

**ECRE COMMENTS ON THE COMMISSION  
PROPOSAL FOR A REGULATION ADDRESSING  
SITUATIONS OF CRISIS AND FORCE MAJEURE  
IN THE FIELD OF MIGRATION AND ASYLUM  
COM(2020) 613**

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## SUMMARY OF VIEWS

The main fundamental rights affected by the current proposal on the crisis regulation are the right to asylum (Article 18 EU Charter), the prohibition of torture and inhuman or degrading treatment or punishment (Article 4 EU Charter, Article 3 ECHR), the right to liberty and security (Article 6 EU Charter, Article 5 ECHR), protection in the event of removal, expulsion or extradition (Article 19 EU Charter), the rights of the child (Article 24 EU Charter) and the right to an effective remedy (Article 47 EU Charter, Article 13 ECHR). Many of them relate to the extension or expansion of controversial concepts as already introduced in other legislative proposals, mainly the border procedure, as in the amended Asylum Procedures Regulation (APR) proposal and the introduction of return sponsorship in the proposal for a Regulation on Asylum and Migration Management (the RAMM). Therefore, these Comments need to be read together with the ECRE Comments on these other instruments.<sup>1</sup>

Generally, ECRE questions the added value of the proposed Regulation, with the exception of immediate protection status. Nevertheless, if the proposal is to be adopted, ECRE submits the following (non-exhaustive) key observations and recommendations aimed at ensuring that the proposed legal framework better complies with the afore-mentioned fundamental rights. Concrete recommendations for amendments to the text can be found throughout the Comments.

***Crisis and force majeure, poorly or non-defined concepts:*** several elements of the *crisis* definition are too vague and prone to political and non-neutral interpretation. These should be further refined. The – already vague – definition of crisis is followed by a part b) referring to “an imminent risk of such a situation”, extending some derogations to situations where there just an imminent risk of such a crisis. As further explained in the Comments, some of these derogations have a considerable impact on the individual. It can not therefore be justifiable that they are applied when a Member State is merely facing a risk of a crisis. ECRE recommends deletion of any reference to an imminent risk of such a crisis (Article 2 (B)).

The proposal does not define *force majeure*; Recital 4 refers only to situations that arise due to circumstances beyond the control of the Union and its Member States. ECRE advocates for the deletion of the section on *force majeure* because the risk of misuse of the concept is high. It creates a vague and open-ended justification for derogations from basic standards. If it is maintained, *force majeure* should at least be defined. ECRE further notes that it remains unclear from the description of the different concepts in the proposals when a Member State will face a situation of migratory pressure (as developed in the RAMM) as opposed to a crisis situation or a situation of *force majeure*.

***Delayed registration in situations of crisis:*** While the rights of applicants should not be affected by a delayed registration, in practice there is a risk that the proposed provision will hinder access to their rights, as the delayed registration creates a barrier on applicants to proof of their status to access their rights, which potentially infringes their right to reception, protection from refoulement, and other rights that are attached to their status as asylum seeker. In principle ECRE recommends deleting Article 6. However, if Article 6 is to be maintained ECRE proposes amendments to Article 3 and Article 6 for clarification purposes, as well as to ensure full respect to the right to human dignity, as enshrined in Article 1 of EU Charter, the right to asylum (Article 18 Charter), and protection in the event of removal, expulsion or extradition (Article 19 Charter), and material reception conditions.

***Extension and expansion of the border procedure:*** Article 4 lays down the possibility for Member States to derogate from the asylum border procedure under Article 41 of the proposed APR in a crisis situation (or imminent risk thereof), by taking decisions in the context of a border procedure on

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<sup>1</sup> See: ECRE Comments on the Commission Amended Proposal for an Asylum Procedures Regulation regarding border asylum procedures and border return procedures COM (2020) 611, December 2020, available at: <https://bit.ly/3sxUtTP>; forthcoming ECRE comments on the Commission Proposal for a Regulation on asylum and migration management COM(2020) 610 2020/0279 (COD).

