducing the emergency plan, the three border crossing points with Turkey (BCP Kapitan Andreevo-Kapikule, BCP Lesovo-Hamzabevli and BCP Malko Tarnovo-Derekoy) remained fully operational.

4.2.1. Grounds and specific justification

The emergency plan was activated with a Minister of the Interior Order[696] following the National Strategy for Integrated Border Management and its objectives, namely: 1) Update of national action plans on irregular entry of groups of migrants on Bulgaria's territory; 2) Preparedness for adequate response and prevention of crises at the borders of Bulgaria[697]. The Ministry of Interior (MoI) justified the activation with the significant rise in irregular border crossings in the first three months of 2022. According to the MoI in April, the unauthorised arrivals along the Bulgarian-Turkish borders represented 98 % of the total, leading to a significant complication of the operational situation at the border. However, the additional measures taken to reinforce surveillance and patrolling at the Bulgarian-Turkish border through the involvement of MoD forces and means did not achieve the desired result[698], posing questions about their effectiveness.

4.2.2. Actors deployed and measures implemented

Following the activation of the Emergency Plan, the government deployed the entire national capacity to contain unauthorised arrivals. As of 24 June 2022, the MoI redeployed 792 officers along the border with Turkey, and the Ministry of Defence (MoD) another 155. Additionally, the MoI relocated experts from the general administration close to the border[699].

Moreover, nearly 3 000 MoD troops on a rotational basis and over 400 units of transport and special equipment from the armed forces were actively involved in operations to protect the state border and the logistical support of the MoI. The MoD also repaired the border fence facilities along the Bulgarian-Turkish border. The Army restored the integrity of 110 km of problematic sections of the border fence by involving its Land 'Forces' engineering formations[700].

International actors also provided support. Under the aegis of Frontex, the joint operation Terra 2022 involved 96 foreign officers with 24 patrol vehicles and surveillance equipment deployed at the external borders with Turkey, Serbia, and North Macedonia[701].

The MoI expanded the capacity of its pre-removal centres. The 'migration pressure' led to a significant increase in the number of persons accommodated compared to the previous year. In response, between 5 April and 31 May 2022, the MoI opened up the 'Multi-Use Infrastructure Site' in Lyubimets to secure additional accommodation capacity[702].

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696 Minister of the Interior Order No 8121z-501/20.04.2022.

697 National Strategy for Integrated Border Management in the Republic of Bulgaria 2020-2025, https://www.strategy.bg/StrategicDocuments/View.aspx?lang=bg-BG&Id=1325

698 MoI (2023b), Appendix to report for the activity on Ministry of the Interior in 2022, p. 15.

699 MoI (2023a), Report on the activities of the Ministry of Interior in 2022, p. 23.

700 MoD (2023), Report on the State of Defence snd Armed Forces of the Republic of Bulgaria, p. 26. https://www.mod.bg/bg/doc/cooperation/20230404_Doklad_otbrana_2022.pdf

701 MoI (2022) Report on the implementation of the National Migration Strategy of the Republic of Bulgaria 2021-2025 in the period April 2021 - June 2022, p. 40.

702 Ibid, p. 37.

4.2.3. Official narratives about the surge of irregular border crossings

The official narrative surrounding the situation emphasised the perceived threats to national security[703], the safety of law enforcement officers[704], and the potential repercussions for Bulgaria's aspirations to join the Schengen agreement[705], discussed in more detail under Section 4.1.

4.3. Effects

The implemented Emergency Action Plan generally aims to mobilise additional resources in all relevant institutions to minimise illegal border crossings.

Although the Plan helped the government to mobilise additional resources and increase accommodation capacity, it faced challenges concerning organisation and coordination. Tragic incidents highlighted coordination problems within the MoI and between the MoI and the MoD[706]. The Plan did not significantly reduce irregular entries, and returns of irregularly residing TCNs decreased by 24.3 % compared to 2021[707].

In their most recent reports, the Bulgarian Helsinki Committee (BHC) and the Frontex FRO expressed concerns that violations of the principle of *non-refoulement* and the right to asylum accompanied the implementation of the measures envisaged under the Plan[708]. The available information about this is discussed in the sections below.

4.3.1. Border crossing points and legal fiction of non-entry

Since activating the Emergency Action Plan on 21 April, unauthorised entries continued to rise, peaking in September. Most apprehensions at the Bulgarian-Turkish borders occurred at the green borders, with only 10 % at official border crossing points. According to the MoI, over 90 % of TCNs who attempted unauthorised crossings returned to Turkish territory voluntarily (Figure 5)[709]. The Bulgarian authorities did not consider closing border crossing points or propose legislative measures to pursue the legal fiction of non-entry.

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703 BNT (2022) Two policemen died in a chase with a bus full of migrants in Burgas. https://bntnews.bg/news/dvama-policai-zaginaha-pri-gonka-s-avtobus-s-migranti-v-burgas-obzor-1205600news.html

704 BNT (2022) Caretaker government proposes tougher penalties for migrant smuggling. https://bnr.bg/burgas/post/101740773/slujebniat-kabinet-predlaga-po-strogi-nakazania-za-trafik-na-migranti

705 Dariknews.bg (2023), 'Demerdzhiev: Bulgaria and Romania's common goal is to join Schengen by the end of the year', https://dariknews.bg/novini/bylgariia/demerdzhiev-obshtata-cel-na-bylgariia-i-rumyniia-e-vlizane-v-shengen-do-kraia-na-godinata--2347489

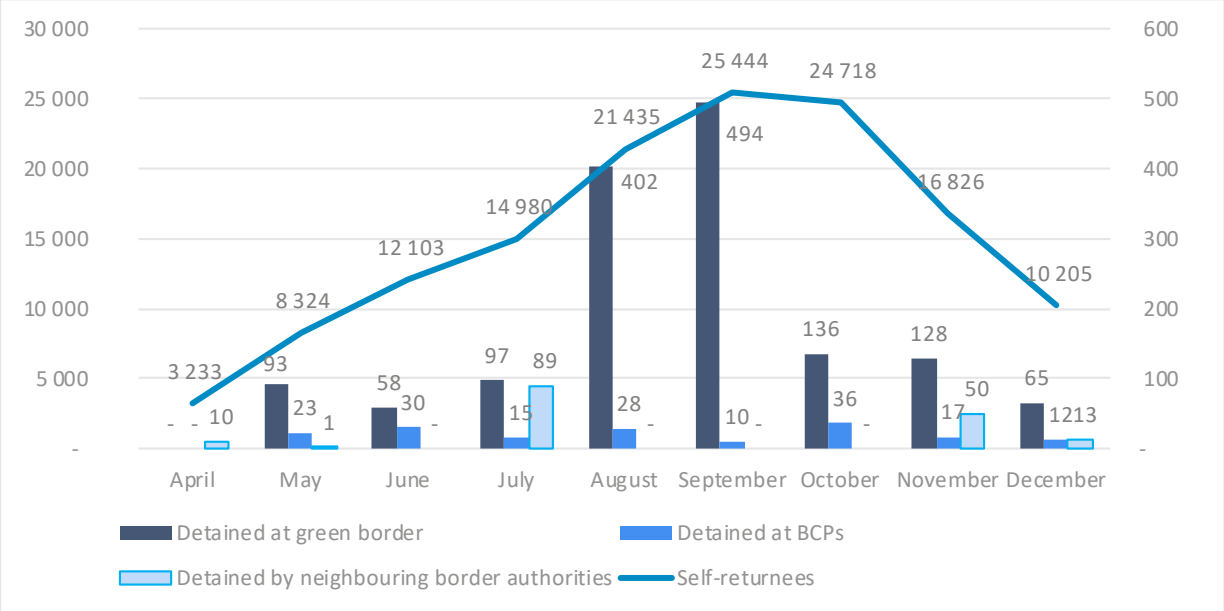
706 Svobodnaevropa.bg (2022), The policeman who was injured during the pursuit of a bus with migrants near Sofia has died. https://www.svobodnaevropa.bg/a/32191758.html

707 MoI (2023b), op.cit, p. 16.

708 FRONTEX FRO (2023), Annual report 2022, p.11. https://frontex.europa.eu/assets/fundamental/FRO_annual_report_2022.pdf; BHC (2023), Country Report: Bulgaria. https://asylumineurope.org/wp-content/uploads/2023/03/AIDA-BG_2022update.pdf

709 MoI (2023b), op.cit.

Figure 5: Overall migratory pressure on the Bulgarian-Turkish border following the Emergency Plan activation in 2022



Source: MoI (2023b), op.cit.

4.3.2. Access to asylum procedures

Before the emergency plan activation in April, access to the asylum procedure was problematic, although this improved later in the year. SAR faced a significant hacker attack following the influx of Ukrainian refugees, blocking application reviews for a month. However, the EU's decision to grant temporary protection to Ukrainian asylum seekers and the measures implemented by the new management appointed in April positively impacted SAR's work[710].

In 2022, SAR issued 19 046 decisions, with 76 % discontinued procedures, 22.4 % granting humanitarian status, 1 % refusals, and 0.5 % granting refugee status. Most decisions to discontinue proceedings were for Afghan nationals (68 %)[711]. Reasons for asylum seekers to abscond included lengthy processes, lower recognition rates for certain nationalities compared to rates in other EU countries, and poor reception conditions[712]. The typical period between registration and absconding was between 5 and 15 days shorter than in 2021.

Most refusals for international protection were from accelerated proceedings, with Morocco and Pakistan being the most affected. According to BHC, their applications are treated as manifestly unfounded, resulting in low recognition rates[713]. By the end of 2022, there were 11 185 pending procedures, a 1.5-fold increase compared to 2021. The new management, appointed on 1 April, successfully addressed the backlog, issuing 16 780 decisions between May and December 2022

[710] BHC (2023), Country Report: Bulgaria, https://asylumineurope.org/wp-content/uploads/2023/03/AIDA-BG_2022update.pdf

[711] SAR (2023), op. cit.

[712] BHC (2023), op. cit. https://asylumineurope.org/wp-content/uploads/2023/03/AIDA-BG_2022update.pdf

[713] BHC (2022), AIDA update on Bulgaria, 23 February 2022, Differential treatment of specific nationalities in the procedure. https://asylumineurope.org/reports/country/bulgaria/asylum-procedure/differential-treatment-specific-nationalities-procedure/

(Table 19), bringing the average procedure length back to legal requirements. The BHC also noted improvements in the standards and quality of the asylum procedure[714].

Table 19: Information about the third-country nationals who sought international protection and SAR decisions in 2021 and 2022

Period	Persons who sought protection	Refugee status granted	Humanitarian status granted	General refusal	Suspended procedures	Discontinued procedures	Total number of decisions
2021	10 999	143	1 876	144	27	2 870	5 060
2022	20 407	100	4 273	199	0	14 474	19 046

Source: SAR (2023), op.cit.

4.3.3. Access to material reception conditions

SAR manages four reception centres with a capacity of 5 160 persons. However, the deteriorating material conditions in these centres barely meet minimum standards due to an insufficient budget for repairs in 2022. Essential services, including hygiene products, are lacking. Reportedly, in December 2022, only 3 932 places were fit for living[715]. The BHC also raised concerns about food quality and quantity in the centres. The limited budget, high inflation and increased number of residents in 2022 aggravated the situation, although SAR secured some supplies through donor agreements[716].

Despite more asylum seekers in 2022, overcrowding was not an issue due to high absconding rates (Figure 6), especially among Afghan asylum seekers[717]. As of 31 December 2022, SAR centres accommodated 2 412 foreigners, filling 64 % of capacity. The highest occupancy was in October 2022, with 2 967 asylum seekers (75 % of capacity)[718].

