



Council of the
European Union

Brussels, 16 December 2021
(OR. en)

15152/21

Interinstitutional File:
2021/0427(COD)

JAI 1428
MIGR 279
ASILE 77
FRONT 444
RELEX 1112
CODEC 1678

PROPOSAL

From:	Secretary-General of the European Commission, signed by Ms Martine DEPREZ, Director
date of receipt:	15 December 2021
To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union
No. Cion doc.:	COM(2021) 890 final
Subject:	Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL addressing situations of instrumentalisation in the field of migration and asylum

Delegations will find attached document COM(2021) 890 final.

Encl.: COM(2021) 890 final



EUROPEAN
COMMISSION

Strasbourg, 14.12.2021
COM(2021) 890 final

2021/0427 (COD)

Proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

addressing situations of instrumentalisation in the field of migration and asylum

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

• Reasons for and objectives of the proposal

Response to instrumentalisation of migrants at the EU's external borders

A highly worrying phenomenon observed is 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.

As a response to the instrumentalisation of people by the Belarusian regime, the European Council Conclusions of 21 and 22 October 2021 underlined that the EU would not accept of any attempt by third countries to instrumentalise migrants for political purposes. Leaders committed to continue countering the ongoing hybrid attack launched by the Belarusian regime at the EU border. They also recalled the need to ensure effective returns and full implementation of readmission agreements and arrangements, using the necessary leverage. They stated that the European Union remained determined to ensure effective control of its external borders. The Commission was invited to propose any necessary changes to the EU's legal framework and concrete measures underpinned by adequate financial support to ensure an immediate and appropriate response in line with EU law and international obligations, including respect for fundamental rights.

On 23 November 2021, the Commission, jointly with the High Representative of the Union for Foreign Affairs and Security Policy, adopted a Communication¹ summarising the measures taken to address the immediate situation as well as additional ones underway to create a more permanent toolbox to address future attempts to destabilise the EU through the instrumentalisation of migrants. It had already raised the phenomenon in the renewed EU action plan against migrant smuggling (2021-2025)².

On 1 December 2021, as part of these measures, the Commission adopted a proposal for a Council Decision based on Article 78(3) of the Treaty on the Functioning of the European Union (TFEU) aimed at supporting Latvia, Lithuania and Poland by providing for the measures and operational support needed to manage in an orderly and dignified manner the arrival of persons being instrumentalised by Belarus, in full respect of fundamental rights. The proposal complements financial, operational and diplomatic efforts adopted by the Union and its Member States to respond to this hybrid attack, including restrictive measures against the Belarusian regime, the provision of material support through the Union Civil Protection Mechanism to the Member States concerned, the deployment of EU agencies or the mobilisation of additional funds to support Latvia, Lithuania and Poland.

Looking ahead, it cannot be excluded that others may attempt to conduct hybrid attacks on the Union that include the instrumentalisation of migrants. It is therefore important that the Union and its Member States are fully equipped to face any future instrumentalisation of migrants and respond rapidly to them. The elements brought forward in this proposal, together with the measures included in the amendment of the Schengen Borders Code, follow the invitation of

¹ Joint Communication to the European Parliament, the Council, the European Economic Committee and the Committee of the Regions Responding to state-sponsored instrumentalisation of migrants at the EU external border (JOIN(2021) 32 final).

² COM(2021) 591 final.

the European Council to the Commission and seek to provide a framework for such a response.

When faced with a situation of instrumentalisation of migrants, 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. Therefore, the Commission is proposing a new instrument alongside those already in the New Pact on Migration and Asylum aimed at addressing the exceptional circumstance of instrumentalisation of migrants. This proposal draws upon the solutions applied in the context of the support measures for Latvia, Lithuania and Poland, in order 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 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.

The proposal for the amended Schengen Borders Code³ defines instrumentalisation of migrants as 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.

Accompanying the proposal for an amendment of the Schengen Borders Code, this proposal addresses the instrumentalisation situation from the migration, asylum and return perspective⁴. 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. It reproduces to a large extent the range of possibilities made available to Latvia, Lithuania and Poland under the proposal for a Council Decision on provisional emergency measures for the benefit of those Member States⁵. It could be expected that when the measures set out are justified, the EU and other Member States will also be supporting the Member States facing the consequences of a situation of instrumentalisation of migrants through instruments such as support from EU Agencies, EU funding opportunities and the Union Civil Protection Mechanism.

The proposed options complement and reinforce the proposals under the New Pact on Migration and Asylum. Therefore, the specific rules introduced in this proposal for a permanent framework are based on and should be consistent with the Commission proposals that form the basis of the future EU migration and asylum policy. Firstly, the 2016 proposal

³ COM proposal (xxxx/xxxx) to amend Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code).

⁴ COM proposal (xxxx/xxxx) to amend Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code).

⁵ COM(2021) 752.

for an Asylum Procedure Regulation⁶, which fully harmonises and sets the overall procedural rules and guarantees in the field of asylum and its amended proposal⁷ adopted in 2020, which establishes the new asylum border procedure. Secondly, the 2016 proposal for a recast Reception Conditions Directive⁸, which sets the basis for more uniform material reception conditions and creates additional obligations for applicants for international protection to prevent unauthorised onwards movements. Thirdly, the 2018 proposal for a recast Return Directive⁹, which will improve the effectiveness of the EU return policy. Finally, the proposal for a crisis and *force majeure* Regulation¹⁰ (hereafter the 2020 crisis proposal), which adapts the asylum and return rules as well as of the solidarity mechanism to assist Member States in addressing situations of crisis and *force majeure*.

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 of migrants. The specific rules for asylum envisaged under the 2020 crisis proposal were conceived specifically for situations of a "mass influx", where a Member State is not able to manage the high numbers of arrivals, and of *force majeure*.

Although this proposal aims at addressing the specific situation of instrumentalisation of migrants, it draws inspiration from the rules envisaged in the 2020 crisis proposal to design the specific measures tailored to respond effectively to the hostile actions of the third country in line with the Union's fundamental values. These rules aim to cater for such specific situation without undermining the right to asylum or the principle of *non-refoulement* and is fully ensuring the protection of fundamental rights of people instrumentalised. The measures included in the proposal will complement border control measures taken under the Schengen Borders Code with specific rules for the asylum and return procedures in addition to operational and solidarity measures in support of the Member State concerned.

Where the EU is under attack, it is important that the EU, at the level of the European Council acknowledges that the actions by a third country can be considered as instrumentalisation of migrants. Those actions are not necessarily targeting one or more Member States but the EU as a whole and therefore require collective EU support. In such a situation, this proposal offers the possibility to the Member State concerned to apply a specific emergency migration and asylum management procedure with specific procedural provisions for longer registration deadlines and the possibility to decide at the border on the admissibility or substance of all applications, except where specific vulnerabilities cannot be catered for. It also foresees specific provisions for return. The Member State facing an instrumentalisation of migrants could request the application of these specific rules individually or cumulatively, to assist in its management of the extraordinary circumstances. However, the conditions specified for the

⁶ 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 – 2016/0244 (COD).

⁷ Amended 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/2020/611 final.

⁸ 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/2016/0465 final – 2016/0222 (COD).

⁹ 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.