the merits of an application where the applicant is of a nationality with below an EU-wide recognition rate of 75% or lower, in addition to the cases listed under Article 41 of the Asylum Procedures Regulation. Both the duration of the asylum border procedure and the return border procedure can each be extended to 20 weeks. This raises serious concerns regarding the right to asylum (Article 18 EU Charter), the prohibition of torture and inhuman or degrading treatment or punishment (Article 4 EU Charter, Article 3 ECHR), the right to liberty and security (Article 6 EU Charter, Article 5 ECHR), protection in the event of removal, expulsion or extradition (Article 19 EU Charter), the rights of the child (Article 24 EU Charter) and the right to an effective remedy (Article 47 EU Charter, Article 13 ECHR), as have been elaborated on in the comments on the border procedure.<sup>2</sup> Besides the impact on the rights of the individual, it also raises serious questions regarding the feasibility for the Member States affected. Taking into account that the amended APR proposal links the border procedure to the refusal of entry, individuals are likely to be detained, or subject to a restriction of movement. The fear that this might lead to mass scale detention is not unfounded. It is hard to imagine how the extension of the border procedure, to the majority of applicants will offer an adequate solution in times of crisis, rather than exacerbating a humanitarian and human rights crisis at the external borders of the EU.

**Presumption of the risk of absconding:** Under the proposed Crisis Regulation a fifth ground can now lead to a presumption of the risk of absconding, namely point (f), “explicit expression of intent of non-compliance with return-related measures applied by virtue of this Directive”. The presumption not only shifts the burden of proof to the individual but means that criteria such as not complying with an existing entry ban could lead to individuals being penalised for having to flee their country of origin following persecution when circumstances in the country change or if they had returned prematurely. For these reasons, ECRE strongly opposes automatic presumptions of absconding as it imposes a disproportionate burden of proof on returnees that may be extremely difficult to discharge and also undermines the individual assessment required under Article 6(2) of the proposal of the recast Return Directive. As discussed in the ECRE Comments on the proposal for a recast Return Directive, a wide interpretation of the risk of absconding would lead to systematic detention, reversing the presumption whereby detention should only be considered as a last resort, and render the concept of voluntary departure almost theoretical.<sup>3</sup>

**Derogations in situations of crisis of force majeure:** Where a Member State is facing a situation of *force majeure*, that Member State shall notify the Commission. After the reasoned notification several extensions are possible: extension of registration time limit (Article 7); extension of time limits set in “Dublin” procedures (Article 8), and an extension of the timeframes for solidarity measures (Article 9). While the rights of applicants should not be affected by a delayed registration, in practice there is a risk that they are because the delayed registration creates a barrier applicants proving their status in order to access their rights. This potentially infringes their right to reception, protection from *refoulement*, and other rights attached to their status as asylum seeker. In principle ECRE recommends deleting Article 7. However, if Article 7 is to be maintained ECRE proposes amendments to it to ensure better respect for the right to human dignity, as enshrined in Article 1 of EU Charter, the right to asylum (Article 18 Charter), and protection in the event of removal, expulsion or extradition (Article 19 Charter). ECRE further proposes amendments to ensure that Member States do not invoke a situation of *force majeure* in bad faith.

**Quid solidarity?** Contrary to what would be expected in addressing crisis situations and situations of *force majeure*, the proposed solidarity measures are limited. They focus on extending solidarity to the likely increased number of applicants in border procedures. The proposal also reinforces the possibility for Member States to provide assistance to each other in carrying out returns in the form of return sponsorship. Return sponsorship in situations of crisis provided for in this Regulation differs from the model in the RAMM because the obligation to transfer the irregular migrant is triggered if the

2 ECRE Comments on the Commission Amended Proposal for an Asylum Procedures Regulation regarding border asylum procedures and border return procedures, COM (2020) 611, December 2020, available at: <https://bit.ly/3sxUtTP>

3 See: ECRE comments on the commission proposal for a Recast return directive COM(2018) 634, November 2018, available at: <https://bit.ly/3qtFWGW>.

person concerned does not return or is not removed within four months (instead of eight). As elaborated on in its Comments on the RAMM, ECRE cannot support the inclusion of return sponsorship as a solidarity option. ECRE's primary concerns are the impact of return sponsorship on the fundamental rights of applicants and the workability of the concept. In line with its proposals to delete return sponsorship in the RAMM, ECRE proposes its deletion in this context as well. The same goes for the relocation of "illegally staying third country nationals" (Article 45 (2), B RAMM) as this kind of "relocation for return" generates fundamental rights concerns as well.