[714] BHC (2023), Country Report: Bulgaria, https://asylumineurope.org/wp-content/uploads/2023/03/AIDA-BG_2022update.pdf

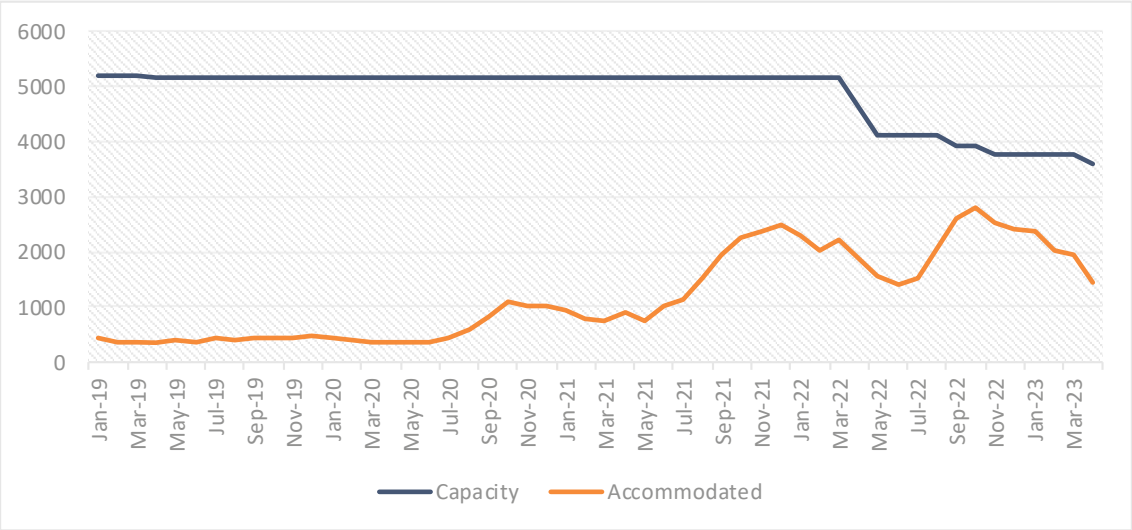
[715] Ibid.

[716] Ibid.

[717] Ibid.

[718] SAR (2023), op.cit.

Figure 6: Third-country nationals accommodated in the centres of SAR



Source: Author's elaboration of MoI data

4.3.4. Expulsions, pushbacks and detention

The increase in unauthorised entries at the Bulgarian-Turkish borders on the eve of the upcoming vote about the Schengen accession in December 2022 pressured the MoI to take decisive measures and contain them [719]. The efforts to curb unauthorised entries led to a dramatic increase in pushback practices, physical violence, and inhumane treatment. The BHC reported a new negative record of 5 268 alleged pushbacks in 2022, affecting 87 647 individuals. They also reported instances of verbal abuse, unlawful detention, strip searches, and illegally confiscating belongings[720]. Furthermore, an international media investigation uncovered the unlawful detention of TCNs in an unregulated centre and their subsequent return to Turkish territory without access to international protection procedures[721]. The FFRO also reported receiving 'credible information concerning allegations of collective expulsions, as well as of ill-treatment of migrants by Bulgarian border guards[722]'.

Reportedly, in August 2022, Bulgarian authorities increased the use of long-term detention orders at pre-removal centres managed by the Directorate Migration', extending detention from one to six months. Previously, short-term detention orders were more common, but the caretaker cabinet instructed the application of long-term orders. This decision aimed to demonstrate readiness for Schengen accession and discourage asylum seekers, disregarding personal circumstances or asylum claims[723]. Implementing long-term orders soon led to overcrowding in detention facilities, with occupancy rates exceeding capacity in August and September (Figure 7), and was eventually abandoned[724]. The Directorate' Migration' of the MoI disagreed with this contention of the BHC,

[719] Euronews.com. (2022), Austria blocks Schengen accession of Romania and Bulgaria, while Croatia gets green light. https://www.euronews.com/my-europe/2022/12/08/austria-blocks-schengen-accession-of-romania-and-bulgaria-while-croatia-gets-green-light

[720] BHC (2023), op. cit. https://asylumineurope.org/wp-content/uploads/2023/03/AIDA-BG_2022update.pdf

[721] Svobodnaevropa.bg (2022), 'We spent three days there'. Frontex checks data on illegal detention of migrants in Bulgaria. https://www.svobodnaevropa.bg/a/32166487.html

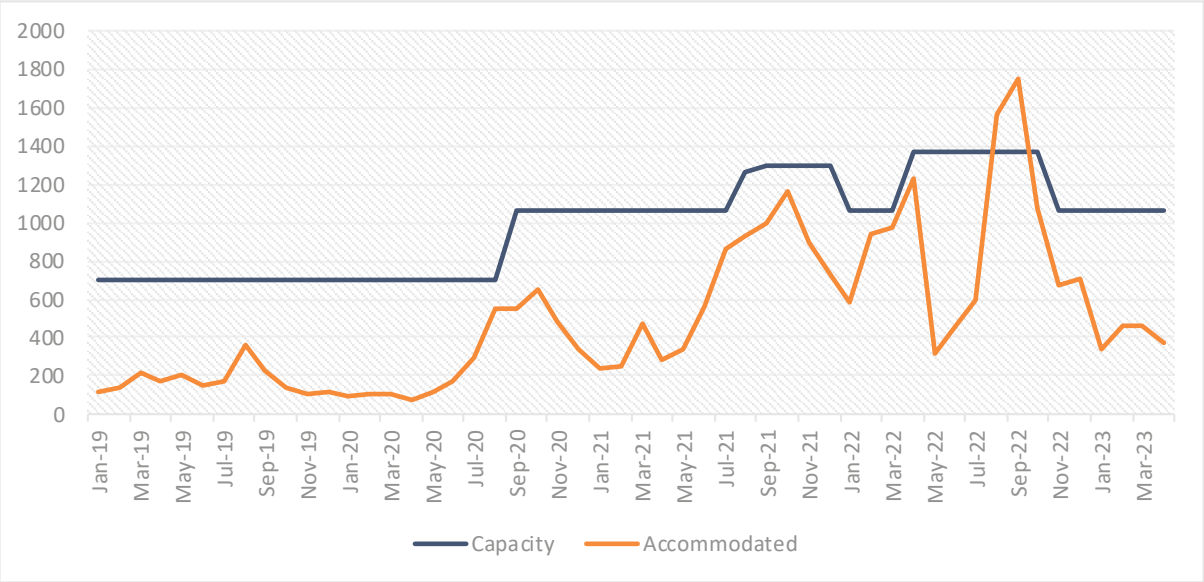
[722] FFRO (2023), op.cit. https://frontex.europa.eu/assets/fundamental/FRO_annual_report_2022.pdf

[723] BHC (2023), op.cit. https://asylumineurope.org/reports/country/bulgaria/detention-asylum-seekers/legal-framework-detention/grounds-detention/

[724] Dnevnik.bg (2022), MoI to house refugees in containers due to overcrowded centres. https://www.dnevnik.bg/bulgaria/2022/09/02/4386483_mvr_shte_nastaniava_bejanci_vuv_furgoni_zaradi/

stating that there was never such an instruction to increase the use of long-term detention orders and that the overcrowding in the pre-removal centres was a mere result of the increased unauthorised arrivals[725]. Nevertheless, the average detention duration in 2022 on an annual basis decreased to six calendar days, lower than the average duration in 2021 (seven calendar days).

Figure 7: Third-country nationals accommodated in the MoI Migration Directorate pre-removal centres



Source: Author's elaboration of MoI's data

4.3.5. New developments on border fencing infrastructures

Bulgaria completed a 234 km border fence with Turkey in 2017 as part of its integrated border management system[726]. However, media reports in 2021 highlighted damages to the fence and issues with the surveillance system and vehicles[727]. To address these problems, in September 2021, the government allocated five million Bulgarian leva (BGN) for repairs[728]. The MoI signed an agreement with the MoD, and engineer army units carried out the repairs, starting in November 2021 and completing them at the end of 2022[729]. Despite the fence repairs, there was no significant impact on unauthorised entries, which peaked in September 2022. Media reports stated that simple tools such as ladders allow TCNs to cross the fence easily[730].

725 Interview with an expert at Directorate 'Migration', 28.06.2023.

726 MoI (2022), Report on the implementation of the National Strategy on Migration Strategy of the Republic of Bulgaria 2021-2025 in the period April 2021 - June 2022. https://www.strategy.bg/FileHandler.ashx?fileId=31294

727 BTVnovinite.bg (2022), On the Bulgarian-Turkish border: part of the fence against refugee pressure has collapsed. https://btvnovinite.bg/bulgaria/na-balgaro-turskata-granica-chast-ot-ogradata-sreshtu-bezhanskija-natisk-e-propadnala.html

728 Dariknews.bg (2022), Ministry of Interior takes over management of the Bulgarian-Turkish border fence. https://dariknews.bg/novini/bylgariia/mvr-poema-upravlenie-vyrhu-ogradata-po-bylgaro-turskata-granica-video-2284454

729 Dnevnik.bg (2022), The army has repaired 121 km of the Turkish border fence. https://www.dnevnik.bg/bulgaria/2022/11/10/4414273_voenni_sa_remontirali_121_km_ot_ogradata_na_turskata/

730 24chasa.bg (2022), Minister Demerdzhiev: I personally saw how the border fence is jumped with a ladder. https://www.24chasa.bg/bulgaria/article/12376844

4.3.6. Debate or investigations at the national level

The Parliament debated 'irregular migrant' entries, and the main concern was law enforcement's inability to counter people-smuggling networks. Three parliamentary groups proposed bills to amend the Penal Code in 2022[731]. The amendments involved increased penalties for illegal border crossing and assistance of aliens to reside or cross the country unlawfully. While the MoI generally supported the bills[732], the Ministry of Justice (MoJ) opposed them, citing a lack of evidence, disproportionate penalties, and duplication of liability[733]. In the event, none of the bills were adopted.

4.3.7. Wider geopolitical implications and the EU involvement

The surge in 'unauthorised entries' from Turkey slowed at the end of 2022. In December 2022, the Bulgarian and Turkish presidents agreed on close cooperation in managing 'irregular migrant flows'[734]. Consequently, there was a visible drop in registered irregular arrivals by the end of 2022, which continued into 2023 with a 50 % decrease compared to the same period in 2022[735]. Bulgaria made no apparent concessions to Türkiye in exchange for its assistance. However, unauthorised arrivals also strained Bulgaria's relations with other EU Member States, particularly regarding its Schengen Agreement accession.

The limited effect of the emergency plan measures, the steady flow of unauthorised entries, and onward movements towards Western Europe eventually resulted in the veto on Bulgarian accession to Schengen in December 2022. As a result, in March 2023, the Bulgarian government and the European Commission launched a six-month Pilot Project to achieve 'more efficient border management' and more effective application of accelerated asylum and return procedures. The project received financial support from the European Commission amounting to EUR 45 million and operational support from EUAA, Europol, and Frontex. The project does not directly fund the border fence infrastructure. However, the Commission also announced that it would make €140 million available "for the development of electronic surveillance systems at land external borders" under the BMVI funds[736].

The pilot project's measures include improving the digitalisation of the asylum and return systems, legislative amendments for issuing a return decision at the same time with a negative decision for international protection, provision of technical (surveillance) equipment and increased deployment of personnel by Frontex, additional support to Bulgaria through return counsellors and interpreters by EUAA, and setting up an operational task force to tackle people smuggling with the assistance of

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731 Bill to amend and supplement the Penal Code No. 48-254-01-73, 25,11,2022. https://www.parliament.bg/bg/bills/ID/164514; Bill to amend and supplement the Penal Code No. 48-254-01-58, 08.11.2022. https://www.parliament.bg/bg/bills/ID/164479; Bill to amend and supplement the Penal Code No. 48-254-01-69, 24.11.2022. https://www.parliament.bg/bg/bills/ID/164509.

732 Opinion of MoI on the Draft Law on Amendments and Additions to the Criminal Code, No. 48-254-01-69, submitted by Kostadin Todorov Kostadinov and a group of MPs on 24.11.2022. https://www.parliament.bg/bg/parliamentarycommittees/3146/standpoint/15354

733 Opinion of MoJ on the Draft Law amending the Criminal Code, No. 48-254-01-58, submitted by Kornelia Petrova Ninova and a group of MPs on 8.11.2022; and Opinion of MoJ on the Draft Law on Amendments and Additions to the Criminal Code, No. 48-254-01-73, submitted by Desislava Valcheva Atanasova on 25.11.2022.

734 Svobodnaevropa.bg (2022), 'A well-guarded border'. Radev and Erdogan unite on measures against migrant pressure. https://www.svobodnaevropa.bg/a/32169694.html

735 MoI (2023c) Migration Statistics.

736 European Commission (2023), The European Commission launches a pilot project with Bulgaria. STATEMENT/23/1787. https://ec.europa.eu/commission/presscorner/detail/en/statement_23_1787

Europol[737]. As part of the activities, SAR deployed additional experts to expedite asylum application examinations at the Reception Centre 'Pastrogor', where they predominantly review asylum applications of third-country nationals from Morocco and Pakistan. The idea is to reduce the absconding of applicants before SAR completes the procedure and issues a final decision[738]. According to the Director of SAR, the new work organisation allowed them to speed up the review of applications and issue final decisions[739]. Statewatch, a leading human rights organisation in the EU, heavily criticised the pilot project as detrimental to the procedural rights of asylum seekers and ultimately working towards more detention at the external borders[740].