¹⁰ Proposal for a regulation of the European Parliament and of the Council addressing situations of crisis and force majeure in the field of migration and asylum, COM/2020/613 final.

application of each provision need to be met individually. Furthermore, the screening of third-country nationals or stateless persons according to the rules laid down in the proposal for a Screening Regulation should apply with the possibility to extend the five-day deadline by another five days as specified in that proposal¹¹.

The proposal preserves the right to access the EU's territory for the purpose of seeking asylum and access to the international protection procedure itself. Furthermore, the safeguards applicable under EU law continue to apply to ensure the protection of vulnerable persons, including children. These measures are accompanied by a series of further safeguards. The proposal also foresees the possibility for the Member State concerned to request support and solidarity measures, to which other Member States can contribute. Under this proposal, the Council would have to authorise by an Implementing Decision the application of the emergency migration and asylum management procedure by the Member State facing a situation of instrumentalisation of migrants.

- (1) Emergency migration and asylum management procedure at the external borders in situations of instrumentalisation

This proposal sets up an emergency migration and asylum management procedure in relation to third-country nationals and stateless persons apprehended or found in the proximity of the border with a third country instrumentalising migrants after an unauthorised crossing or after having presented themselves at border crossing points.

- (a) The emergency asylum management procedure

The main features of this procedure are as follows:

- **Possibility for the Member State concerned to register an asylum application and offer the possibility for its effective lodging only at specific registration points located in the proximity of the border including the border crossing points designated for that purpose**

Under the amendment of the Schengen Borders Code, the Member State facing a situation of instrumentalisation of migrants will be allowed to restrict flows at the border by limiting the number of border crossing points open with a view to preventing unauthorised entry and protecting their national security.

To ensure a coherent approach with these measures in an instrumentalisation situation, this proposal ensures a genuine and effective access to the asylum procedure in accordance with the possibilities offered by the proposal for an Asylum Procedure Regulation, which allow Member States to designate specific locations for the registration and lodging of applications for international protection. Those specific registration points can be located in the proximity of the border, which may also include border crossing points designated for that purpose.

- **Possibility to extend the registration deadline to up to four weeks**

This proposal allows, but does not require, the Member State facing an instrumentalisation of migrants to extend the registration deadline for applications for international protection to up to four weeks in relation to asylum applications of third-country nationals or stateless persons apprehended or found in the proximity of the external border with a third country instrumentalising migrants after an unauthorised entry or after they have presented themselves at border crossing points. This flexibility may be needed to help the Member State respond

¹¹ The Screening Proposal also includes rules concerning preliminary health checks, including for communicable diseases, that would apply to all third-country nationals and stateless persons submitted to the screening at the external border.

effectively to the hostile actions whilst enabling it to manage the unexpected caseload, given the nature and sudden character of the third country interference.

Where migrants are being instrumentalised, through the sudden and unforeseeable interference/intervention by a hostile third country, the Member State facing this situation may need to deviate resources to the task of managing the arrival of third-country nationals or stateless persons at its borders. As a result, the Member State may need time to reorganise its resources and increase its capacity, including with the support of the EU agencies. However, if the Member State facing an instrumentalisation of migrants makes use of the longer registration deadline, the registration of the applications for international protection shall be prioritised whenever the case seems likely to be well-founded or has been lodged by unaccompanied minors, or by minors and their family members.

- **Possibility to apply the asylum border procedure to all applications and possibility to extend its duration**

The measures should support the Member State facing an instrumentalisation of migrants in preventing the entry of those who do not fulfil entry conditions, while protecting fundamental rights. The possibility to examine an application at the border without authorising entry to the territory in accordance with Article 41 of the proposal for an Asylum Procedure Regulation offers this kind of protection. However, presently as well as under the rules included in the proposals under the New Pact, the admissibility and merits of applications may be examined in a border procedure only in a limited set of circumstances.

This proposal therefore allows Member States to apply the emergency asylum management procedure to decide on the admissibility and substance of all applications, except for medical cases. This measure will 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. Where a negative decision is taken under the emergency asylum management procedure, the applicant will have the right to an effective remedy but the appeal will not have automatic suspensive effect, as foreseen in Article 54(3) of the amended proposal for the Asylum Procedure Regulation.

As provided for in the amended proposal for an Asylum Procedure Regulation and explicitly stated in this proposal, during the emergency asylum management procedure, the rules and guarantees of the Asylum Procedure Regulation would apply to ensure that the rights of those who seek international protection are protected, while maintaining the right to asylum and the respect of the *non-refoulement* principle.

The proposal further stipulates the mandatory prioritisation of well-founded claims and those of unaccompanied minors, families and children. If, following the completion of the screening, or during the examination of the application, it becomes apparent that the application is likely to be well-founded or if the application has been lodged by minors and their families or unaccompanied minors, the application should be prioritised in accordance with Article 33(5) of the 2016 proposal for an Asylum Procedure Regulation. Furthermore, the Member State facing an instrumentalisation of migrants should not apply the emergency asylum management procedure to medical cases as provided for in Article 41(9)(c) of the 2020 amended proposal for an Asylum Procedure Regulation.

This proposal also provides for the possibility to extend the duration of the border procedure, including the possible appeal, for sixteen weeks.

Similarly to the extension of the registration deadline above, a longer duration for the emergency asylum management procedure can be considered to help the Member State in relation to the consequences of the instrumentalisation of migrants, given the nature and

character of the third-country's action. The Member State affected may need time to reorganise its resources and increase its capacity, including with the support of the EU agencies. In addition, the number of cases to be processed in the emergency asylum management procedure will be larger (as in principle all applicants can be subject to it) than under normal circumstances. Therefore, the extension will help the Member State to apply the fiction of non-entry for a longer period of time providing for more flexibility to deal with the increased workload.

In accordance with the safeguards provided in the proposal for an Asylum Procedure Regulation and the proposal for the Reception Conditions Directive recast, the detention of applicants should be a measure of last resort, where other sufficient or less coercive measures cannot be applied in a specific case. Therefore, the application of the emergency asylum management procedure will not imply a systematic detention of applicants.

(b) Material reception conditions

Where migrants are instrumentalised, it might be difficult for the Member State to ensure the material reception conditions standards are met as the Member State's administrative capacities might be overstretched as a result of the instrumentalisation situation. The Member State has to manage normal flows in addition to the increased flows resulting from the instrumentalisation and also reorganise resources to protect its territorial integrity. 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.

Article 17(9) of the proposal for the Reception Conditions Directive recast allows the Member State, in duly justified cases and under certain conditions, to set modalities for material reception conditions different from those provided in the Reception Conditions Directive recast, provided that it will ensure access to health care in accordance with Article 18 and a dignified standard of living for all applicants. This proposal extends the possibility to set different material reception conditions in a situation of instrumentalisation of migrants provided that basic needs are covered, including temporary shelter, food, water, clothing, adequate medical care, assistance to vulnerable persons, in full respect of the right to human dignity. The Member State concerned should ensure access and allow for the provision of humanitarian assistance by humanitarian organisations in line with the relevant needs.