**Immediate protection:** The granting of immediate protection is generally welcome, as it provides people in need of protection with more access to rights, such as swifter access to employment, access to education, access to procedures for recognition of qualifications and validation of skills, social security and social assistance, healthcare, etc, while they await a decision on their application for international protection. Despite this positive aspect of the proposal, ECRE recommends exploring the option of granting *prima facie* recognition to people in need of protection on the basis of readily apparent, objective circumstances in the country of origin or, in the case of stateless asylum seekers, their country of former habitual residence. This is likely to provide a more suitable response in a crisis situation, and one which would both alleviate administrative pressure on the Member State, as well as guarantee swift access to international protection for people in need of it.

If the immediate protection status is included it should be as short as possible and, following the resumption of the examination, a swift examination of protection needs should take place, in order to ensure that the persons concerned are rapidly granted the appropriate status and can proceed with family reunification where relevant.

## INTRODUCTION

In September 2020, the European Commission presented a New Pact on Migration and Asylum<sup>4</sup> involving a comprehensive approach to external borders, asylum and return systems, the Schengen area of free movement, and external policies. The Communication on the Pact was presented together with a set of legislative proposals, including a Regulation<sup>5</sup> addressing situations of crisis and *force majeure* in the field of migration and asylum. With this Crisis Regulation the European Commission aims to create an adapted legal regime for:

***"exceptional situations of mass influx of third-country nationals or stateless persons arriving irregularly in a Member State, being of such a scale and nature that it would render a Member State's asylum, reception or return system non-functional and which risk having serious consequences for the functioning of, or result in the impossibility of applying, the Common European Asylum System and the migration management system of the Union".***

Situations where there is simply a risk of a crisis situation are also covered, and in a second part the Regulation creates a legal regime for situations of *force majeure*.

The objective of the proposal is to provide for the necessary adaptation of the rules on asylum and return procedures (as per the APR and Return Directive) and of the solidarity mechanism established in the RAMM to ensure that Member States are able to address situations of crisis and *force majeure*. A simplified procedure and shortened timeframes are set out for triggering the compulsory solidarity mechanism for situations of migratory pressure in the RAMM. The solidarity mechanism in situations of crisis provides for a wider scope for relocation and reinforces the possibility for Member States to provide assistance to each other in carrying out returns in the form of return sponsorship.

The proposal also includes provisions related to crisis situations which allow for certain derogations from the APR. In particular, it will be possible to extend the scope of application of the border procedure to third-country nationals and stateless persons whose EU-wide first instance recognition rate is 75% or lower, in addition to the grounds already provided by APR, as well as to extend the duration for the examination of an application for international protection under the border procedure by an additional eight weeks. It also allows Member States to derogate from the provisions on registering applications for international protection with a longer deadline of four weeks. The proposal also provides for the possibility to derogate from certain provisions on the border procedure to carry out return and to extend its length (up to 20 weeks).

ECRE does not support a separate legal instrument with far-reaching derogations in times of crisis or *force majeure*, both concepts that are poorly defined in the proposal. Furthermore, there is no need to create a specific legal regime to operate in times of crisis and it should certainly not apply when there is merely a "risk" of crisis. There are already provisions in EU law that allow for adaptation in emergency situations, including provisions that allow for derogation from elements of the legal framework and provisions that allow for the introduction of special emergency measures. The former include general provisions applicable in all areas of law, under Article 72 TFEU. Those related to asylum law are contained inter alia in Article 78 TFEU, as well as in secondary legislation.