4.4. Relevance of the instrumentalisation proposal

The analysis of the developments around the recent surge of unauthorised arrivals at the Bulgarian-Turkish border in 2022 suggests that the proposed Instrumentalisation regulation would have brought little to help Bulgarian authorities cope with the situation in terms of additional support or easing their workload. Closing border crossing points would have brought multiple negative impacts (e.g. logistical, economic, political), and it makes little sense when most arrivals occur through unauthorised entries at the green border. Similarly, extending the asylum procedures' length would not be relevant considering the high absconding rates of asylum seekers in Bulgaria. Moreover, enacting the proposed derogation would have proven challenging since there is no evidence that Turkey actively encouraged or facilitated the influx of third-country nationals or sought to destabilise Bulgaria. The 2022 'crisis' hardly fits the proposed definition of "situation of instrumentalisation in the field of migration" in the draft Instrumentalisation regulation. Thus, adopting the proposed regulation would only contribute to disproportionate expectations from Bulgaria in Schengen accession in addition to all the other implemented policies and could negatively affect bilateral relations with Turkey.

737 European Commission (2023), Migration management: Update on progress made on the Pilot Projects for asylum and return procedures and new financial support for Bulgaria and Romania. Press release. https://ec.europa.eu/commission/presscorner/detail/en/ip_23_3132; and Annex. https://home-affairs.ec.europa.eu/joint-pilot-project-bulgaria-annex_en

738 Interview with the Director of SAR, 16.06.2023.

739 Ibid.

740 Statewatch (2023), Bulgaria and Romania speed up asylum and deportation procedures with EU support. https://www.statewatch.org/news/2023/june/bulgaria-and-romania-speed-up-asylum-and-deportation-procedures-with-eu-support/

5. Spain

Iker BARBERO, University of the Basque Country

5.1. Description of the events

5.1.1. Background, scale, and causes of the cross-border movements

Starting on 17 May 2021 and lasting two days, one of the most important migratory incidents of recent years took place at the border between Ceuta (Spain) and Morocco. Around 8 000[741] people crossed the border through the breakwaters of the Ceuta beaches of Benzú in the north and El Tarajal in the south. Although there were many sub-Saharan adults, most were families and young people, including minors, from Moroccan towns near Ceuta, such as Fnideq, or even from further-away places such as Tangier, Tetouan and Fez. Historically, they had been allowed to cross on the basis of an exception in the Schengen Agreement for 'atypical trade', but due to the Covid-19 border closure, they had been excluded from this for months, giving rise to situations of hunger and desperation[742].

This crossing was not spontaneous, but the result of the circulation of anonymous and false messages encouraging crossing. As the activist Helena Maleno reported, migrants had been calling them for days beforehand talking about a rumour circulating that there was no one guarding the borders and that they were going to take to the sea in 'toy' boats (in local migrant jargon)[743]. That same Monday, May 17, Maleno posted on Twitter: 'Since yesterday, information has been circulating that Morocco has stopped guarding its borders, allowing the movement of people on the Strait route. Bad weather and desperation may put hundreds of lives at risk'. Mumin, a 15-year-old boy, stated 'We were told that they had opened the Ceuta border and we came running. Some friends called us: "They're letting people in!" (...) The police were telling us: "Go to Ceuta"'[744].

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741 The asylum organisation CEAR places the number at 14 000 in its 2022 report: https://www.cear.es/wp-content/uploads/2022/06/Informe-Anual-2022.pdf. There are no official data referring to this case. In fact, the Spanish Ministry of Interior expressly (see page 8) does not include any of the crossings that occurred in this episode in the Irregular Migration Year Balance 2021. https://www.interior.gob.es/opencms/pdf/prensa/balances-e-informes/2021/21_informe_quincenal_acumulado_01-01_al_14-11-2021.pdf

742 Before Covid-19, the border closure decreed by Morocco on 13 March 2020, the exception to the Schengen Agreement (art 41 CFS) authorised Moroccan citizens from the province of Tetouan to spend the day in Ceuta, allowing them to take part in 'atypical trade', a kind of tolerated smuggling exercised mainly by women in conditions of semi-slavery. In addition, it is estimated that 2 000 Moroccans from neighbouring towns also had cross-border permits. Most of them were women domestic workers and caregivers. Finally, on 31 May 2022, access to Ceuta to cross-border workers with a special visa came into force, which meant the end of the Schengen exception.

743 'Several days before they were letting us know: they are going to open the borders. They started sending videos saying that there was no surveillance', the activist said. 'They told us that they were going to let thousands of people pass'. ElDiario.es, 18 May 2021. https://www.eldiario.es/politica/marruecos-provoca-crisis-espana-utilizando-poblacion-desestabilizar-frontera-ceuta_1_7947531.html

744 ElDiario.es, 19 May 2021. https://www.eldiario.es/politica/marruecos-provoca-crisis-espana-utilizando-poblacion-desestabilizar-frontera-ceuta_1_7947531.html. Unfortunately, this was not an isolated event. In August 2014, 1,000 people arrived on the Spanish beaches of the Strait 'whipped up by the yallah (let's go!) of the Moroccan gendarmes. ABC, 18 May 2021. https://www.abc.es/espana/abci-migrantes-castillejos-sabian-desde-domingo-marruecos-no-vigilaria-playas-202105181335_noticia.html. As then Minister of the Interior, Jorge Fernández Diaz, recounts in his memoirs (Cada día tiene su afán, editorial Península, 2019), the conflict was because days before the Spanish Civil Guard had stopped some pleasure boats and jet skis, one of them manned by the King of Morocco himself, Mohamed VI, off the coast of Ceuta, to identify their occupants.

According to the media[745], several people died during those days. One committed suicide on a bridge at the Tarajal border; a second was apparently hit with a baseball bat, another fell 10 m onto the dock of the port of Ceuta when trying to sneak onto a boat to reach the mainland. Finally, there was also news of two people who drowned while trying to reach the Tarajal beach.

5.1.2. Reactions of the national authorities

Initially, the Moroccan Minister of Foreign Affairs, Nasser Burita, blamed the situation, on 'the fatigue of the Moroccan police after the festivities of the end of Ramadan' and 'the inaction of the Spanish police'. However, the predominant hypothesis was that these events were a response to Brahim Ghali's, leader of the Polisario Front of Western Sahara, admission to the hospital of Logroño in La Rioja, Spain with Covid-19, where he had allegedly entered under a false identity and with the involvement of the Spanish authorities in April 2021.

In a statement, the Moroccan Foreign Ministry accused Spain of 'deliberately omitting' such circumstances, considering it a 'premeditated act' that would bring consequences. In a similar vein, the Moroccan ambassador to Spain, Karima Benyaich, stated that 'there are acts that have consequences and must be assumed'[746]. The former Spanish Minister of Foreign Affairs, Arantxa Gonzalez Laya, justified the act 'on strictly humanitarian reasons', criticising Morocco's reaction. In his appearance before the Congress of Deputies, Pedro Sanchez, the president of Spain, described the incident as an 'act of defiance', and that 'the lack of border control by Morocco is not a lack of respect for Spain, but for the European Union'[747].

5.2. Policies

Since Spain joined the European Union in 1986, its Southern Border officially became Europe's external land border with Africa, and therefore, its security, border control regulations, and especially police forces, were exponentially increased[748].

This border closure, together with the imposition of visa requirements on Moroccan nationals by Spain after its entry into Schengen in 1991, transformed the country from a destination for a tolerated number of seasonal/circular migrants into a new immigration route through the Spanish/European external border for Moroccans and nationals from sub-Saharan Africa (mainly Senegal, Mauritania, Nigeria or Mali). Ever since, there have been cyclical negotiations between the authorities on both sides of the border[749]. A first key moment was the 1991 Treaty of Friendship,

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745 El Pais journalist interviewed, 'The chaos was such that nobody cared about us. We accessed even to the beach and the fence'.

746 Europa Press, Embajadora de Marruecos: "Hay actos que tienen consecuencias y se tienen que asumir". 18 May 2021. https://www.europapress.es/nacional/noticia-embajadora-marruecos-hay-actos-tienen-consecuencias-tienen-asumir-20210518145207.html

747 La Moncloa, Declaración institucional del presidente del Gobierno ante la llegada de migrantes irregulares a Ceuta. 18 May 2021. https://www.lamoncloa.gob.es/presidente/actividades/Paginas/2021/180521-sanchez_ceuta.aspx.

748 X. Ferrer-Gallardo (2008), "The Spanish-Moroccan Border Complex: Processes of Geopolitical, Functional and Symbolic Rebordering," *Political Geography* 27(3):301–21; D. Godenau and A. Lopez-Sala (2016), "Multi-Layered Migration Deterrence and Technology in Spanish Maritime Border Management," *Journal of Borderlands Studies* 31(2)151–69; A. Lopez-Sala (2005), "El Control de La Inmigración: Política Fronteriza, Selección Del Acceso e Inmigración Irregular," *Arbor* 180(713):27–39.

749 A. Del Valle Galvez (2022), "Ceuta, Melilla Gibraltar y El Sáhara Occidental. Estrategias Españolas y Europeas Para Las Ciudades de Frontera Exterior En África, y Los Peñones de Vélez y Alhucemas," *Paix et Securite Internationales* (10):1–43.

Good Neighbourliness and Cooperation between Spain and Morocco[750], which intended to create stability in the Maghreb[751]. As a consequence of the friendship treaty, Morocco signed a bilateral agreement concerning the movement of people, transit and readmission of illegally entered foreigners, which, although signed on 13 February 1992, only entered into force in December 2012[752].

Beyond the bilateral relations between Morocco and Spain, since the late 1990s and early 2000s, the European Union has become a key player in this area, promoting the externalisation of border control to countries of origin and transit[753]. Underlying all agreements was 'the migration issue'. On the one hand, the EU demanded that Morocco (and other African countries) should control human trafficking and smuggling networks, as well as the conclusion of readmission agreements for third-country nationals (in the case of Morocco, still unsigned)[754]. On the other hand, the EU also demanded that Morocco implement a legal system up to the standards of a migration destination country in matters of foreigners and asylum. While some limited progress has been achieved, there have been several years now of legislative procrastination in asylum matters, which has generated a climate of legal insecurity, especially with regard to the practical implementation of the effective right to request international protection (authorities, categories, procedures, etc.)[755].

In addition, a Joint Declaration was signed on 7 April 2022 entitled 'New stage of the partnership between Spain and Morocco'[756]. In this declaration, Spain refers to Morocco's initiative on Saharan autonomy as 'the most serious, realistic and credible basis for resolving this dispute' and both parties commit to strengthening 'cooperation in the field of migration' through a permanent Spanish-Moroccan Group on Migration. While this declaration was being negotiated, on 2 March 2022, around 2 500 sub-Saharan migrants tried to climb the border fence around Melilla; 491 made it but more than 40 were injured.

Nor was it a coincidence when a few days before the NATO summit in Madrid, on 24 June 2022, between 1 500 and 2 000 migrants, mostly from South Sudan and Chad, tried to jump over the Melilla border fences[757]. As a result of the Morrocan and Spanish police containment on both sides,

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750 Treaty of Friendship, Good Neighbourliness and Cooperation between Spain and Morocco. http://www.boe.es/boe/dias/1993/02/26/pdfs/A06311-06314.pdf.

751 11 years later, when Spanish-Moroccan relations were under considerable strain , Spain signed a similar treaty with Algeria, another key player in the Maghreb (mainly as a gas exporter), and a flagbearer of the Saharawi cause, and also a departure site for migrants to the Mediterranean, as a measure of strategic pressure.

752 Entrada en vigor del Acuerdo entre el Reino de España y el Reino de Marruecos relativo a la circulación de personas, el tránsito y la readmisión de extranjeros entrados ilegalmente, hecho en Madrid el 13 de febrero de 1992. https://www.boe.es/boe/dias/2012/12/13/pdfs/BOE-S-2012-299.pdf.

753 D. Lo Coco and E. Gonzalez-Hidalgo (2021), "La Doble Lógica de La Externalización Europea: Protección y Deportación En Marruecos," *Revista CIDOB d'Afers Internacionals* (129):79–106. See the Euro-Mediterranean Agreement between the European Union and Morocco in 1996, implemented through Decision 2000/204/EC; the 2008 European Neighbourhood Policy (ENP); and the EU-Morocco Mobility Partnership Agreement signed in June 2013.

754 S. Carrera, J.P. Cassarino, N. EL Qadim, L. den Hertog and M. Lahlou (2016), "EU-Morocco Cooperation on Readmission, Borders and Protection: A Model to Follow?, CEPS Papers in Liberty and Security in Europe," *CEPS, Liberty and Security in Europe* (87):1–16.