(c) The emergency return management procedure

In a situation of instrumentalisation of migrants, it is essential to equip the Member State concerned with the necessary legal tools to ensure a swift return of those who do not qualify for international protection. The proposal therefore provides for the possibility to derogate from Article 41a of the proposal for an Asylum Procedure Regulation and from the application of the proposal for a Return Directive recast in relation to third country nationals or stateless persons whose application for international protection was rejected on the basis of the emergency asylum management procedure. In relation to third country nationals who did not apply for international protection, the provision of Article 2(2)(a) of the Return Directive recast can be applied by Member States. The derogation set out in this proposal aims at establishing a mechanism that is similar to the derogation as set out in Article 2(2)(a) of the Return Directive recast, comparable to the provisions proposed for the benefit of Latvia, Lithuania and Poland. It also provides for specific safeguards, notably concerning the respect of the principle of *non-refoulement*, taking account of the best interests of the child, family life and state of health of third-country nationals and stateless persons, as well as concerning the limitations to the use of coercive measures, postponement of removal, emergency health

care, needs of vulnerable persons and detention conditions, while fully ensuring the fundamental rights of such persons.

(2) Support and solidarity measures

In terms of support and solidarity measures, the proposal introduces measures focused on the needs of the Member State facing an instrumentalisation of migrants.

Such a situation, where the Union is under attack, requires EU solutions and EU support. Therefore, there is a need for all Member States to quickly react and rally support to the Member State concerned.

However, this type of situation requires a different approach and procedure from the one currently included in the instruments of the New Pact. The proposal includes the possibility to resort to all the measures that could address the instrumentalisation of migrants. Possible support and solidarity measures could include capacity measures to help deal with the consequences of the instrumentalisation of migrants, support return operations or support with outreach to third countries from where the people instrumentalised originate. The Member State facing an instrumentalisation of migrants should identify its support and solidarity needs and communicate these to the Commission. The Commission would then invite the other Member States to contribute for the benefit of the Member State affected and coordinate those measures.

As the effects of the instrumentalisation actions might easily spill over (or even have as their objective) to impact more broadly neighbouring Member States and the European Union, it is necessary to foresee the means for providing support at EU-level. If the Member State facing instrumentalisation of migrants requests support from EU agencies, the agencies should prioritise their operational support. This would particularly be the case for the European Union Asylum Agency (EUAA) which can 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; or from Frontex to support border control activities, including screening, and return operations; and from Europol to provide intelligence. Similarly to the process of operational assistance provided under the amended Schengen Borders Code proposal, in the field of asylum, the EUAA should also be able on its own initiative to offer assistance under Article 16(1)(d) of the EUAA Regulation, while further assistance could be provided by Frontex and Europol in line with their respective mandates.

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 Code¹² or foreign policy actions, (e.g. diplomatic outreach, 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).

(3) A specific procedure to authorise the application of the emergency migration and asylum procedure

The Member State facing instrumentalisation of migrants and intending to apply the emergency migration and asylum management procedure must request the Commission the application of the derogations they aim to use, as well as any support and solidarity measures. Based on the information provided by the Member State concerned, the Commission will,

¹² Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas, as amended by Regulation (EU) 2019/1155, OJ L 243 15.9.2009, p. 1.

where appropriate, and without delay, prepare a proposal for a Council Implementing Decision setting out the derogations that can be applied, which should be for an initial period of no longer than six months. The Council Implementing Decision will authorise the derogations to be applied and set out their temporal application, including starting date as well as their duration. The Commission should keep the situation, including the proportionality of the measures, under constant monitoring and review, and propose either a prolongation of the measures or their repeal should the situation so require.

- **Consistency with existing policy provisions in the policy area**

This proposal is fully consistent with the New Pact on Migration and Asylum adopted by the Commission in September 2020. It 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. The starting point for the specific rules introduced in this proposal are the Commission proposals for an Asylum Procedure Regulation adopted in 2016 and its amended proposal adopted in 2020, the recast Reception Conditions Directive adopted in 2016 and the recast Return Directive adopted in 2018. The proposal is also consistent with, and provides the legislative follow-up to proposal for a Council Decision 752/2021 on provisional measures for the benefit of Latvia, Lithuania and Poland.

Interactions with Article 78(3) of the Treaty on the Functioning of the European Union

The establishment of specific rules in a situation of instrumentalisation is without prejudice to the possibility for the Council to adopt, on a proposal from the Commission, provisional measures for the benefit of a Member State confronted by an emergency situation as characterised by Article 78(3) TFEU.

The present proposal aims to put the Union in a position to address a specific situation with which the Union has been already confronted and to be prepared for any similar situations in the future, enabling the Union to act quickly for the benefit of the Member State facing a situation of instrumentalisation of migrants. A permanent framework on which the Union can consistently rely tailored to this situation is necessary, which would also allow maintaining the exceptional nature of provisional measures under Article 78(3) TFEU and thus render unnecessary to resort to Article 78(3) TFEU to address situations of instrumentalisation that fall under this proposal.

The present proposal aims to establish specific rules to support a Member State when it is victim of a third country instigating 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.

- **Consistency with other Union policies**

This proposal is consistent with the need to sustain a reduced pressure from irregular arrivals and maintain strong external borders being important elements of the comprehensive approach set out in the New Pact on Migration and Asylum. As set out in the Joint

Communication¹³, this proposal is part of the efforts made at strengthening the EU's legal framework, including the 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'¹⁴, to give better tools to Member States to protect the external borders in situations of instrumentalisation of migrants, while ensuring full respect for fundamental rights. In this context, it complements the Schengen Borders Code and the Schengen reform, in which the Commission is proposing a permanent framework for addressing possible situations of instrumentalisation of migrants that may still confront the Union in the future.

It also aims to reduce onward movements of irregular migrants and stress on the Schengen area. Swift and effective return and readmission of instrumentalised migrants are effectively addressed, in line with the comprehensive approach to migration management set out in the New Pact on Migration and Asylum. It is also consistent with, and should be used in parallel to, the Union's external action, such as EU restrictive measures.

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

• Legal basis

This proposal supports the Member State faced with instrumentalisation of migrants. The proposal contains a number of provisions related to the proposal for an Asylum Procedure Regulation and its amended proposal, the proposal for the Reception Conditions Directive recast and the proposal for the Return Directive recast. It should therefore be adopted on the appropriate legal basis, namely Article 78, second paragraph, points (d) and (f) and Article 79, second paragraph, point (c) TFEU, in accordance with the ordinary legislative procedure.

• Variable geometry

Two recitals address variable geometry, with regard to the matter of participation of Ireland and Denmark in this Regulation.

In accordance with Protocol No 21 on the position of Ireland in respect of the Area of Freedom, Security and Justice, annexed to the Treaty on European Union (TEU) and to the TFEU, Ireland may decide to take part in the adoption and application of measures establishing a Common European Asylum System. In this respect, Ireland has given notice of its wish to take part in the adoption and application of Directive 2005/85/EC and of its decision not to participate in the adoption of Directive 2013/32/EU. Consequently, the provisions of Directive 2005/85/EC apply to Ireland, while the provisions of the current Directive do not apply to Ireland. Ireland has not given notice of its wish to take part in the adoption of the new Asylum Procedure Regulation, which would be necessary for this Regulation to produce legal effect in respect of Ireland, should Ireland decide to opt in, in accordance Protocol No 21.

In accordance with Protocol No 22 on the position of Denmark, annexed to the TEU and to the TFEU, Directive 2005/85/EC and Directive 2013/32/EU are not binding on Denmark nor is Denmark subject to their application. Denmark is also not taking part in the adoption of this Regulation and is not bound by it or subject to its application.