It is also questionable whether the proposed measures can achieve the objective of addressing a crisis situation or a situation of *force majeure*. The proposal is unclear on how exactly the proposed measures will mitigate crises. The link between the reasoning and measures is often unclear, especially when it comes to the derogatory measures.<sup>6</sup> The extended and expanded border

4 European Commission, *Communication on a New Pact on Migration and Asylum*, COM (2020) 609final, 23 September 2020, available at: <https://bit.ly/3oFPDkx>

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

6 See for example: "... the Union needs a structured approach to handle crisis in order to avoid ad hoc responses" p1 Explanatory Memorandum; "may occur very quickly and be of such a scale and nature that they require a specific set of tools in order to be effectively addressed" p3 Explanatory Memorandum.

procedure seems more likely to exacerbate a crisis rather than alleviate it, while the solidarity measures seem inadequate despite the adaptations. In addition, the measures, and the impact they have on the rights of individuals, are not proportionate to goals.

Of all the changes, compared to the RAMM legal regime, the rapid triggering of solidarity is the only one that makes sense as a suitable response to a crisis situation, although the solidarity measures themselves are inadequate as mentioned. The decision to focus on far-reaching derogations suggests that the content of the instrument about political considerations rather than representing a legal or operationally sound and suitable responses to actual needs in times of crisis.

The impact on the fundamental rights of people on the move cannot be ignored. The asylum *acquis* reflect a balance between the interests of states and the human rights of people on the move. Under the current legal framework this balance has already been tilted in favour of the interests of states. With the proposed legal changes in this instrument, as well as in the other legislative proposals that accompanied the Pact, the balance further tilts in this direction, especially as the imbalance in the legal framework is compounded by the lack of respect in practice for the procedural guarantees that are necessary for applicants to access the rights they have on paper.

As with restrictive measures in the Pact as a whole, the underlying justification provided is that an increasing proportion of those arriving are found to not be entitled to international protection. The harsher measures are supposed to target this group however they often disproportionately affect refugees rather than those without protection needs; the provisions of the Crisis Regulation are no exception. Notwithstanding the lack of a definition of crisis, it seems to mean times where there is an increase in the number of people seeking protection in Europe and direct references are made to 2015. The crisis of 2015/2016 and other major protection crises such as the 1992-1996 and 2000-2001 displacements, are times when the vast majority of those seeking protection in Europe were refugees. Any potential crises are likely to be similar. Thus, refugees are likely to be most affected by the proposed measures to create or expand poorer quality approached to asylum in times of crisis.



## CHAPTER 1: ADDED VALUE OF A SEPARATE INSTRUMENT ?

Questions arise as to whether a separate instrument is needed. A first consideration to take into account is that EU law already has provisions that allow for adaptation in emergency situations, including provisions that allow for derogation from elements of the legal framework and provisions that allow for the introduction of special emergency measures.

Specific measures related to asylum can be found in Article 78(3) TFEU. This provision states “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, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament.”

Under Title V of the TFEU, Article 72<sup>7</sup> states that the provisions relating to the area of freedom, security and justice shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security. The extent of this provision has been clarified by the CJEU. In recent cases before the CJEU, Member States have used Article 72 to defend actions taken in pursuance of internal/national security and public order resulting in the disapplication of secondary legislation in part or entirely.<sup>8</sup> These States interpreted Article 72 as constituting an affirmation of a Member State’s retained competence in respect of security and a limit to the EU’s competence in the domain. Article 72, so they argued, was a clear legal basis to derogate from asylum law where emergencies raising internal security and law and order were at stake. A recent CJEU judgment<sup>9</sup> in one of these cases has clearly rejected the States’ argument in this respect and, as a result, it is unlikely that Member States can continue to rely on Article 72 TFEU as entitling them to lawfully derogate from their EU asylum obligations on grounds of an emergency. In particular, where the security provisions contained in secondary law are sufficient to address State security interests, and are most appropriate to ensure that the objectives of the *acquis* are met, reliance on Article 72 TFEU by the States was rejected by the Court.