755 D. Perrin (2023), « La fabrique d'un droit d'asile au Maroc. Circulation des normes, tâtonnements juridiques, et atermoiements politiques », La Revue des droits de l'homme [En ligne], 24 | 9 mai 2023, http://journals.openedition.org/revdh/17310

756 "Nueva Etapa del Partenariado entre España y Marruecos" Declaración Conjunta. 7 April 2022. https://www.lamoncloa.gob.es/presidente/actividades/Documents/2022/070422-declaracion-conjunta-Espana-Marruecos.pdf.

757 According to statements by Adam, a 21-year-old Sudanese man who managed to enter Melilla to El País, the authorities gave them an ultimatum: 'A police officer came alone and told us that we had 24 hours to leave: "If you leave the mount, we will not use violence, but if you refuse to leave, we will use live fire."' (ElPais.es, ¿Qué sucedió en

many were trapped in the border structure, which, when it gave way due to its weight, caused the deaths by crushing of at least 37 people and injured around a hundred[758]. Although he later retracted, President Sanchez declared at the summit that it was a 'violent attack on the territorial entity of a country, organised by mafias that traffic in human beings'. In addition, he showed as an achievement of his government that NATO considers it necessary to reinforce the southern border, especially the enclaves of Ceuta and Melilla, to fight against the threat of irregular immigration, something that Morocco did not like, which has historically claimed sovereignty over these territories[759]. The investigation into the deaths, injuries and disappearances, even though it was taken to a parliamentary commission, was immediately archived by the Spanish prosecutor (23 November 2022), alleging that it was a matter that occurred in Moroccan territory, contrary to the geolocation evidence of the border post[760].

5.3. Effects

5.3.1. Government decisions and political reactions

To return to the 'Ceuta May 2021' case, at first, the Guardia Civil and the Red Cross primarily provided medical assistance to those swimming ashore ('We can do no more than prevent a tragedy from occurring'). But as the hours passed, the Guardia Civil armed themselves with riot gear, rifles and 'border containment' devices, using aerosols and tear-gas grenades against migrants approaching the fence, and immediately returning those caught in Spanish territory across gates in the fence and not across authorised crossing points.

The president of Ceuta, Juan Jesús Vivas (Popular Party) described the atmosphere in the city as a 'state of exception', calling for a rapid and forceful intervention of the army, as well as the immediate return of adult migrants. There are around 3 000 troops stationed in Ceuta. The Ministry of Defence communicated that the Army was 'providing security and support in collaboration with the Police and the Civil Guard'. Images broadcast from the vicinity of the beaches showed numerous light armoured vehicles stationed close to the border. The same afternoon of Monday, 17 May 2021, the Spanish Minister of the Interior, Fernando Grande-Marlaska, met with senior government officials, including the Secretary of State for Security, the Undersecretary of the Ministry of the Interior or the general directors of the Police and Civil Guard, where they agreed to 'immediately reinforce' with about 200 border troops (Civil Guard) and foreign, scientific and anti-riot units (National Police).

During a government control session in the Congress of Deputies on 19 May, the opposition introduced the case of Ceuta[761]. The then leader of the opposition, Pablo Casado (PP), asked the president to 'guarantee national sovereignty in Ceuta and Melilla and the territorial integrity of our

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la frontera de Melilla? El paso a paso de la tragedia. 2 July 2022. https://elpais.com/espana/2022-07-03/que-sucedio-en-la-frontera-de-melilla-el-paso-a-paso-de-la-tragedia.html). To delve into concepts such as instrumentalisation, the violation of rights, the geolocation of borders and deaths and, therefore, the responsibility attributable to each country, see also the documentary 'La tragedia de Melilla: ¿Qué papel jugaron España y Marruecos en las muertes?' by El País. https://www.youtube.com/watch?v=Q_J502iAcTc

[758] Currently, the border architecture in Melilla consists of a palisade, a moat and a concertina wire fence on the Moroccan side, and a triple fence of 6- 8m on the Spanish side. Formally there are only four crossing points (Farhana, Barrio Chino, Beni Enzar and Mariguari) but along the border perimeter there are numerous gates through which informal returns take place.

[759] Irregular migration was included as a security threat and as part of 'hybrid attacks' in the NATO 2022 Strategic Concept. The document expressly mentions the instrumentalisation of migration as part of hybrid attacks in paragraph 7, page 3. https://www.nato.int/nato_static_fl2014/assets/pdf/2022/6/pdf/290622-strategic-concept.pdf

[760] See Death on the Border - BBC Africa Eye documentary. https://www.youtube.com/watch?v=MJoL7E4uvuU

[761] CORTES GENERALES DIARIO DE SESIONES DEL CONGRESO DE LOS DIPUTADOS PLENO Y DIPUTACIÓN PERMANENTE. 19 May 2021. https://www.congreso.es/public_oficiales/L14/CONG/DS/PL/DSCD-14-PL-103.PDF.

borders (...) reinforcing the police forces, the Armed Forces, the coordination with Europe and the relations with Morocco. Ceuta has been Spanish for 600 years and our compatriots there do not deserve this'. The representative of the far-right VOX party, Espinosa de los Monteros, accused the Moroccan government of 'launching an organised invasion to take the city of Ceuta. Arrest, identify and expel immediately all those who have violated our sovereignty, and make sure that no one does it again in the future'. However, the representative from CUP (Catalan radical left), Mireia Vehí, strongly criticised the refoulements, some of them carried out with extreme violence, and the violations of rights, especially against minors. At the same session, the President of Spain, Pedro Sanchez, announced that 400 police had been deployed and that around 4 800 people had been returned.

5.3.2. Between humanitarian management of receptions and multiple forms of returns

In addition to the informal pushbacks[762] committed during the first days, based on an agreement reached late on 19 May between the countries, the Moroccan authorities undertook to accept the return of 40 migrants every two hours. This is a peculiar issue since the return of Moroccan citizens detained in the peninsula is normally done through the border crossings of the Strait, and never through Ceuta and Melilla, since Morocco does not recognise Spanish sovereignty over these cities. Paradoxically, however, in the weeks following the incidents of May 2021, the Moroccan adults who were not expelled 'in the heat of the moment' were subject to the administrative procedure of return[763], being admitted by the Moroccan authorities at the Tarajal border.

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[762] After years of lack of regulation regarding 'hot' pushbacks and a fiction of non-legal entry, the Partido Popular (PP) included them in an amendment to the Immigration Law (first additional provision), introduced by the Citizen Security Law (first final provision. Special regime of Ceuta and Melilla). However, this regulation continues to impose the observance of national and international regulations on human rights. On 13 February 2020, the European Court of Human Rights made public its ruling on the case of *ND and NT v. Spain*, by which it resolved the appeal against the previous ruling of 3 October 2017, of the same court. Against that sentence in the first instance, among other relevant issues (such as that in the face of the indeterminate concept of 'operational border', the border fence must already be considered Spanish territory and therefore the jurisdiction of the ECtHR), the Great Chamber determined, in favour of Spain, that Article 4 of the Protocol to the Convention is not applicable to this case since it was the applicants themselves, who positioned themselves in an illegal situation by not using the access points established by law, such as the request for asylum at the embassies or at the border post. The Spanish Constitutional Court ruled along a similar line when legitimising the rejections as long as, not yet being in Spain, they are not assisted by the constitutionally recognised fundamental rights (STC 13/2021, of 28th of January). This argument was firmly denied, with reliable data, both by organisations that work for the rights of migrants and asylum seekers and by the media critical of the border regime. The lawyer specialising in international protection and member of the Melilla Bar Association (ICAME) Antonio Zapata not only considers that the Strasbourg decision 'protects the State at the expense of Human Rights', but also reiterates that 'the Asylum Offices are inaccessible to sub-Saharan migrants, it is impossible for them to access due to Morocco's active role regarding immigration'. (Publico.es, 12 February 2020. https://www.publico.es/sociedad/devoluciones-caliente-frontera-melilla-muro-impide-acceso-legal-subsaharianos.html). It is also worth mentioning that the 13/2021 Constitutional Court´s decision had a dissenting vote in which it was demanded that "it should be established more clearly that the constitutionality of the so-called rejection at the border must presuppose the existence of genuine and effective access to the means of legal entry". Abdou, a Senegalese boy who managed to reach the beach in May 2021 and who was subsequently returned without individualised identification, legal or linguistic assistance, in 2022 formalised a claim (promoted by the CEAR organisation) before the ECtHR for violation of article 13 of the Convention (Right to appeal the expulsion) and of article 4 of the protocol to the Convention (prohibition of any collective expulsion). On 6 June 2023, the ECtHR declared the claim inadmissible, invoking the ruling of the judgment N.D and N.T. of 2020. See more in M. Martínez-Escamilla and J. Sánchez-Tomás (2019), "La vulneración de derechos en la frontera sur: de las devoluciones en caliente al rechazo en frontera," *Crítica Penal y Poder* 18:28–39; M. Aparicio (2023), Las devoluciones en caliente y la fría razón de Estado: una mirada a la política de fronteras de la Unión Europea. Oñati socio-legal series, vol. 13, no 3, pp. 936-953.

[763] I. Barbero (2021), "When Return Orders Are More than Just a Deportation Receipt: Transit Migration and Socio-Legal Meanings of Administrative Documents." *Journal of Immigrant and Refugee Studies* 21(1).

We must remember that Ceuta is an enclave under Spanish/European sovereignty on the African continent, with an area of 18.5 km2, delimited by an 8 km-long fence that separates it from Morocco (as well as its sister city, Melilla, with around 12 km2 and a 12 km-long border fence). Specifically, there are only two areas or crossing points in the border perimeter of Ceuta, located at either end of the border perimeter, El Tarajal in the south and Benzú in the north. However, in practice, only Tarajal is considered an international border crossing point[764].

The police facilities of the Asylum and Refugees Group under the Provincial Brigade for Alien Affairs of the National Police of Ceuta are located at the Tarajal border post. Although this post was inaugurated in 2015, due to operativity reasons it did not register any applications until September 2019. The circumstances of May 2021 led to a significant increase in applications in Ceuta. From 285 applications in 2020, there were 3 152 in 2021[765]. It is important to note that they were processed through the territory procedure (arts. 17 to 20 of the 2009 Asylum Law, longer terms) and not through the border procedure (much faster and therefore with less guarantee in practice)[766]. However, due to increased numbers, the Central Repatriations Unit (UCER) had to be reinforced to attend around 35 interviews a day, although according to the Spanish Immigrant Assistance Commission (CEAR) there were cases in which people wanted to ask for asylum but were not heard (CEAR 2022). Sub-Saharan nationalities (Senegal, Mali, Ivory Coast, Guinée Conakry…) are under-represented because, as a strategy to discourage protection demands, historically the asylum applications were considered a blockage in the transfer to the peninsula until the decision was notified. Since the 1128/2020 ruling of the Supreme Court, the right to free movement in Spain (including Ceuta and Melilla) is recognised for all persons whose asylum application has been admitted for processing[767].

From the beginning of the incident, Red Cross Immediate Emergency Response Teams (ERIE) were deployed at Tarajal and Benzú, but the emergency shelters were installed in warehouses in the industrial estate near the border. These warehouses remained in operation for several months, with canvas stretchers and bunk beds set up, as well as some toilets, giving shelter to unaccompanied children, families and other vulnerable profiles. Some of these warehouses were used to quarantine people for 72 hours for Covid-19 prevention. It is also worth mentioning the spontaneous reaction of the citizens of Ceuta, who provided blankets, water and food, as well as the local organisations Asociación Elín, No Name Kitchen or Maakum, who provided exhaustive assistance, especially to unaccompanied minors, and who denounced the deplorable conditions in which they were being sheltered[768]. According to CEAR, the Centre for Temporary Stay of Immigrants (CETI) in Ceuta, managed by the Ministry of Labour and Social Economy, denied people with 'vulnerable profiles'

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764 Benzú has never been an international border crossing point. Based on the Friendship Agreement, only people whose documents stated that they lived in Belyounech and Spanish people living in Benzú (Ceuta) could cross. Now it is permanently closed and the Tarajal is the only international crossing point.

765 These were mostly Moroccans (2 992), followed by Algerians (38), Yemenis (22), Senegalese (20), Guineans (19), Syrians (10), Sudanese (10), Malians (8), Tunisians (7) and others in smaller numbers from countries such as Ivory Coast, Gambia, Cameroon, and Bangladesh. Of the applications, 2 715 were made by men and 281 by women; 156 were minors, of whom 117 were accompanied and 39 'unaccompanied' (83 boys and 73 girls).