¹³ Joint Communication to the European Parliament, the Council, the European Economic Committee and the Committee of the Regions Responding to state-sponsored instrumentalisation of migrants at the EU external border (JOIN(2021) 32 final).

¹⁴ COM(2021) 753 final.

- **Subsidiarity (for non-exclusive competence)**

Title V of the TFEU on the Area of Freedom, Security and Justice confers certain powers on these matters to the European Union. These powers must be exercised in accordance with Article 5 of the Treaty on the European Union, i.e., if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can, therefore, by reason of the scale or effects of the proposed action, be better achieved by the European Union.

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, should be considered as an attack on the EU as a whole and therefore requiring EU solutions and EU support. There is a need to equip the Member State facing an instrumentalisation of migrants with the adequate legal tools to address the situation effectively and for all Member States to quickly react and rally support to the Member State concerned.

Achievement of these objectives requires action at the EU level since they are cross-border by nature. It is clear that actions taken by individual Member States cannot satisfactorily reply to the need for a common EU approach to a common problem.

Such a common approach cannot be sufficiently achieved by the Member States individually and can, by reason of the scale and effects of this proposed Decision, be better achieved at Union level. The Union must therefore act and may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5(3) of the Treaty on European Union.

- **Proportionality**

In accordance with the principle of proportionality, as set out in Article 5(4) of the Treaty on the European Union, this proposal for a Regulation 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.

All the elements of the measures proposed to deal with the specific situation of instrumentalisation of migrants are limited to what is necessary to ensure Member States can manage the situation in an orderly and effective way while ensuring the equality of treatment in terms of rights and guarantees for applicants. In this sense, the derogations from the rules set out in the 2016 proposal for an Asylum Procedure Regulation, the 2020 amended proposal for an Asylum Procedure Regulation and the recast Reception Conditions Directive and recast Return Directive are proportionate, with a number of safeguards put in place that strike a balance between on the one hand, the immediate needs of the Member State facing instrumentalisation of migrants to manage that situation, and on the other, 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 proposal establishes safeguards for applying the derogations and specific rules. In view of the extraordinary situation of instrumentalisation of migrants, it is considered proportionate to apply the emergency asylum management procedure to all applicants, as it would help to avoid that third countries target specific nationalities or categories of migrants, which would

be excluded from the border procedure. To allow Member State to deal with the increased number of persons placed in the emergency asylum management procedure, the maximum duration of the border procedure is prolonged to sixteen weeks. This is considered sufficient to allow the Member State the necessary flexibility to process applications at the proximity of the border or at designated border crossing points without allowing third-country nationals and stateless persons entry in the territory. The derogations from the Reception Conditions Directive recast are proportionate in the situation of instrumentalisation of migrants due to the hostile actions of a third country as it might not be possible for the Member State in practice to ensure the material reception conditions normally required as the Member State's capacities might be overstretched. They should be considered in the context of the safeguards and flexibility offered under the 2020 amended proposal for an Asylum Procedure Regulation to organise resources and capacity to apply the border procedure. If the derogation is applied, the Member State must provide for the applicant's basic needs and the full respect of human dignity.

The specific derogations from the recast Return Directive are proportionate to ensure an expedite return of those who do not qualify for international protection, which is essential in a situation of instrumentalisation of migrants to prevent further arrivals. A number of safeguards are put in place to protect the fundamental rights of those subject to return in accordance with the EU Charter of Fundamental Rights and international obligations.

It is also proposed that the duration of these measures be limited in time to what is strictly necessary to enable the Member States concerned to address the situation of instrumentalisation and in any case they should be applied for an initial period of no more than six months. To this end, following the authorisation by the Council, the Commission should keep the situation under constant monitoring and review, including to determine whether the measures the Member State has been authorised to apply remain proportionate.

- **Choice of the instrument**

It is only a Regulation establishing specific rules and derogations from the asylum and return procedures in the Union, and whose provisions shall be directly applicable, that can provide the necessary degree of uniformity and effectiveness needed in the application of EU procedural rules on asylum in a situation of instrumentalisation of migrants.

3. RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS

- **Stakeholder consultations**

The proposal relies on the information provided by stakeholders during the consultation process since the beginning of summer 2021.

- **Fundamental rights**

This proposal respects fundamental rights and observes the principles recognised, in particular, by the Charter of Fundamental Rights of the European Union, as well as the obligations stemming from international law, including a genuine and effective access to the asylum procedure and the access to the territory of the EU for the purpose of making an application for international protection. To this end, the Member State facing a situation of instrumentalisation should ensure there are sufficient registration points, including border crossing points, open and easily accessible. As explained below, the emergency migration and asylum procedure provided for in this proposal respects the fundamental rights as enshrined in the Charter, including the right to human dignity (Article 1), prohibition of torture and inhuman or degrading treatment or punishment (Article 4), the right to liberty and security

(Article 6), the right to respect for private and family life (Article 7), the right to the protection of personal data (Article 8), the right to asylum (Article 18), the prohibition of collective expulsion and protection from *refoulement* (Article 19(1) and (2)), the right to non-discrimination (Article 21), the principle of equality between men and women (Article 23), the rights of the child (Article 24) and the right to an effective remedy (Article 47). Furthermore, the Commission also considers it necessary that Member States respect freedom of expression, media freedom and freedom of association of civil society organisations.

As regards the application of the emergency migration and asylum management procedure, the principles and guarantees provided for by the proposals in the New Pact remain applicable to applicants subject to that procedure. Furthermore, the proposal includes the mandatory prioritisation of well-founded claims, following the completion of the screening or whenever the protection needs become apparent, consistently with 2016 proposal for an Asylum Procedure Regulation, and those of unaccompanied minors, families and children. It is to the benefit of these applicants to have their asylum applications decided upon as quickly as possible. The guarantees for persons with special procedural needs under Article 41(9)(b) of the 2020 amended proposal for an Asylum Procedure Regulation also continue to apply. The proposal also guarantees the right to an effective remedy ensuring that Courts have power to rule whether or not the applicant may remain on the territory of the Member State pending a decision on an appeal and with the right guarantees applicable to enable an applicant to make such requests to the Courts.

This proposal fully respects the rights of the child and the special needs of vulnerable persons. The safeguards provided for children and vulnerable persons in the proposal for the Reception Conditions Directive recast shall be of primary consideration, including where detention has to be applied, for competent authorities. When setting the different modalities for reception conditions, the framework provided for in this proposal respect the safeguards of preserving human dignity at all times in all circumstances.

The right to liberty and freedom of movement is protected given that, if detention is used in the context of the emergency migration and asylum management procedure, it can only be applied in a strictly regulated framework and for a limited time. In accordance with Article 7 of proposal for the Reception Conditions Directive recast Member State may restrict an applicant's freedom of movement in order to process applications in the border procedure. According to the proposal for the Reception Conditions Directive recast, Member States shall not hold a person in detention for the sole reason that he or she is an applicant. Article 8 of that proposal provides for the grounds and conditions of detention, following and individualised assessment and when other less restrictive measures cannot be applied, that allow Member States to detain applicants for international protection in order to decide, in the context of a procedure, on the applicant's right to enter the territory. Article 8 also provides that Member States may detain an applicant only if other, less coercive alternative measures – like restrictions to freedom of movement under its Article 7 – cannot be applied effectively.