The European Commission justified its choice of instrument as follows: “Given that this proposed Regulation provides for certain derogations to the proposed Regulation on Asylum and Migration Management and to the proposed Asylum Procedures Regulation, the same legal instrument is used for putting in place a set of rules to enable the Member States and the Union to deal with the specific situations of crisis caused by a mass influx of third country nationals onto the territory of a Member State or to deal with the specific situation of force majeure.” This explanation does not give satisfactory reasons as to why the derogatory measures and solidarity measures have not been incorporated into these respective instruments, while leaving the immediate protection status in its own regulation.

Justification for derogations can also be found in secondary legislation. The current Asylum Procedures Directive (APD), and APR proposal, for example, already foresee an extension of the registration deadline from three to ten days, in case of a “disproportionate” number of applicants, simultaneously arriving. It would have been more transparent to thus add the different delays in the same instrument (maximum three days in normal circumstances, ten days in case of a “disproportionate” number of applicants, or four weeks in cases of crisis or *force majeure*).

Another example can be found in the Return Directive. Article 18 constitutes an emergency clause on which Member States can rely in crises. Here, an emergencies are “situations where an exceptionally large number of third-country nationals to be returned places an unforeseen heavy burden

7 See for an extensive analysis: ECRE/ELENA, derogating from EU Asylum law in the name of “emergencies”: The legal limits under EU law, June 2020, <https://bit.ly/39zcs4W>

8 Opinion of Advocate General Sharpston of 31 October 2019, C-715/17, C-718/17 and C-719/17, ECLI:EU:C:2019:917, para 172-173. See also Case C-18/19 (Op. cit. n 7), paras 26-27 where the Swedish Government presented a similar argument to that of Poland and Hungary in C-715/17.

9 Judgments of 2 April 2020, C-715/17, C-718/17 and C-719/19, ECLI:EU:C:2020:257.



on the capacity of the detention facilities of a Member State or on its administrative or judicial staff". In such a situation a Member State may, as long as the exceptional situation persists, decide to allow for longer periods for judicial review and to take urgent measures in respect of the conditions of detention.

As for the solidarity mechanism, the current wording of Article 2 of Crisis Regulation is quite complex and cannot be understood without being read in conjunction with the relevant provision of the RAMM. In that regard, and in order to enhance legal clarity, it would have been more logical to incorporate these elements into the RAMM. At the same time, this would offer the opportunity to create more clarity on the different solidarity mechanisms that can be triggered in case of disembarkation, situations of migratory pressure or a situation of crisis.

A second consideration to take into account is the necessity of the proposed measures. Are they the most adequate measures to tackle a crisis situation or a situation of *force majeure*? And is the impact these measures have on the situation and rights of the individual proportionate? These questions remain largely unanswered in the proposal and the explanatory memorandum.

## CHAPTER 2: DEROGATIONS IN TIMES OF CRISIS

### What constitutes a crisis? (Article 1 (2))

The proposal defines a crisis as “an exceptional situation of mass influx of third-country nationals or stateless persons arriving irregularly in a Member State or disembarked on its territory following search and rescue operations, being of such a scale, in proportion to the population and GDP of the Member State concerned, and nature, that it renders the Member State’s asylum, reception or return system non-functional, or an imminent risk of such a situation”. Such situations are covered by the proposal only if they can have serious consequences for the functioning of the Common European Asylum System or the Common Framework as set out in the proposed Regulation on Asylum and Migration Management (RAMM). The two conditions “rendering a system non-functional” and “serious consequences” are too vague and prone to political and non-neutral interpretation. They should be further refined.

When looking for further guidance on the extent of such a crisis, the recitals to the Regulation point toward a broad interpretation. Recital 4 refers to a situation of crisis or *force majeure* in the field of migration and asylum that arises due to circumstances beyond the control of the Union and its Member States. Both recitals and 6<sup>10</sup> and 12<sup>11</sup> include references to “unauthorized movements”, as being part of a crisis. When reading the relevant Articles and recitals, it seems that the number of arrival of people and onward movement will be two important elements in defining a crisis.