766 Although there is an asylum application procedure at the border (Art. 22), these facilities do not assist asylum seekers at the border, but are mainly used to assist asylum seekers already inside Ceuta, especially in the CETI, and to carry out interviews and other procedures.

767 I. Barbero (2021), "The Struggle Against Deportation of Bangladeshi and Indian Immigrants at the Border Cities of Ceuta and Melilla: A Case Study of Citizenship After Orientalism." *Journal of Borderlands Studies*, vol. 36(3) 1–18; I. Barbero (2021), "Refugiados En Contención: Lógicas de (in)Movilidad En Materia de Derecho de Asilo En La Frontera Sur." *Revista CIDOB d'Afers Internacionals* (129):179–202.

768 Maakum, Elin and No Name Kitchen (2021), Informe sobre las vulneraciones de la infancia, adolescencia y juventud migrante en Ceuta. https://maakumceuta.files.wordpress.com/2021/06/informe-vulneraciones-de-derechos-de-la-infancia-adolescencia-y-juventud-migrante-en-ceuta.-junio-2021-1-1.pdf

access to the facility by requiring Moroccans to have an asylum application admitted for processing (asking for asylum was not enough)[769]. According to IRIDIA, people stayed in parks and other urban spaces for days, or hid in wooded areas around the CETI for fear of police raids[770]. Thanks to a letter of complaint from social organisations such as CEAR, Elin, IRIDIA, No name Kitchen, etc., the CETI was made more accessible.

5.3.3. The issue of returned minors

Although the exact number of minors who arrived in Ceuta is unknown, according to CEAR, 1 108 were reported in June 2021 (not counting those who were returned informally or returned voluntarily during the first days). In addition to the industrial warehouses, places such as the Piniers shelter, the Esperanza centre, and the Santa Amelia sports centre also provided temporary shelter, and around 200 minors who were already under guardianship were relocated to minors' centres on the peninsula to free up places for the new arrivals. Some returned alone to Morocco between May and August, but 55 were expelled between 13 and 15 August. These refoulements were subsequently frozen by the Contentious Administrative Court 1 of Ceuta, thanks to complaints filed with the Juvenile Prosecutor's Office by the organisations *Coordinadora de Barrios* and *Fundación Raíces*[771]. Subsequently, the High Court of Justice of Andalusia (STSJA 555/2022, 23 June 2022[772]), reaffirmed that the repatriation of a group of adolescents to Morocco did not comply with the legal procedures set out in the Bilateral Agreement on Accompanied Minors and in Article 35 of the Law on Foreigners and 189 to 195 of its regulations (RD557/2011), such as verifying the situation of family abandonment of minors in Morocco.

Similarly, on 13 August 2021 the Ombudsman called attention to 'the legal duty to comply with the provisions of Article 35.7 of Organic Law 4/2000 on the Rights and Freedoms of Foreigners in Spain, requesting a report on the family circumstances of the minor from the diplomatic representation of the country of origin, prior to the decision regarding the initiation of a procedure on his repatriation'. The complaint is still awaiting an institutional response[773].

On 25 June 2021, in a parliamentary control appearance before the Interior Commission of the Congress of Deputies Minister Grande-Marlaska assured that 'there was no illegal return, all the people who returned did so in accordance with the law, voluntarily, and those who did not, through the appropriate means. UNHCR and the Red Cross were in Tarajal, with our State Security Forces, with the Civil Guard, with the Armed Forces, and we worked on the determination of the vulnerable profiles or those reasonably susceptible to international protection. CEAR was also there'[774]. However, these organisations rejected the Minister's words and denied having collaborated in the assessment process of vulnerable people, confirming that there were indeed informal pushbacks during the first days, and that they were aware of specific testimonies.

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769 CEAR, Informe 2022: Las personas refugiadas en España y Europa, p. 97. https://www.cear.es/informe-cear-2022/

770 IRIDIA (2021), Vulneración de derechos humanos en la Frontera Sur del Estado español 2021-2022. https://iridia.cat/es/Publicaciones/vulneracion-de-derechos-humanos-en-la-fs-del-estado-espanol-2021-2022/

771 This was the joint work of the organisations Anadalucía Acoge, Coordinadora de Barrios, Elin, Fundación Racies, Gentium, Maakum and NO Name Kitchen, https://twitter.com/CoordiBarrios/status/1427270480139018250/photo/1.

772 High Court of Justice of Andalusia. STSJA 555/2022, 23 June 2022. https://www.abogacia.es/wp-content/uploads/2022/06/20220629-ST-TSJ-139-21-CORRECTA-sin-nombres.pdf

773 Defensor del Pueblo, Devolución sin procedimiento de menores extranjeros no acompañados en Ceuta. complaint number 21019792. https://www.defensordelpueblo.es/resoluciones/devolucion-sin-procedimiento-de-menores-extranjeros-no-acompanados-en-ceuta/. See also Defensor del Pueblo, Annual Report 2022, page 164. https://www.defensordelpueblo.es/wp-content/uploads/2023/03/Defensor-del-Pueblo-Informe-anual-2022.pdf

774 CORTES GENERALES DIARIO DE SESIONES DEL CONGRESO DE LOS DIPUTADOS PLENO Y DIPUTACIÓN PERMANENTE. 25 June 2021. https://www.congreso.es/public_oficiales/L14/CONG/DS/CO/DSCD-14-CO-446.PDF.

Border-crossing facilities were enabled for people who wished to return voluntarily, but it is also true that people who had entered Ceuta before, such as people from the LGTBIQ+ collective with a clear profile of asylum seekers, were returned under false pretences. A paradigmatic case was that of six Yemeni boys and eight women from the Democratic Republic of Congo. According to one of the testimonies: 'On May 18, I went to Fnideq at the border of Ceuta with Morocco, I swam 100 metres until I reached the coast of Ceuta. I told them I was a Yemeni refugee, but the Spanish authority forced me to return to Morocco. I tried to swim a longer distance again until I reached Ceuta. I showed my Yemeni passport and that I wanted asylum, but I was beaten and forced to return to Morocco'[775].

5.3.4. Geopolitical and juridical implications

With regard to the immediate geopolitical implications of the May 2021 events in Ceuta, together with the already mentioned long-lasting crucial geopolitical issues related to sovereignty over Ceuta/Melilla, the Western Sahara controversy, fisheries and trade, we must make the following points.

First of all, we must refer to a direct consequence of the conflict, which is the resignation and subsequent indictment of then Minister, Arantxa Gonzalez Laya, for the clandestine entry into Spain of the Polisario Front leader, Brahim Ghali. According to several media reports[776], the Moroccan government, in a secret meeting held on 2 July 2021 in Rabat, demanded the dismissal of the Minister as a condition for resuming the proper control of migratory departures. The Minister was eventually dismissed on 12 July 2021. From September 2021, she was under judicial investigation, but was finally exonerated, the action of receiving the Saharawi leader being considered 'a political act of government' with no criminal implications.

Secondly, this episode has had an impact on the way Spanish authorities have dealt with the forced returns. This has led to political resignations and trials because of human rights violations, especially those of minors. We have mentioned the rulings of the High Court of Justice of Andalusia declaring inadmissible refoulements that were carried out in violation of Spanish legislation on the repatriation of unaccompanied minors, as well as the bilateral agreement on the same matter. What is relevant is that in the case dated 23 March 2023, the Supreme Court admitted the appeal of the Government of Ceuta and the State Attorney's Office against the resolution of the court of Ceuta that required them to 'adopt the necessary measures' to achieve 'the return of the [unaccompanied] minors who were effectively repatriated'. The Supreme Court must now verify whether those returns, which, as the Andalucian Hight Court of Justice ruled, were carried out 'without the initiation of any procedure, nor a request for reports, nor a phase of allegations, nor a hearing, nor a phase of evidence, nor even a resolution agreeing to the repatriation of the minors (...) That is, there is no trace of a repatriation file', were in accordance with national and international law. Some of those minors were returned to Spain. All this has led to an ongoing criminal process against the Spanish government representative in Ceuta, Mabel Deu, the vice-president of the city, and other possible collaborators, all of whom are accused of administrative prevarication.

An additional fact to conclude on is the Verbal Note from the Government of Morocco on 17 May 2023, which was sent to the EU Delegation in Rabat compiling what it considers to be a dozen

[775] ElPaís.es, Marlaska defiende la legalidad de todos los retornos en la crisis de Ceuta, pero Acnur denuncia posibles devoluciones ilegales. 25 June 2021. https://elpais.com/espana/2021-06-25/marlaska-defiende-la-legalidad-de-todos-los-retornos-en-la-crisis-de-ceuta-pero-acnur-denuncia-posibles-devoluciones-ilegales.html

[776] Público, Marruecos pidió al Gobierno la destitución de González Laya y Sánchez la cesó días después. 19 April 2023. https://www.publico.es/politica/marruecos-pidio-gobierno-destitucion-gonzalez-laya-sanchez-ceso-dias-despues.html and El Confidecial, Sánchez cesó a González Laya como ministra una semana después de que Marruecos se lo pidiera. 19 April 2023. https://www.elconfidencial.com/espana/2023-04-19/sanchez-destituyo-gonzalez-laya-ministra-despues-peticion-marruecos_3613550

'hostile statements' by Margaritis Schinas, the Vice President of the European Commission responsible for Promoting our European Way of Life, regarding Morocco and 'the Moroccan cities of Ceuta and Melilla'. In statements made in May 2021, Schinas said that 'Europe will not be intimidated. (...) In recent months, we have seen attempts by third countries to instrumentalise migration. We will make it very clear that no one can blackmail the EU. We are too strong to be victims of such tactics which are not admissible in today's Europe. Ceuta is a European border and what happens there is not a problem only for Madrid, it is a problem for all'. He also described the reiterations to the Ceuta case (also about Greece or Belarus) during the European Summit on Defence and Security held in Brussels on 11 May 2023 as a 'hybrid threat'. According to the May verbal note from the Moroccan government, the EU should rectify the previous statements 'in order to preserve the serenity of cooperation [with Morocco] and its harmonious deployment'.

5.4. Relevance of the instrumentalisation proposal

There is a direct causal relationship between the Morocco–Spain–European Union tensions and the important arrivals of asylum seekers and migrants either to the coasts of the Canary Islands and Andalusia, as well as those jumping the fences of Ceuta and Melilla.

Morocco is aware of the important role it plays in EU migration management policies, and it asserts its position as a strategy in the negotiation with Spain and the EU, both for the financing of the border control itself, as well as other issues that directly affect it, such as the Western Sahara conflict and other matters such as fishing agreements, land mining, and maritime prospecting near the Canary Islands. Nor can we ignore the historical claim of sovereignty of the Moroccan kingdom over Ceuta and Melilla. To be precise, the current customs negotiations in these cities are a very important issue: for the local populations on both sides of the borders, the economy was based on the different immigration and tax regimes.

Unlike other European contexts, as can be seen from the data provided in this case study, it was mostly the Moroccan population itself that was the main protagonist of the crossing in May 2021. At the same time, it is also true that other unauthorised border crossings, especially through the fences, are carried out by nationals of sub-Saharan countries. The reason is, as we have previously stressed, the impossibility of formally circumventing the first Moroccan border filter to access the asylum offices at the border to make asylum claims. It is a fenced border perimeter that in recent years has received an exponential increase in funding to enhance technological surveillance and human resources for deterrence purposes[777].

At the same time, in the event that one of the consequences of the application of the instrumentalisation proposal is the reduction of land border points, we must be aware that in Spain, by only having land border areas (Ceuta and Melilla), this would result in the concentration of arrivals in the coasts in the so-called Temporary Assistance Centres for Foreigners (CATE). These are police

[777] Considering that border control industry (devices, technologies or human resources such as SIVE or the fences maintenance) have a multilateral public-private financing system (see https://porcausa.org/spectram/static/docs/icm2.pdf), I will mention just a few samples. In October 2018, Spain donated to Morocco, 108 vehicles and computer equipment worth 3.2 million euros. Between 2019 and 2020, Morocco received 30 million euros from Spain, to be paid from the General State Budget (Council of Ministers of July 19th, 2019), which were included in the 147.7 million euros from the European Emergency Fund for Africa, as well as 389 million Euros from new cooperation programs of the European Commission (December 20th, 2019), to improve and upgrade the fleet of vehicles with which to reinforce its border control and thus repress irregular migratory flows towards Europe. In 2021, the Ministry of the Interior allocated 9.7 million euros to the integral maintenance of the facilities of the border perimeter of Ceuta and Melilla. On the 13th of June 2023, the Council of Ministers has agreed to contract for the execution of works and technological equipment at the entrances and exits of two border crossings with Morocco in Ceuta and Melilla with a total investment of 1,253,506 euros.

units, without legal regulation, located near the seaports, where asylum seekers and TCNs remain for a maximum of 72 hours to carry out the police review, interview with Frontex and opening of the return sanction procedure[778].