The principle of *non-refoulement* enshrined in Article 33 of the 1951 Refugee Convention and Article 19 of the Charter of Fundamental Rights of the European Union is also respected when derogations from the Return Directive recast are applied. The proposal therefore explicitly recalls the duty of Member States to always observe this principle in the fulfilment of their obligation to control borders. Respecting the principle of *non-refoulement* includes an assessment of whether there is neither a risk of persecution, torture or inhumane or degrading treatment, nor a risk of chain *refoulement*.

4. BUDGETARY IMPLICATIONS

Due to the nature of this proposal linked to a situation of instrumentalisation of migrants, it is not possible to estimate *a priori* the possible budgetary impact. 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.

5. OTHER ELEMENTS

- **Implementation plans and monitoring, evaluation and reporting arrangements**

The Commission will use the reporting under the “Migration Blueprint Network” as a tool for monitoring on the situation and if needed make recommendations regarding the prolongation or discontinuation of the measures.

- **Detailed explanation of the specific provisions of the proposal**

Subject matter of the proposal to address situations of instrumentalisation of migrants

Article 1 sets out the subject matter of the Regulation addressing situations of instrumentalisation of migrants in the field of migration and asylum within the EU.

Emergency asylum management procedure in a situation of instrumentalisation

Article 2 introduces the specific rules that Member States may use in a situation of instrumentalisation of migrants in the framework of an emergency asylum management procedure.

Article 2(1)(a) lays down that the Member State facing a situation of instrumentalisation of migrants may extend the registration deadline for applications for international protection in relation to applications of third-country nationals or stateless persons apprehended or found in the proximity of the external border with the third country instrumentalising migrants in connection with an unauthorised crossing or after they have presented themselves at border crossing points, to up to four weeks. Prioritisation should be given to register the cases which are likely to be well-founded and applications made by unaccompanied minors, and minors and their families.

Article 2(1)(b) lays down the possibility for the Member State facing a situation of instrumentalisation of migrants to extend the scope of the asylum border procedure to cover all applicants, by not excluding any category of applicants (except medical cases as per Article 41(9)(c) of the amended Asylum Procedure Regulation). **Article 2(1)(b)** also clarifies that when it becomes apparent after the screening or during the examination in the border procedure that the application is likely to be well-founded or the application is lodged by minors and their families, including unaccompanied minors, the examination of their application should be prioritised.

Article 2(1)(c) allows Member States to apply the border procedure as provided for by the amended Asylum Procedure Regulation for a period of sixteen weeks, including any appeals,

¹⁵ Council Regulation (EU, Euratom) 2020/2093 of 17 December 2020 laying down the multiannual financial framework for the years 2021 to 2027, OJ 4331, 22.12.2020, p. 11-22.

after which the person should be allowed entry into the territory except when the person is subject to return.

In applying these derogations, the safeguards of the Asylum Procedure Regulation continue to apply.

Material Reception Conditions

Article 3 allows the Member State to set modalities for material reception conditions different from those provided in the Reception Conditions Directive recast, provided the Member State ensures the applicant's basic needs and the full respect of human dignity.

Emergency return management procedure in a situation of instrumentalisation

Article 4 lays down a possibility for Member States to derogate from Article 41a of the Asylum Procedure Regulation and from the application of the Return Directive recast in relation to third-country nationals or stateless persons whose application for international protection was rejected on the basis of the emergency asylum management procedure at the border in accordance with Article 2(1) points (b) and (c). The derogation aims at establishing a mechanism similar to derogation under Article 2(2)(a) of the Return Directive recast. The proposal includes the necessary safeguards concerning the obligation to respect the principle of *non-refoulement*, take account of the best interests of the child, family life and state of health of third-country nationals or stateless persons, as well as on the limitations to use of coercive measures, postponement of removal, emergency health care, needs of vulnerable persons and detention conditions, while fully respecting the fundamental rights of such persons.

Provision of support and solidarity measures in a situation of instrumentalisation

Article 5 provides the possibility for a Member State to request support and solidarity measures from other Member States. Those measures should include all the measures that could address the situation of instrumentalisation of migrants including capacity building measures, measures to support return through cooperation with third countries or outreach to third countries whose nationals are being instrumentalised. The Member State affected should send a request to the Commission requesting support and solidarity measures from other Member States.

The Commission shall invite the other Member States to contribute for the benefit of a Member State facing a situation of instrumentalisation that correspond to the needs of that Member State and coordinate those measures as soon as possible after receiving the request. In addition, as regards operational support, a Member State facing a situation of instrumentalisation may request support from the EU Asylum Agency¹⁶, the European Border and Coast Guard Agency or Europol in accordance with their mandates.

Specific safeguards

Article 6 lays down specific guarantees. In order to guarantee access to the asylum procedure, the Member State facing an instrumentalisation of migrants should duly inform third-country nationals or stateless persons in a language which the third-country national or stateless person understands or is reasonably supposed to understand about the measures applied, the

¹⁶ The EUAA shall provide assistance at the request of the Member State or upon its own initiative (with the agreement of the Member State concerned) or the Council may decide in measures to be taken, on the basis of a proposal from the Commission in such specific circumstances.

points accessible for registering and lodging an application for international protection, in particular the location of the nearest point where they can register or lodge an application for international protection, the possibility to challenge the decision taken on the application, and the duration of the measures. In addition, the Member State facing an instrumentalisation of migrants should not apply Articles 2, 3 and 4 longer than what is strictly necessary to address the situation, and no longer than the period set out in the Council Implementing Decision.

Authorisation procedure

Article 7 lays down the procedure for authorising the derogations. The Commission is to make a proposal for a Council Implementing Decision, which should be adopted by the Council setting out the derogations to be applied. The Council Implementing Decision should set out the starting date of the application of the derogations as well as their duration and the temporary application of the Decision. They should be applied for a period not exceeding six months. The Commission is to keep the situation under constant monitoring and review, and on that basis, propose where appropriate to repeal the Council Implementing Decision authorising the application of the specific derogations or the adoption of a new Council Implementing Decision authorising the prolongation of the application of the derogations.

Cooperation and review

Article 8 lays down that the Commission, the European Union agencies and the Member States should closely cooperate and regularly inform each other on the implementation of the measures, as referred to in Article 7, laid down in this proposal. Member States also need to report relevant data including statistics via the EU Migration Preparedness and Crisis Management Network.

UN agencies and other relevant partner organisations should have effective access to the border under the conditions set out in the Reception Conditions Directive recast and the Asylum Procedure Regulation. The United Nations High Commissioner for Refugees should be allowed access to applicants, including those at the border. The Member State facing an instrumentalisation of migrants should work in close cooperation with UN agencies and relevant partner organisations.

Proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

addressing situations of instrumentalisation in the field of migration and asylum

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 78(2), (d) and (f) and Article 79(2)(c) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee¹⁷,

Having regard to the opinion of the Committee of the Regions¹⁸,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) A situation of instrumentalisation of migrants may arise where a third country instigates irregular migratory flows into the Union by actively encouraging or facilitating the movement of third country nationals to the external borders, onto or from within its territory and then onwards to those external borders, where such actions are indicative of an intention of a third country to destabilise the Union or a Member State, where the nature of such actions is liable to put at risk essential State functions, including its territorial integrity, the maintenance of law and order or the safeguard of its national security.
- (2) This Regulation follows the invitation of the European Council to the Commission in its conclusions of 22 October 2021 to propose any necessary changes to the Union's legal framework and concrete measures to ensure an immediate and appropriate response to the hybrid threat in line with Union law and international obligations. Furthermore, it contributes to establishing a comprehensive and permanent framework to equip the Member States concerned with the necessary tools to respond effectively and swiftly to an instrumentalisation situation in full respect of fundamental rights and international obligations.
- (3) One of those tools in this Regulation is the introduction of an emergency migration and asylum management procedure providing the possibility for Member States to have recourse to legal tools to face future situations of instrumentalisation of migrants.
- (4) This Regulation respects the fundamental rights and observes the principles recognised by the Charter of Fundamental Rights of the European Union, in particular Articles 1, 4, 7, 24, 18 and 19(2) and (2) thereof as well as the Geneva Convention of 28 July of 1951. In order to reflect, in particular, the primary consideration that must be given to the best interests of the child, the need to respect family life, and to ensure the

¹⁷ OJ C , , p. .

¹⁸ OJ C , , p. .

protection of the health of the persons concerned, this Regulation provides for specific rules and safeguards applying in respect of unaccompanied minors and minors and their family members, and of applicants whose state of health requires a specific and adequate support. The rules and guarantees set out in Regulation (EU) XXX/XXX¹⁹ [*Asylum Procedure Regulation*] should continue to apply in respect of persons subject to the asylum emergency management procedure, except where this Regulation provides otherwise. The rules set out in Directive XXX/XXX [*Reception Conditions Directive recast*]²⁰, including those concerning the detention of applicants for international protection, should continue to apply, from the moment an application for international protection is made, except where this Regulation provides otherwise.

- (5) To assist the Member State facing an instrumentalisation situation with the orderly management of the flows, under the emergency asylum management procedure, it should be possible for the Member State concerned to decide in relation to third-country nationals or stateless persons that have been apprehended or found in the proximity of the external border with the third country instrumentalising migrants after an unauthorised crossing or who have presented themselves at border crossing points, to register applications for international protection only at specific registration points designated for this purpose situated in the proximity of the border, and provide an effective possibility for lodging an application for international protection only at the specific points that have been designated for such purposes and which should be easily accessible. An effective and genuine access to the international protection procedure must be ensured in accordance with Article 18 of the Charter of Fundamental Rights of the European Union and the Geneva Convention of 28 July of 1951. To this end, the Member State concerned should ensure that sufficient registration points, which may include border crossing points, are designated and open for such purpose. Applicants should be duly informed about the locations where their application will be registered and can be lodged.
- (6) In a situation of instrumentalisation of migrants, it is essential to prevent the entry of those who do not fulfil entry conditions, while ensuring the protection of fundamental rights. In order to ensure that the Member State facing such a situation has the necessary flexibility and avoid that a hostile third country targets specific nationalities or specific categories of third-country nationals or stateless persons, it should be possible under the emergency migration and asylum management procedure set out in this Regulation for the Member State concerned to take a decision in the framework of the border procedure, as set out in Article 41 of Regulation (EU) XXX/XXX [*Asylum Procedure Regulation*] on admissibility and the merits of all applications for international protection by third-country nationals or stateless persons apprehended or found in the proximity of the border with the third country after an unauthorised crossing or who presented themselves at border crossing points. The principles and guarantees set out in Regulation (EU) XXX/XXX [*Asylum Procedure Regulation*] have to be respected.
- (7) Where the emergency asylum management procedure is applied, the best interests of the child and the safeguards for applicants with medical conditions should be a primary consideration for the competent authorities. For this reason, the Member State facing a situation of instrumentalisation should exclude from the emergency asylum management procedure cases where there are medical reasons for not applying the border procedure in line with Article 41(9)(c) of Regulation (EU) XXX/XXX [*Asylum*

¹⁹ OJ C , , p. .

²⁰ OJ C , , p. .

Procedure Regulation]. This should also be the case if the health problems become apparent during the examination of the application. The Member State concerned should also prioritise the examination of applications from persons whose claims are likely to be well-founded or from minors and their family members, as well as from unaccompanied minors. If during the screening under Regulation (EU) XXX/XXX [*Screening Regulation*]²¹ or the examination of the application it becomes apparent 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, in accordance with Article 41(9)(b) of Regulation (EU) XXX/XXX [*Asylum Procedure Regulation*], the Member State concerned should not apply, or cease to apply, the emergency asylum management procedure at the border.

- (8) In accordance with Article 8(3)(d) of Directive XXX/XXX [*Reception Conditions Directive recast*], an applicant may be detained in order to decide, in the context of a procedure, on the applicant's right to enter the territory. Article 8(2) of that Directive also provides that Member States may detain an applicant only, if other less coercive alternative measures – like restrictions to freedom of movement under its Article 7 – cannot be applied effectively. The rules and safeguards regarding detention set out in Directive XXX/XXX [*Reception Conditions Directive recast*], in particular those concerning unaccompanied minors, minors and their families should be respected. Alternatives to detention, such as restrictions in the freedom of movement in accordance with Article 7 of Directive XXX/XXX [*Reception Conditions Directive recast*], may be as effective as detention in a situation of instrumentalisation of migrants and should therefore be considered by the authorities, particularly for minors. In any case, if detention is applied and the guarantees and conditions for detention are not met or cannot be met at the border, the emergency asylum management procedure should not apply or should cease to apply, as foreseen in Article 41(9)(d) of Regulation (EU) XXX/XXX [*Asylum Procedure Regulation*].
- (9) In a situation of instrumentalisation of migrants, it should be possible for the Member State concerned to register applications for international protection within an extended period of four weeks. In addition, it should be possible to examine applications for international protection at the border for a maximum duration of sixteen weeks. If the decision on the application, including a decision on a possible appeal against a negative decision, which should not have automatic suspensive effect, is not taken within the sixteen weeks, entry to the territory should be granted, unless the person is subject to the return procedure. These procedural timelines are conceived to help the Member State concerned to deal with the situation of instrumentalisation of migrants. When confronted with such a situation, the Member State concerned need to divert resources to manage the third country nationals arriving at its borders or that are already present in its territory. 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 the Member State facing a situation of instrumentalisation may need more time to be able to take decisions without allowing entry into the territory. However, the Member State concerned should prioritise the registration of applications of well-founded cases and unaccompanied minors and minors and their family members.

²¹ OJ C , , p. .