The – already vague – crisis definition is followed by a part (b) referring to “an imminent risk of such a situation”, extending some derogations to cases where there is simply an imminent risk of such a crisis. As further explained in the text, some of these derogations have a considerable impact on the individual. It is not justifiable that they could be applied when a Member State is merely at risk of a crisis.

To that end, ECRE suggests that the co-legislators provide for a clearer and narrower definition of crisis (Article 2(a)). ECRE also recommends deleting any reference to an imminent risk of such a crisis (Article 2(b)).

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10 Recital 6: “A mass influx of persons crossing the border irregularly and within a short period of time may lead to a situation of crisis in a particular Member State. That may also have consequences for the functioning of the asylum and migration system, not only in that Member State but in the Union as a whole, due to unauthorised movements and the lack of capacity in the Member State of first entry to process the applications for international protection of such third-country nationals. It is necessary to lay down specific rules and mechanisms that should enable effective action to address such situations.”

11 Recital 12: « In situations of crisis, Member States might need a wider set of measures in order to manage a mass influx of third-country nationals in an orderly fashion and contain unauthorised movements. Such measures should include the application of an asylum crisis management procedure and a return crisis management procedure. »

## Article 1

### Subject matter

1...

2. For the purposes of this Regulation, a situation of crisis is to be understood as:

(a)... or

~~(b) an imminent risk of such a situation.~~

## Process for invoking a “crisis” legal regime

According to the explanatory memorandum the consequences of a crisis need to be demonstrated and Member States are required to submit a “reasoned request” to the European Commission (Article 3). The Commission assesses the reasoned request and determines whether there is a situation of crisis on the basis of substantiated information, in particular the information gathered by the Commission pursuant to the EU Mechanism for Preparedness and Management of Crises related to Migration.<sup>12</sup>

This is different from the new mechanism that is put in place by the RAMM, under which Member States have to take part in solidarity measures when another Member State is facing migratory pressure. Article 2(w) of the RAMM defines migratory pressure as: “a situation where there is a large number of arrivals of third-country nationals or stateless persons, or a risk of such arrivals, including where this stems from arrivals following search and rescue operations, as a result of the geographical location of a Member State and the specific developments in third countries which generate migratory movements that place a burden even on well-prepared asylum and reception systems and requires immediate action”. While the main difference might lie in the effect the situation has on the consequences for the functioning the Common European Asylum System (CEAS) or the Common Framework, it remains to be seen which circumstances will be evaluated as a situation of migratory pressure and which as a crisis situation or imminent risk thereof. Seeing the far-reaching consequences for the fundamental rights of individuals under the derogations in the case of crisis situation, “crisis” should be clearly and restrictively interpreted.

It should also be noted that a country may have an interest in declaring itself to be in crisis. As a crisis situation also brings changes to the solidarity obligations of other Member States, this might also create tension between Member States. ECRE also notes the risk that it might also create an incentive for Member States to avoid investing in their asylum systems because they know that at times of crisis these systems will not be put to a real test but that the crisis legal regime will apply.

Just as in the RAMM, there is a stronger role for the Commission. Although ECRE generally welcomes an enhanced role for the Commission, there are also risks attached to it. The EU’s overall strategy, taken up and at times shaped by DG Home, has been focused on certain aspects of asylum and migration policy at the expense of others. The Pact continues this trend, with a strong focus on return, restricting movement and borders, and with limited references to other elements of asylum policy, including important areas covered by the asylum *acquis*. This enhanced role should be balanced by providing consultation of European Parliament and relevant EU agencies.

While, the Commission has limited tools for assessing the Member States’ capacity and the situation on the ground. Article 3(8) relies on sources such as the Member State’s own reporting for the Preparedness Mechanism, EASO and Frontex, none of which provide an independent assessment of preparedness, meaning that any “influx” could immediately be classified as a “crisis”.

12 Migration Preparedness and Crisis Blueprint, by EASO pursuant to Regulation (EU) No 439/2010, the European Border

and Coast Guard Agency pursuant to Regulation (EU) 2019/1896 and the Migration Management report referred to in the proposed Regulation on Asylum and Migration Management.