This is precisely the main problem that motivates crossings through unauthorised posts. As stated in the reports of entities working for the protection of the rights of asylum seekers and migrants, the procedures to formalise the asylum application in European embassies located in third countries and asylum applications at the border crossing points in Ceuta and Melilla are totally vetoed, especially for nationals from sub-Saharan countries and in some cases of South-Asian TCNs.

In conclusion, all the management of the Ceuta May 2021 case has been carried out through highly informal procedures and with a strong disregard for EU legal standards and regulations on fundamental rights, non-refoulement and child protection. Although some of these returns were corrected and are currently being prosecuted, there were and still are many people who are immediately sent back without being able to benefit from an individualised assessment of their case, and returned to hostile territories where their human dignity is violated.

[778] I. Barbero (2021), "Los Centros de Atención Temporal de Extranjeros como nuevo modelo de control migratorio: situación actual, (des)regulación jurídica y mecanismos de control de derechos y garantías." *Derechos y Libertades* 45.

6. Italy

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6.1. Background

Immigration, especially unauthorised immigration by sea, has consistently remained at the forefront of the Italian political agenda for many years[779]. After a significant decrease in unauthorised arrivals by sea between 2016 and 2019, the number of third-country nationals (TCNs) disembarking in Italy has been steadily increasing since 2020 (see Table 20).

Table 20: Number of arrivals by sea, asylum applications and refusals of entry issued, 1997-2022

Year	Arrivals by sea	Number of asylum applications	Refusal of entry issued by the Police (usually after a non-authorised crossing of the border)
1997	22.343	2.595	n.a.
1998	38.134	18.496	15.564
1999	49.999	37.318	11.500
2000	26.817	24.296	11.350
2001	20.143	21.575	10.433
2002	23.719	18.754	6.139
2003	14.331	15.274	3.195
2004	13.635	10.869	2.563
2005	22.939	10.704	4.232
2006	22.016	10.026	2.132
2007	20.455	13.310	1.507
2008	36.951	31.723	1.019
2009	9.573	19.090	557
2010	4.406	12.121	457
2011	62.692	37.350	5.529
2012	13.267	17.352	2.527
2013	42.925	26.620	2.093
2014	170.100	64.886	2.589
2015	153.842	83.970	1.345
2016	181.436	123.000	1.528
2017	119.369	130.119	1917

[779] Geddes, A. and A. Pettrachin (2020), "Italian migration policy and politics: Exacerbating paradoxes." *Contemporary Italian Politics* 12(2), pp. 227-242.

2018	23370	53.596	1438
2019	11471	43.783	998
2020	34154	26.963	1185
2021	67040	53.609	1221
2022	105140	77.195	n.a.

Source: Author's elaboration on data retrieved from the Italian Ministry of Interior

TCNs predominantly arrive in Italy via two main pathways: the central Mediterranean Sea, with departures from Libya (resulting in 53 119 arrivals in 2022) and Tunisia (which led to 32 101 arrivals in 2022), and the eastern Mediterranean Sea, with departures from Lebanon and Turkey (amounting to over 16 000 departures in 2022)[780]. In addition to arrivals by sea, a certain number of TCNs are intercepted near land borders in the north of Italy, particularly those arriving from Slovenia, whose numbers are steadily increasing (see Table 21).

Table 21: TCNs detected at land borders, by border of detection; 2016-2022

	2017	2018	2019	2020	2021	2022
France	n.a.	105	149	598	599	n.a.
Switzerland	n.a.	42	47	170	171	n.a.
Austria	n.a.	447	387	359	1449	n.a.
Slovenia	n.a.	1567	3568	4120	5634	n.a.
Total	1590	2161	4151	5247	7853	14451

Source: Author's elaboration on data retrieved from the Italian Ministry of Interior

To meet the increased reception needs of asylum seekers (see Table 20), Italy has extensively revised its reception system since 2010, significantly expanding its capacity[781]. Due to the decrease in the number of arrivals by sea and asylum requests, the system's capacity has, however, progressively been contracted since 2017, losing 240 % of its reception capacity over the course of four years (see Table 22).

[780] Presidenza del Consiglio dei Ministri (2023), *Relazione Annuale sulla Politica dell'informazione per la Sicurezza. 2022.* Roma.

[781] Campesi, G. (2018), "Between containment, confinement and dispersal: the evolution of the Italian reception system before and after the 'refugee crisis'", *Journal of Modern Italian Studies*, 23(4), pp. 490-506.

Table 22: Capacity of the Italian reception system; 2010-2021

	Hotspots		First reception facilities		Second reception facilities		Extraordinary reception facilities		Total number of individuals in reception as of December 31st.
	Number of facilities	Number of individuals in reception as of December 31st.	Number of facilities	Number of individuals in reception as of December 31st.	Number of facilities	Number of individuals in reception as of December 31st.	Number of facilities	Number of individuals in reception as of December 31st.	
2010			13	6593	138	3146			9.739
2011			13	4958	151	3979	n.a.	24.198	33.135
2012			13	4870	151	3979	1332	18371	27.220
2013			14	7180	302	10381			17.561
2014			14	9592	432	23836	1657	35499	68.927
2015	3	n.a.	13	7394	430	30.345	3090	76.683	114.422
2016	4	820	15	14.694	652	34528	7005	137.218	187.260
2017	5	1037	15	10.319	775	24.573	9132	148.502	184.431
2018	4	244	13	5.520	877	26.869	8102	101.668	134.301
2019	4	78	9	2569	844	23.981	5465	63.960	90.588
2020	4	21	8	1592	794	25.399	4584	52.436	79.448
2021	3	398	8	1883	851	24.477	4204	50.038	76.796

Sources: Author's elaboration on data retreived from the Italian Ministry of Interior and Sistema accoglienza e integrazione (former SPRAR)

Currently the Italian reception system operates on three levels, with the following capacity at the beginning of 2023[782]:

[782] Camera dei Deputati (2023), *Audizione del Ministro dell'interno, Matteo Piantedosi, sulle linee programmatiche del dicastero*. Commissione Affari Costituzionali, della Presidenza e del Consiglio. Roma, p. 8; Senato della Repubblica (2023) *Dossier: Disposizioni urgenti in materia di flussi di ingresso legale dei lavoratori stranieri e di prevenzione e contrasto all'immigrazione irregolare. D.L. n. 20/2023 - A.C. n. 1112.* Servizio Studi. Roma.

- First aid and identification (hotspots): three hotspots located in Lampedusa, Pozzallo (Ragusa), and Taranto, for a capacity of 830 places.
- First reception (CPA[783] and CAS[784]): nine CPA facilities with a capacity for 3 248 guests, and 5 408 CAS facilities accommodating 69 650 guests.
- Second reception (SAI[785] centres): 2 023 SAI centres providing accommodation for 33 244 guests. It is worth noting that despite funding being allocated for 43 923 places, there were still 10 679 unoccupied places in SAI centres as of March 2023.

Italy has also welcomed over 170 000 Ukrainian refugees since 2022, implementing a comprehensive plan for extraordinary reception. This plan has leveraged not only on traditional second reception facilities but also on a new model of dispersed reception, which for the first time in the history of Italian reception practices also included a monetary allowance[786]. As of 17 February 2023, there were 173 684 Ukrainians in Italy, of which only 14 484 were hosted in secondary reception facilities[787].

The management of disembarkations has been a subject of political dispute since the beginning of the legislature, especially as consequence of the political controversy raised by the attempts made at regulating the search and rescue activities carried out by NGOs. Attempts which culminated in the adoption of Decree 1/2023[788].

In this scenario, the Cutro shipwreck, with 94 confirmed deaths, marked a turning point. This critical event has further intensified the ongoing political controversy about the most appropriate manner to manage migration by sea, prompting the government to adopt a new emergency measure[789].

By enacting a new Decree, the government aimed to reinvigorate the approach to border control and reception management that was initiated in 2018 and partly revised in 2020 following a change in the ruling political coalition. The overall objective involves a comprehensive redesign of the system for managing arrivals by sea. In particular, it entails confining asylum seekers considered not in clear need of protection primarily to first reception centres, especially those in close proximity to disembarkation points. Simultaneously, the utilisation of second reception facilities would be reserved for individuals with protection status or belonging to specific categories (such as Ukrainians, those displaced from Afghanistan, or individuals with specific vulnerabilities).

The first months of 2023 have marked a significant increase in the number of arrivals by sea compared to the previous years. The increase occurred in a context where the capacity of the Italian

783 CPA stands for *Centro di prima accoglienza*, 'first reception centre' in English.

784 CAS stands for *Centro di accoglienza straordinaria*, 'extraordinary reception centre' in English. CAS can be opened pursuant to article 11 of Legislative Decree 142/2015 (in *Official Journal of the Italian Republic*, 15 September 2015, No. 214) when there are not enough places available in ordinary reception facilities. Although originally designed as extraordinary reception facilities, CAS have quickly become the main component of the Italian reception system, covering over 70 % of its reception capacity.

785 SAI stands for *Sistema di accoglienza e intergrazione*, 'system for reception and integration' in English.

786 Decree 21/2022 converted with amendments by the Law 51/2022, in *Official Journal of the Italian Republic*, 20 May 2022, No. 117. To manage the initiatives aimed at supporting the Ukrainian population, the Italian Government declared a state of emergency with the Decision of the Council of Ministers issued on 23 February 2022 (in *Official Journal of the Italian Republic*, 10 March 2023, No. 59). As a consequence, the Department of Civil Protection was entrusted with the duty of providing humanitarian assistance and reception for Ukrainian refugees.

787 Camera dei Deputati (2023), *Audizione del Ministro dell'interno, Matteo Piantedosi, sulle linee programmatiche del dicastero*. Commissione Affari Costituzionali, della Presidenza e del Consiglio. Roma, p. 4.

788 Decree 1/2023, converted with amendments by the Law 15/2023, in *Official Journal of the Italian Republic*, 2 March 2023, No. 15.

789 Decree 20/2023, converted with amendments by the Law 50/2023, in *Official Journal of the Italian Republic*, 5 May 2023, No. 104.

reception system had been progressively reduced. This situation, as depicted in Table 23 and Table 22, quickly highlighted the potential ramifications of the new approach for managing arrivals by sea, resulting in an immediate overcrowding of first reception facilities, particularly in Lampedusa[790].

[790] According to the Italian Interior Minister Piantedosi, the presence of up to 3 000 people in Lampedusa in March 2023 has been reported (Camera dei Deputati (2023), *Interrogazione a risposta immediata del Ministro Piantedosi*. Seduta n. 90 di mercoledì 19 aprile 2023).

Table 23: Number of arrivals by sea from January 1st to June 15th.

2021	2022	2023
17.698	22.917	55.662

Source: Author's elaboration on data retrieved from the Italian Ministry of Interior

As a result of this, the Italian government has finally declared a new state of emergency[791]. This has been done with the official aim of a more effective distribution of incoming TCNs within the reception system.

6.2. Policies

Italy's model for managing migration by sea has historically been marked by an emergency-driven approach. Starting from 2011, there has been a notable escalation in the number of crisis-like measures enacted, to the point that the reception facilities categorised as 'extraordinary' under the law have become the cornerstone of Italy's reception system. In recent years, the successive waves of reforms, combined with shifts in political coalitions governing the country, have added further complexity to the situation.

The measures adopted in the early months of 2023 are clearly in line with the derogation-based policymaking that characterises border control and asylum reception policies in Italy. This approach is focused on the adoption of special decrees (*Decreto legge* in Italian) and extraordinary measures based on necessity and urgency.

In particular, the legal basis for adopting special decrees can be traced back to Article 77 of the Italian Constitution, which authorises the Government to adopt temporary measures with the force of law in 'extraordinary cases of necessity and urgency'. These measures must subsequently be approved by Parliament within sixty days.

The legal basis for declaring a state of emergency is to be found in Legislative Decree 1/2018, which empowers the Council of Ministers to declare a state of emergency, specifying its duration and determining its territorial extent[792], in cases of emergencies caused by 'disastrous events of natural origin or resulting from human activities'[793]. The declaration of a state of emergency authorises the appointment of a special commissioner, who adopts the necessary measures 'in derogation of any existing legal provision'.