- (10) 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.
- (11) Where a Member State is faced with a flow of third-country nationals or stateless persons at the border due to instrumentalisation, it might not be possible for the Member State in practice to ensure the material reception conditions normally required as the Member State's capacities might be overstretched. For this reason, in a situation of instrumentalisation, the Member State concerned should be able to set modalities for material reception conditions that differ from those provided for in Directive XXX/XXX [*Reception Conditions Directive recast*] in cases other than those referred to in Article 17(9) of that Directive, while providing third-country nationals and stateless persons with temporary shelter which should be adapted to seasonal weather conditions and covering their basic needs, in particular by providing food, water, clothing, adequate medical care, and assistance to vulnerable persons, in full respect of the right to human dignity. Without prejudice to the obligations set in that regard upon Member States by this Regulation, 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.
- (12) In order to complement and ensure full coherence with the emergency asylum management procedure at the external border, the competent authorities of the Member State facing a situation of instrumentalisation of migrants should be provided with the necessary flexibility to carry out return procedures, following the application of an emergency asylum management procedure. For this reason, in a situation of instrumentalisation, the Member State concerned should be allowed to derogate from the application of Directive XXX/XXX [*Return Directive recast*]²² in relation to third-country nationals and stateless persons whose application for international protection was rejected in the context of an emergency asylum management procedure as set out in this Regulation. Where a subsequent application is made merely to delay or frustrate the return, it is possible for Member States to apply the rules set out in Articles 42 and 43 of Regulation (EU) XXX/XXX [*Asylum Procedure Regulation*]. The rules set out in this Regulation are without prejudice to the possibility for Member States to derogate from the application of Directive XXX/XXX [*Return Directive recast*] by virtue of Article 2(2)(a) of that Directive, in relation to illegally staying third-country nationals or stateless persons apprehended in connection with the irregular crossing by land, sea or air of the external border of a Member State and who have not subsequently obtained an authorisation or right to stay in that Member State.
- (13) When applying the derogation to the application of Directive XXX/XXX [*Return Directive recast*], the Member State concerned should ensure full respect of the Charter of Fundamental Rights of the European Union and their international obligations. This includes full respect of the principle of *non-refoulement* and taking

²² OJ C , , p. .

due account of the best interests of the child, family life and the state of health of the third-country national concerned as otherwise set out for derogations in the Return Directive. The Member State also needs to ensure that the treatment and level of protection in relation to limitations on the use of coercive measures, postponement of removal, emergency health care and needs of vulnerable persons and detention conditions, are no less favourable than those set out in Directive XXX/XXX [*Return Directive recast*].

- (14) Where a Member State applies one or more of the measures in this Regulation, the Member State should inform third-country nationals and stateless persons thereof. In particular, the Member State facing a situation of instrumentalisation should inform third-country nationals or stateless persons in a language which the third-country national or stateless person understands or is reasonably supposed to understand about the derogations applied, the points accessible for registering and lodging an application for international protection, in particular the location of the nearest points where their application can be registered and lodged, the possibility to appeal the decision on the application, and the duration of the measures.
- (15) In case of instrumentalisation of migrants, the Member State facing a situation of instrumentalisation should have the possibility to request from other Member States support and solidarity measures that are most suited to its needs to manage the instrumentalisation situation. The support and solidarity measures could take all forms to address the situation of instrumentalisation, including capacity-building measures, support for return and support on the external dimension of the crisis and measures aimed at responding to instrumentalisation situation through cooperation with third countries or outreach to third countries whose nationals are being instrumentalised.
- (16) The other Member States which are not themselves facing a situation of instrumentalisation should be invited to contribute for the benefit of a Member State facing a situation of instrumentalisation by means of support and solidarity measures corresponding to the needs identified. The Commission should coordinate those support and solidarity measures as soon as possible after receiving the request from the Member State facing a situation of instrumentalisation.
- (17) A Member State facing a situation of instrumentalisation of migrants may request support from the EU Asylum Agency, the European Border and Coast Guard Agency or Europol in accordance with their mandates. As appropriate, the Asylum Agency may propose assistance on its own initiative in accordance with Article 16(1)(d) of Regulation XXX/XXX [*EUAA Regulation*], whereas the European Border and Coast Guard Agency may propose assistance in the field of return in accordance with Articles 48, 50, 52 and 53 of Regulation (EU) 2019/1896 in agreement with the Member State concerned and Europol may propose assistance in accordance with Article 6(1) of Regulation (EU) 2016/794.
- (18) If the application of the relevant derogations set out in this Regulation is requested by the Member State concerned, and taking into account whether the European Council has acknowledged that the Union or one or more of its Member States are facing a situation of instrumentalisation of migrants, the Commission should, where appropriate, bring forward a proposal authorising a Member State to apply the derogatory rules provided for in this Regulation. To ensure a high level of political scrutiny and support and to reinforce the expression of the Union's solidarity towards the Member State facing an instrumentalisation of migrants, implementing powers should be conferred upon the Council. Therefore, the Implementing Decision

authorising the Member States to apply derogatory rules should be adopted by the Council.

- (19) The Council Implementing Decision should include an authorisation of the specific derogations that the Member State facing a situation of instrumentalisation of migrants could apply, and set the date from which they should apply, as well as their duration.
- (20) In order to support the Member State concerned in providing the necessary assistance to third country nationals falling under the scope of this Regulation, including by promoting voluntary return activities or by carrying out their humanitarian duties, 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 under the conditions set out in the Directive (EU) XXX/XXX [*Reception Conditions Directive recast*] and Regulation (EU) XXX/XXX [*Asylum Procedure Regulation*]. In accordance with Regulation (EU) XXX/XXX [*Asylum Procedure Regulation*], the United Nations High Commissioner for Refugees should be allowed access to applicants, including those at the border. To this end, the Member State concerned should work in close cooperation with UN agencies and relevant partner organisations.
- (21) [In accordance with Articles 1 and 2 of Protocol No 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, and without prejudice to Article 4 of that Protocol, Ireland is not taking part in the adoption of this Regulation and is not bound by it or subject to its application.]

OR

[In accordance with Article 3 of Protocol No 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, Ireland has notified (by letter of ...) its wish to take part in the adoption and application of this Regulation.]

- (22) In accordance with Articles 1 and 2 of Protocol No 22 on the position of Denmark, annexed to the TEU and to the TFEU, Denmark is not taking part in the adoption of this Regulation and is not bound by it or subject to its application.

HAVE ADOPTED THIS REGULATION:

CHAPTER I

General Provisions

Article 1

Subject matter

This Regulation provides for specific rules derogating from those set out in Regulation (EU) XXX/XXX [*Asylum Procedure Regulation*], Directive (EU) XXX/XXX [*Reception Conditions Directive recast*] and Directive (EU) XXX/XXX [*Return Directive recast*] that may be applied by a Member State in a situation of instrumentalisation of migrants as defined in [Article 2(27)] of the Schengen Borders Code where necessary for responding to such a situation. It also provides for specific rules on support and solidarity measures that may be taken in such situation.

CHAPTER II

Emergency migration and asylum procedure in a situation of instrumentalisation of migrants

Article 2

Emergency migration and asylum procedure in a situation of instrumentalisation of migrants

1. In a situation of instrumentalisation of migrants as referred to in Article 1, the Member State faced with the arrival of third-country nationals or stateless persons at its external border as a consequence of such situation may apply, in relation to third-country nationals or stateless persons who are apprehended or found in the proximity of the external border with the third country instrumentalising migrants in connection with an unauthorised crossing or who have presented themselves at border crossing points, one or more of the following derogations, in accordance with the procedure laid down in Article 6:
 - (a) by way of derogation from Article 27 of Regulation (EU) XXX/XXX [*Asylum Procedure Regulation*], register applications for international protection made within the period during which this point is applied no later than four weeks after the application is made.

Where applying this derogation, the Member State concerned shall prioritise the registration of applications likely to be well-founded and those of unaccompanied minors and minors and their family members.
 - (b) by way of derogation from Article 41(2)(a) and (b) and Article 41(5) of Regulation (EU) XXX/XXX [*amended Asylum Procedure Regulation*], decide at their borders or transit zones on the admissibility and on the merits of all applications registered within the period during which this point is applied.

Where applying this derogation, the Member State concerned shall prioritise the examination of applications for international protection likely to be well-founded and those lodged by unaccompanied minors and minors and their family members.
 - (c) by way of derogation from Article 41(11) of Regulation (EU) XXX/XXX [*Asylum Procedure Regulation*], the maximum duration of the emergency asylum management procedure for the examination of applications registered within the period during which this point is applied shall be sixteen weeks. Following that period, provided that the applicant is not subject to the return procedure in accordance with Article 4, the applicant shall be authorised to enter the Member State's territory for the completion of the procedure for international protection.
2. Where applying this Article, the principles and guarantees of Regulation (EU) XXX/XXX [*Asylum Procedure Regulation*] shall apply.

Article 3

Material Reception Conditions

By way of derogation from Directive XXX/XXX [*Reception Conditions Directive recast*], and in accordance with the procedure laid down in Article 6, the Member State faced with the arrival of third-country nationals or stateless persons at their external border as a consequence of a situation of instrumentalisation of migrants may temporarily set modalities for material reception conditions different from those provided for in Articles 16 and 17 of that Directive in relation to applicants apprehended or found in the proximity of the border with the third country instrumentalising migrants in connection with an unauthorised crossing or who have presented themselves at the border crossing points, and are subject to the measures in Article 2 of this Regulation, 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.

Article 4

Emergency return management procedure in a situation of instrumentalisation of migrants

In a situation of instrumentalisation of migrants, and in accordance with the procedure laid down in Article 6, the Member State faced with the arrival of third-country nationals or stateless persons at its external border as a consequence of a situation of instrumentalisation of migrants may, in respect of third-country nationals or stateless persons who do not fulfil the conditions of entry and whose applications were rejected in the context of the emergency asylum management procedure at the border in accordance with Article 2(1) points (b) and (c), and who have no right to remain and are not allowed to remain, decide not to apply 41a of Regulation (EU) XXX/XXX [*Asylum Procedure Regulation*] and Directive XXX/XXX [*Return Directive recast*]. Where resorting to this derogation, the Member State concerned shall:

- (a) respect the principle of *non-refoulement* and take due account of the best interests of the child, family life and state of health of the third country national concerned as set out in Article 5 of Directive XXX/XXX [*the Return Directive recast*];
- (b) ensure that their treatment and level of protection are no less favourable than as set out in Article 10(4) and (5) (Limitations on use of coercive measures) Article 11(2)(a) – (postponement of removal), Article 17(1)(b) and (d) [emergency health care and taking into account needs of vulnerable persons], and Articles 19 and 20 [conditions for detention and detention of minors and families] of Directive XXX/XXX [*Return Directive recast*].

Article 5

Support and solidarity measures

1. Where a Member State is facing a situation of instrumentalisation of migrants, it may request support and solidarity measures from other Member States in order to manage that situation. Support and solidarity contributions for the benefit of a Member State facing a situation of instrumentalisation of migrants may include the following types of contributions:
 - (a) capacity-building measures in the field of asylum, reception and return;
 - (b) operational support in the field of asylum, reception and return;

- (c) 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
 - (d) any other measure considered adequate to address the instrumentalisation situation and support the Member State concerned.
- 2. The Member State facing a situation of instrumentalisation shall send a request to the Commission for support and solidarity contributions from other Member States specifying the solidarity measures requested.
 - 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.
 - 4. A Member State facing a situation of instrumentalisation of migrants may request support from the EU Asylum Agency, from the European Border and Coast Guard Agency, or from Europol in accordance with their mandates. As appropriate, the EU Asylum Agency may propose assistance on its own initiative in accordance with Article 16(1)(d) of Regulation XXX/XXX [*EUAA Regulation*]. The European Border and Coast Guard Agency may propose assistance in the area of return in accordance with Articles 48, 50, 52 and 53 of Regulation (EU) 2019/1896 to the Member State concerned. Europol may propose assistance in the area of law enforcement cooperation in accordance with Article 6(1) of Regulation (EU) 2016/794.

Article 6

Specific guarantees

- 1. Where applying the derogations referred to in Articles 2, 3 and 4, the Member State concerned shall duly inform third-country nationals or stateless persons in a language which the third-country national or stateless person understands or is reasonably supposed to understand about the measures applied, the location of the registration points, including the border crossing points, accessible for registering and lodging an application for international protection, and the duration of the measures.
- 2. The Member State facing a situation of instrumentalisation of migrants shall not apply Articles 2, 3 and 4 longer than what is strictly necessary to address the situation of instrumentalisation of migrants, and in any case, no longer than the period set out in the Council Implementing Decision referred to in paragraph 4 of Article 7.

CHAPTER III

Procedural rules

Article 7

Authorisation procedure

1. A Member State faced with the arrival of third-country nationals or stateless persons at its external border as a consequence of a situation of instrumentalisation of migrants, may request the authorisation to apply the derogations provided for in Articles 2, 3 and 4.
2. Where the Commission considers it appropriate, on the basis of the information provided by the requesting Member State facing a situation of instrumentalisation of migrants, the Commission shall, without delay, make a proposal for a Council Implementing Decision referred to in paragraph 3.
3. The Council shall assess this proposal as a matter of urgency and adopt an Implementing Decision authorising the Member State concerned to apply the specific derogations provided for in Articles 2, 3 and 4.
4. The Council Implementing Decision referred to in paragraph 3 shall set the date from which the rules laid down in Articles 2, 3 and 4 may be applied, as well as the time period for their application, which shall not exceed an initial period of six months.
5. The Commission shall keep the situation of instrumentalisation of migrants under constant monitoring and review. Where the Commission considers it appropriate, it may propose the repeal of the Council Implementing Decision referred to in paragraph 3 or the adoption of a new Council Implementing Decision authorising the prolongation of the application of the specific derogations referred to in Articles 2, 3 and 4 for a period, which shall not exceed six months. The Member State concerned shall provide the Commission specific information needed for it to carry out this review and to make the proposal for repeal or prolongation as well as any other information the Commission may request.

Article 8

Cooperation and assessment

1. The Commission, relevant European Union institutions and agencies and the Member State facing a situation of instrumentalisation of migrants shall closely cooperate and regularly inform each other on the implementation of the derogations and measures referred to in Article 7. The Member State concerned shall continue reporting all relevant data including statistics that are relevant for the implementation of this Regulation, via the EU Migration Preparedness and Crisis Management Network.
2. The Member State facing a situation of instrumentalisation of migrants shall ensure close cooperation with the United Nations High Commissioner for Refugees and relevant partner organisations to determine the modalities for support to applicants in the instrumentalisation situation in line with the rules set out in this Chapter and in Regulation (EU) XXX/XXX [*Asylum Procedure Regulation*] and Directive XXX/XXX [*Reception Conditions Directive recast*].

CHAPTER IV

Final provisions

Article 9

Entry into force

This Regulation shall enter into force on the day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaties.

Done at Strasbourg,

For the European Parliament
The President

For the Council
The President