The possibility to derogate from existing regulations is however granted within the limits and in accordance with the procedures specified in the state of emergency declaration, while respecting the general principles of the legal system and the regulations of the EU. This means that the declaration of a state of emergency does not authorise deviations from essential migration and asylum regulations. Specifically, it does not permit exemptions from asylum or return procedures, nor does it allow for disregarding standards related to reception. The main rationale of the declaration of a state of emergency usually lies in simplifying the procedures governing public procurements.

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791 Decision of the Council of Ministers, 11 April 2023, in *Official Journal of the Italian Republic*, 08 May 2023, No. 106. It is worth noting that the state of emergency declared for the reception of Ukrainians has been extended until 31 December 2023. (Decision of the Council of Ministers, 23 February 2023, in *Official Journal of the Italian Republic*, 10 March 2023, No. 59).

792 Article 24, Legislative Decree 1/2018, in *Official Journal of the Italian Republic*, 22 January 2018, No. 17.

793 Article 7, Legislative Decree 1/2018.

The Italian emergency legal regime is primarily centred on humanitarian categories, which serve as guiding principles for the actions of civil protection authorities. Migrations are framed as a calamity, where their impact on order and security is considered to be primarily indirect, rather than being perceived as an unconventional threat or as a 'weapon' wielded by hostile political actors. As we shall see, the declaration of a state of emergency may certainly have consequences on the quality of the reception offered and on the overall accountability of the system, but it does not necessarily lead to a direct and explicit securitization of migration[794].

The interaction between the humanitarian and security frames is however heavily influenced by the prevailing political climate in a given situation. For instance, even though an humanitarian approach steered the emergency response strategy during the Ukraine crisis (see above), the initial months of 2023 witnessed a noticeable shift towards a heightened securitization of migration.

The reasons of 'necessity' and 'urgency' that led to the adoption of the Decree 20/2023, and the subsequent declaration of the state of emergency in April 2023, were vigorously debated during the parliamentary discussions that followed the conversion of the decree into law. Specifically, within the ranks of the opposition there has been substantial objection to classifying unauthorised arrivals by sea as an unexpected emergency[795]. The extent of these discussions was such that the Interior Minister himself was compelled to acknowledge that there was no actual state of emergency, but rather that the term 'state of emergency' was a technical formula employed to streamline procedures[796].

While 'mass migration' was occasionally depicted as a potentially destabilising phenomenon[797], direct and explicit references to 'the instrumentalisation of migrants' have however remained relatively infrequent. Instead, the official justifications for the implemented measures predominantly hinge on three primary narratives.

The primary narrative used to justify the provisions regarding the regulation of search and rescue activities conducted by NGOs (Decree 1/2023) and the elimination of 'special protection' (Decree 20/2023)[798] has been the reference to the need to discourage irregular departures. In particular, both the presence of NGOs at sea and the possibility of obtaining an additional form of protection beyond refugee status and subsidiary protection have been presented as 'incentives' for irregular arrivals[799].

Another relevant narrative was the reference to the need to combat criminal networks and ensure the safety of TCNs from traffickers. This played a crucial role in supporting the government's interpretation of the events after the Cutro tragedy, which attributed the responsibility for the

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794 Since the seminal contribution of Waever, in political and social sciences, the concept of securitisation refers to the process of framing a particular social phenomenon as a threat to national security and public order. See: Waever, O. (1995), "Securitization and Desecuritization", in Lipschutz Ronnie D. (ed), *On Security*, New York: Columbia University Press: 46-86.

795 Senato della Repubblica (2023), *Aula: Resoconto stenografico.* Seduta n. 58 del 19 aprile 2023. XIX Legislatura.

796 Redazione Adkronos. 2023. *Migranti, Piantedosi: "Nessun allarme, stato emergenza è solo formula tecnica"*, available at: https://www.adnkronos.com/migranti-piantedosi-nessun-allarme-stato-emergenza-e-solo-formula-tecnica_1i9qdT1YqOSDMrPtLullcy (last accessed, June 22, 2023).

797 Camera dei Deputati. 2023. *Interrogazione a risposta immediata del Ministro Piantedosi*. Seduta n. 90 di mercoledì 19 aprile 2023.

798 In Italy, 'special protection' refers to a legal status granted to individuals who do not meet the criteria for refugee status or subsidiary protection but are unable to return to their country of origin due to family ties, integration into Italian society, length of stay in Italy, and cultural or social ties with their country of origin.

799 Presidenza del Consiglio dei Ministri (2023), *Relazione Annuale sulla Politica dell'informazione per la Sicurezza*. 2022. Roma, p. 37; Senato della Repubblica (2022), *Informativa del Ministro dell'interno sulla gestione dei flussi migratori*. Seduta n. 8 del 16 novembre 2022. XIX Legislatura; Senato della Repubblica (2023), *Aula: Resoconto stenografico*. Seduta n. 58 del 19 aprile 2023. XIX Legislatura.

deaths at sea to the actions of human traffickers rather than any potential delays in rescue operations. This narrative was primarily deployed to justify the introduction of new criminal offences against smugglers and traffickers (Decree 20/2023)[800].

Finally, the reference to the increasing 'migratory pressure', combined with an emphasis on the necessity to manage the growing number of arriving TCNs by strengthening reception infrastructure and improving the efficiency of asylum and return procedures, has been the primary narrative mobilised to justify both a significant portion of the measures adopted with Decree 20/2023 regarding asylum and return procedures and asylum reception, and the declaration of the state of emergency in April 2023[801].

In spite of occasional suggestions made by certain government representatives regarding the potential exploitation of migration as a 'hybrid threat'[802], the instrumentalisation narrative has not played a significant role in justifying the adoption of exceptional measures. On the contrary, the government has appeared on several occasions to emphasise the need for constructive collaboration with neighbouring third countries of origin or transit[803].

6.3. Effects

In this section, we will focus on the impact that the extraordinary measures adopted in the early months of 2023 had on the range of actors involved in migration and asylum management, on the quality of legal and political accountability, and on the fundamental rights of TCNs. This will also enable us to delve into the potential impact that the approval of the instrumentalisation proposal will have on the Italian political and institutional framework for managing and asylum.

6.3.1. Actors

The adoption of 'extraordinary measures' traditionally reshapes the landscape of actors involved in migration management, leading to a redistribution of powers. Similarly, the measures taken in the early months of 2023 have resulted in a number of shifts in roles and responsibilities.

Decree 1/2023 was adopted with the stated aim of minimising the participation of NGOs in search and rescue operations. This is the latest act in a concerted effort to curb non-governmental search

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800 Senato della Repubblica (2023), *Analisi tecnico-normativa del disegno di legge di conversione del decreto-legge 10 marzo 2023*, n. 20. XIX Legislatura; Consiglio dei Ministri (2023), *Conferenza stampa del Consiglio dei Ministri n. 24. Introduzione del Presidente Meloni*. Available at: https://www.governo.it/it/articolo/conferenza-stampa-del-consiglio-dei-ministri-n-24-lintroduzione-del-presidente-meloni/22020 (last accessed, June 22, 2023).

801 Senato della Repubblica (2023), *Interrogazione a risposta immediata del Ministro dell'Interno Matteo Piantedosi*. Seduta di giovedì 4 maggio 2023. XIX Legislatura p. 11; Consiglio dei Ministri (2023), *Conferenza stampa del Consiglio dei Ministri n. 28*. Available at: https://www.governo.it/it/articolo/comunicato-stampa-del-consiglio-dei-ministri-n-28/22332 (last accessed, June 22, 2023); Camera dei Deputati (2023), *Interrogazione a risposta immediata del Ministro Piantedosi*. Seduta n. 90 di mercoledì 19 aprile 2023.

802 See for instance the statements made by Defence Minister Crosetto and Foreign Affairs Minister Tajani, as reported by the *Adkronos* and the *Ansa* press agencies on 13 March 2023 (Redazione Adkronos. 2023. *Migranti, Tajani e Crosetto: "Rischi da strategia Wagner e guerra ibrida russa"*, available at: https://www.adnkronos.com/migranti-tajani-e-crosetto-rischi-da-strategia-wagner-e-guerra-ibrida-russa_Ij6NKj6FVawjrWgMFMSiF [last accessed, June 22, 2023]; Redazione Ansa. 2023. *Migranti, Crosetto: "Boom per strategia dei mercenari della Wagner"*, Availabe at: https://www.ansa.it/sito/notizie/politica/2023/03/13/migranti-crosetto-boom-per-strategia-dei-mercenari-della-wagner_1cc8210a-2498-46a7-903b-69c5ea2cc097.html [last accessed, June 22, 2023]).

803 Senato della Repubblica (2023), *Interrogazione a risposta immediata del Ministro dell'Interno Matteo Piantedosi*. Seduta di giovedì 4 maggio 2023. XIX Legislatura; Camera dei Deputati (2023), *Audizione del Ministro dell'interno, Matteo Piantedosi, sulle linee programmatiche del dicastero*. Commissione Affari Costituzionali, della Presidenza e del Consiglio. Roma, p. 5.

and rescue operations that began as early as 2017, with the aim of allowing governmental actors to assume a leading role[804].

The declaration of the state of emergency of April 2023 has centralised the management of reception in the hands of the Interior Ministry, via the special commissioner appointed to handle the emergency. As a consequence, the role of local authorities and third-sector organisations has been reduced, with the Red Cross and Civil Protection becoming key actors of reception.

The instrumentalisation proposal employs a war-like language that could promote a quasi-military approach to migration management. While the involvement of the Navy in border control activities in Italy has a considerable history[805], the role of the armed forces in managing the reception infrastructure for TCNs has remained relatively limited in scope until now[806].

The risk is that the approval of the instrumentalisation proposal may amplify the role of the armed forces, leading to a gradual militarisation of first reception and immigration detention facilities near border areas.

6.3.2. Accountability

One of the most sensitive aspects of any emergency regime is the potential for the search for greater effectiveness to limit the accountability of the institutional actors involved in migration management. The measures implemented in Italy in the early months of 2023 all pose significant risks in this regard.

One of the main consequences of the measures adopted with Decree 1/2023 is, for example, that the government may designate disembarkation points specifically designated for NGOs located far from the search and rescue zone. The removal of NGOs from critical areas not only leads to a reduction in search and rescue capacity, but also results in a decrease in independent oversight over the activities carried out by institutional actors responsible for border control, such as the Coast Guard, Border Police, Navy, and Frontex.

Another concerning consequence of the policies recently enacted in Italy, especially via Decree 20/2023 and the declaration of the state of emergency in April 2023, is that these will result in the proliferation of temporary reception facilities and in the development of a hidden geography of detention sites established near border regions, including premises within police stations or dedicated sections within hotspots.

The approval of the instrumentalisation proposal would authorise further derogations, leading in particular to the proliferation of detention facilities located near border areas. One likely consequence will be that monitoring the conditions of reception and detention will become significantly more challenging. This is due to the increased difficulty in maintaining an updated list of all active reception and detention facilities in Italy.

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804 Cusumano, E. and M. Villa (2021), From "angels" to "vice smugglers": The criminalization of sea rescue NGOs in Italy. *European Journal on Criminal Policy and Research*, 27, pp. 23-40.

805 Campesi, G. (2018), "Italy and the militarisation of euro-mediterranean border control policies." In *Contemporary Boat Migration. Data, Geopolitics and Discourses*, Rowman & Littlefield, London: 51-74.

806 Since 2008, the Italian Army has been authorised to participate in ordinary public order activities through the implementation of Operation 'Safe Streets' (*Strade Sicure* in Italian). As part of this operation, the Army can be involved in the surveillance of first aid and reception centres, as well as detention centres. However, their involvement is primarily focused on maintaining security outside these facilities, and they do not have the authority to intervene in the internal management or maintenance of order within them. Recently, Decree 20/2023 has established that military personnel and armed forces will be deployed to facilitate the transfer of TCNs between different first reception facilities.

6.3.3. Effectiveness

The effectiveness of many of the emergency measures adopted in Italy has been called into question by observers. For instance, the effectiveness of deterring departures by obstructing NGOs is rather dubious, as research indicates that the presence of NGOs at sea has little impact on the overall number of arrivals[807]. Furthermore, it is important to note that the majority of rescue operations are conducted by governmental entities rather than NGOs[808].

The elimination of 'special protection' as one of the forms of protection offered to individuals who, while not qualifying for refugee status or subsidiary protection, cannot be returned due to health, family, or other humanitarian reasons, is unlikely to lead to the expected decrease in arrivals. Data presented during parliamentary discussion indicates that it mainly benefited TCNs who did not arrive via sea routes[809].

One of the most significant aspects to consider in terms of the effectiveness of the proposed measures is the emphasis placed on the dimension of control and containment. In contrast to the approach taken in managing Ukrainian refugees, the recently implemented measures in Italy highlight the importance of enhancing first reception facilities, particularly in relation to the possibility of detaining individuals undergoing border asylum and return procedures in frontier areas.

There is a clear similarity in this regard with the underlying philosophy that inspires the instrumentalisation proposal, particularly for what concerns the possibility of limiting the number of border crossing points and expanding the application of border asylum and return procedures. The outcome of such an approach could be to increase the strain placed on the reception infrastructure located near key disembarkation points, leading to a rapid growth in the number of individuals held in conditions of de facto or de jure detention at the border.

This is hardly in line with the stated objective of the Italian government to relieve the strain on some facilities by distributing asylum seekers across different reception centres, or with the stated objective of the instrumentalisation proposal to reduce the administrative burden placed on national authorities.

6.3.4. Fundamental rights impacts

The protection of fundamental rights is undoubtedly the most concerning aspect of all emergency approaches to migration management. Many of the measures implemented by the Italian government have raised considerable concerns regarding the protection of fundamental rights in this context.

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807 Cusumano, E. and M. Villa (2019), *Sea rescue NGOs: a pull factor of irregular migration?*, Florence: European University Institute.

808 Since 2018, the Italian Coast Guard has discontinued the publication of detailed data on search and rescue activities carried out in the central Mediterranean and the main actors involved. According to the few data included in the 2021 report, the Italian Coast Guard saved approximately 22 000 individuals in SAR events 'related to the management of migration' (Guardia Costiera (2022), *Rapporto annuale della Capitanieria di Porto Guardia Costiera*. Roma, p. 14). In 2022, the number of individuals rescued in SAR operations 'related to migration' exceeded 57 000 (Guardia Costiera. 2023. Rapporto annuale della Capitanieria di Porto Guardia Costiera. Roma, p. 11). These figures do not include the individuals rescued by other government entities such as the Navy, Border Police, or Frontex. According to the data provided during a parliamentary hearing by the Interior Minister Piantedosi, the number of individuals saved by NGO vessels was 9 956 in 2021 and 11 090 in 2022 (Senato della Repubblica. 2022. *Informativa del Ministro dell'interno sulla gestione dei flussi migratori*. Seduta n. 8 del 16 novembre 2023. XIX Legislatura, p. 11).

809 Senato della Repubblica (2023), *Aula: Resoconto stenografico*. Seduta n. 58 del 19 aprile 2023. XIX Legislatura.

The regulation of NGO activities at sea raises concerns about the heightened risks faced by TCNs, including the increased potential for pushbacks going undetected[810] and the rule of law more generally[811]. The elimination of 'special protection' is believed to restrict access to protection for thousands of potentially deserving individuals, hereby increasing the risk of violating the principle of non-refoulement and of protection of family life[812]. Moreover, the introduction of new criminal offences may have a significant negative impact on the rights of TCNs, as counter-smuggling legislation is often applied disproportionately against migrants and asylum seekers themselves[813].

However, the risks to the protection of fundamental rights mainly arise from the new model of border control and first reception, which relies heavily on the use of border procedures for asylum and return. Many of the measures enacted by the Italian Government in the early months of 2023 entail various risks to the rights of TCNs, including inadequate consideration of protection needs, refoulement, diminished access to effective judicial remedies, and expanded use of detention, especially in border regions.

In many ways, the adopted measures suggest a substantial institutionalisation of the fastened non-individualised return procedures, which have recently led to Italy's condemnation before the ECtHR for breaching Article 4 of Protocol No. 4 (prohibition of collective expulsion of aliens) to the European Convention of Human Rights[814]. Specifically, the Court censored Italy for issuing return decisions without conducting an individualised assessment of TCNs specific circumstances and not providing them with a genuine and effective possibility of submitting arguments against their expulsion. Many of the measures implemented with Decree 20/2023 exacerbate the risks of inadequate consideration of protection needs and arbitrary expulsions, as they expand the use of accelerated border procedures to all TCNs coming from countries designated as safe countries of origin[815].

In such cases, the asylum procedure must be concluded within seven days, allowing for the potential detention of the applicant in existing hotspots located at major landing points or in facilities similar to hotspots ('strutture analoghe' in Italian) that will be designated. Alternatively, the applicant may be held in pre-removal detention facilities located in close proximity to the border[816].

If the application is rejected, the applicant is provided with a special appeals procedure that follows an expedited timeline to ensure a final decision within four weeks. This timeframe represents the maximum period of detention for asylum applicants subjected to border procedures.

Furthermore, in the event of a rejection, a separate return decision is no longer required and the third-country national concerned is already under the obligation to leave Italy. The decision to deny

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[810] Cusumano, E. and M. Villa (2021), From "angels" to "vice smugglers": The criminalization of sea rescue NGOs in Italy. *European Journal on Criminal Policy and Research*, 27: 23-40.

[811] Carrera, S., D. Colombi, and R. Cortinovis (2023), Policing Search and Rescue NGOs in the Mediterranean. Does Justice end at Sea?, Brussels: CEPS.

[812] Amnesty Italia (2023), *Contributo di Amnesty International Italia nell'ambito dell'iter di conversione in legge del Dl n. 20/2023. Senato della Repubblica*. Available at: https://www.senato.it/application/xmanager/projects/leg19/attachments/documento_evento_procedura_commissione/files/000/425/971/AMNESTY_INTERNATIONAL_ITALIA.pdf (last accessed, June 22, 2023).; UNHCR. 2023. *Nota tecnica: Legge 5 maggio 2023, n. 50 di conversione, con modificazioni, del decreto-legge 10 marzo 2023, n. 20.* Roma

[813] Picum (2022), *Migrant Smuggling: Why We Need a Paradigm Shift. Briefing Paper.* Brussels. See also the report by Arci Porco Rosso and Alarm Phone analysing more than 1 000 cases of migrants arrested on charges of smuggling in Italy (ARCI Porco Rosso and Alarm Phone. 2021. *From Sea to Prison: The Criminalization of Boat Drivers in Italy*, available at: https://fromseatoprison.info).

[814] See ECtHR, *J.A. and Others v. Italy*, application no. 21329/18.

[815] Article 7 bis, Decree 20/2023, converted with amendements by the Law 50/2023.

[816] Article 7 bis, Decree 20/2023, converted with amendements by the Law 50/2023.

asylum carries the same weight as a return decision and is immediately enforceable[817]. The linking of asylum and return decisions reduces judicial safeguards, thereby increasing the likelihood of inadequate consideration of the risk of refoulement and arbitrary expulsion[818].

Furthermore, according to the scenario outlined by Decree 20/2023, applicants subjected to border procedures could receive an immediately enforceable return decision within a couple of weeks without ever having had the opportunity to leave the border areas. This implies that they could be repatriated without ever having had access to any form of independent legal support, having remained entirely reliant on the authorities responsible for managing reception or detention facilities throughout the entire duration of the procedure.

Italy was also censured by the ECtHR for the extremely poor material reception conditions in the Lampedusa hotspot, which in the Court's view amounted to inhumane and degrading treatment. It is worth noting here that, given the absolute character of Article 3 of the ECHR, in Court's view the difficulties deriving from the increased inflow of TCNs does not exonerate member States of the Council of Europe form their obligations under this provision[819].

Many of the measures included in Decree 20/2023, by increasing the number of individuals detained in border areas, will contribute to the deterioration of material conditions in reception and detention facilities located near the border.

Another alarming aspect of Decree 20/2023 is the possibility that it allows the government to indefinitely multiply the places of detention and reception by establishing extraordinary facilities.

As seen, according to Article 7-bis, applicants subjected to border procedures can be detained in facilities similar to hotspots. Article 5-bis allows for the transfer of newly arrived third-country nationals to 'similar facilities' even for the purpose of providing first aid and finalising identification and screening procedures upon arrival. These facilities can be established through simplified procedures and managed by providing only basic services such as food, accommodation, clothing, healthcare, and language assistance.

6.3.5. Wider geopolitical implications

Although unauthorised migration by sea has remained a prominent issue in the political agenda for several years, the utilization of the narrative of instrumentalisation of migration by third countries has not consistently entered the public debate, nor has it been widely employed as a justification for the measures implemented in Italy.

Throughout the early months of 2023, Italy played a proactive role in advancing the diplomatic initiatives of the EU which eventually culminated in the establishment of a political agreement with Tunisia[820]. This commitment resonated in the frequency with which the representatives of the Italian government, while implementing the exceptional measures discussed in this case study,

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817 Article 7 ter, Decree 20/2023, converted with amendements by the Law 50/2023.

818 UNHCR. 2023. *Nota tecnica: Legge 5 maggio 2023, n. 50 di conversione, con modificazioni, del decreto-legge 10 marzo 2023, n. 20.* Roma.

819 See ECtHR, *J.A. and Others v. Italy*, application no. 21329/18, para 65.

820 European Commission (2023), *The European Union and Tunisia: political agreement on a comprehensive partnership package*. STATEMENT/23/3881. Available at: https://ec.europa.eu/commission/presscorner/detail/en/statement_23_3881 (last accessed: August 29, 2023).

underscored the paramount importance of reinforcing collaborations with third countries of origin or transit[821].

In such a diplomatic scenario, making reference to an active instrumentalisation of migration by third countries, particularly Tunisia, would certainly have complicated the establishment of a partnership between the EU and the North African country. However, given the broad definition of 'instrumentalisation' included in the proposal, it cannot be ruled out that in the future, should the scenario change, the reluctance or outright refusal of third countries to cooperate with Italy on migration control may be interpreted as an intentional instrumentalisation of migration.

6.4. Relevance of the instrumentalisation proposal

The unique geography of the Italian external borders, which do not directly share land borders with any third country, combined with the state of diplomatic relations with major countries of origin or transit, has limited the perspective of interpreting unauthorised migration through the intrumentalisation lens.

However, the expansive concept of instrumentalisation included in the Commission's proposals could potentially create an opportunity to interpret the refusal or lack of cooperation by third countries in these terms, thereby legitimising the adoption of special measures and wide-ranging derogations from the existing legal framework for managing migration and asylum.

The adoption of the proposal would substantially broaden the already extensive scope for deviating from existing rules and procedures in Italy.

As observed, the Italian system of migration and asylum governance is already highly adaptable, to the point that it has led to the emergence of a reception model where exceptions (extraordinary facilities) often take precedence over the norm (first and second reception facilities). However, the use of special powers is currently granted to the Italian government without the possibility of derogating from the general principles of the legal system and regulations of the European Union.

Another important element to be considered relates to the radical shift that the approval of the instrumentalisation proposal would bring about in the underlying philosophy that inspires the functioning of existing emergency legal regimes in Italy.

The Italian emergency legal regime is primarily centred on humanitarian categories, which serve as guiding principles for the actions of civil protection authorities. Migrations are framed as a calamity, where their impact on order and security is considered to be primarily indirect, rather than being perceived as an unconventional weapon wielded by hostile political actors. The declaration of a state of emergency has certainly consequences on the quality of the reception offered and on the overall accountability of the system, but it does not necessarily lead to a direct and explicit securitization of migrations.

The approval of the instrumentalisation proposal would provide a more convenient opportunity to finally replace the humanitarian framework that still guides the use of exceptional powers in Italy with a war-like language and narrative, and this would definitively prioritize the dimension of migration containment and control over that of protection and assistance.

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821 Senato della Repubblica. 2023. *Interrogazione a risposta immediata del Ministro dell'Interno Matteo Piantedosi*. Seduta di giovedì 4 maggio 2023. XIX Legislatura; Camera dei Deputati. 2023. *Audizione del Ministro dell'interno, Matteo Piantedosi, sulle linee programmatiche del dicastero*. Commissione Affari Costituzionali, della Presidenza e del Consiglio. Roma, p. 5.

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This substitute impact assessment of the European Commission's proposal for a regulation addressing situations of instrumentalisation in the field of migration and asylum was requested by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE) in the absence of a European Commission impact assessment accompanying the proposal. This substitute IA reviews the problem identified by the Commission and the objectives of the instrumentalisation proposal. It studies the proposal's relationship with the EU Treaties, existing EU border, migration and asylum *acquis* and the legislative proposals in the 2016 common European asylum system (CEAS) reform and those under the 2020 new pact on migration and asylum. The assessment identifies and analyses the main expected impacts of the proposal, notably the fundamental rights, societal, economic and territorial impacts, as well as those relating to EU external relations. It includes an examination of the effectiveness and efficiency of the proposal's derogations to EU asylum, border and returns standards, and its compatibility with the EU general principles of subsidiarity, proportionality and the rule of law. Attention is also paid to how the monitoring and evaluation of the proposal may be ensured.

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