## Article 3

### Criteria and procedural provisions

1. Where a Member State considers that it is facing a crisis situation as referred to in Article 1(2), that Member State shall submit a **detailed** reasoned request, to the Commission for the purpose of applying the rules laid down in Articles ~~4, 5 or~~ 6 as necessary, **thereby demonstrating how the rules will contribute to managing the crisis situation.**
2. Where, on the basis of the examination carried out in accordance with paragraph 8, the Commission considers, **after consultation with the European Parliament,** such a request justified, it shall, by means of an implementing decision, authorise the Member State concerned to apply the derogatory rules laid down in Articles ~~4, 5 or~~ 6.
3. The implementing decision referred to in paragraph 2 shall be adopted within ten days from the request and shall set the date from which the rules laid down in Articles ~~4, 5 or~~ 6 may be applied, as well as the time period for their application.
- ~~4. The Commission may authorise the application of the rules laid down in Articles 4 and 5 for six months. That period may be extended for a period not exceeding one year.~~
8. The Commission shall examine the reasoned request pursuant to paragraph 1, or the notification pursuant to paragraph 7 on the basis of substantiated information ... **The Commission shall prioritise reports by the UNHCR and other competent organisations regarding the asylum and reception systems in the concerned Member State.**

Once a reasoned request on a crisis situation has been justified, the Commission shall issue an implementing decision, which will set the date, from which the rules may be applied, as well as the time limit for their application (Article 3 (3)). The following derogations are possible:

- Prolongation of the asylum border procedure and changes to its scope of application (Article 4);
- Extension of the return border procedure (Article 5)
- Delayed registration (Article 6)

## Extension and prolongation of the asylum border procedure (Article 4)

### ***Larger scope of application***

Article 4 lays down a possibility for Member States to derogate, when in a crisis situation or imminent risk thereof, from the asylum border procedure under Article 41 of the proposed Asylum Procedures Regulation, by taking decisions in the context of a border procedure on the merits of an application where the applicant is of a nationality with an EU-wide recognition rate of 75% or lower, in addition to the cases listed under Article 41 of the APR. The recognition rate threshold of 75% or lower is intended to constitute a basis for Member States to rapidly channel third-country nationals and stateless persons into an asylum procedure at the border. Member States have to continue to apply the border procedure to all those cases provided by the APR (security threat, applicants coming from a country with less than 20% of the EU average recognition rate) but can apply the border procedure to all other applicants coming from a country with an EU-wide recognition rate of 75% or lower. The explanatory memorandum does not contain specific reasons for extending the asylum border procedure, nor does it explain how these measures are suitable for dealing with a crisis, or why the threshold of 75% was chosen. It should also be noted that a likely characteristic of a genuine crisis is that there is a significant increase in arrivals and that a higher percentage of those arrivals are refugees (because these are the situations that trigger large scale arrivals).

In this context expanding the scope of the lower standard border procedure seems unfair and illogical. Further, based on current EU-wide recognition rates, a 75% threshold will create unjustifiable differences between the nationalities that tend to fluctuate slightly above or below this mark, creating an arbitrary difference in treatment. The supposed reasoning for the expanded use of the border procedure in the Pact is low(er) protection rates, yet here, a much greater expansion is proposed for times when protection rates are likely to be very high.

As elaborated on in ECRE's Comments<sup>13</sup> on the amended APR, ECRE opposes mainstreaming border procedures as a core instrument of the EU's common asylum and return policies, and is strongly against any type of mandatory border procedures. ECRE has expressed serious concerns about the proposed border procedures and the deliberate joining together of asylum and return procedures. ECRE believes it will lead to an increase in detention, to protection gaps and an increased risk of refoulement for individuals, as well as increasing the administrative burden on certain Member States. ECRE has therefore urged the Commission and co-legislators to withdraw proposals for border procedures and recommends that, instead, Member States invest in regular asylum procedures, to make them fair and efficient, compliant with rights, and adequately resourced.<sup>14</sup>

The fact that in a crisis situation the border procedure can be extended to the merits of an application where the applicant is of a nationality with an EU-wide recognition rate of 75% or lower, means that the majority of asylum applicants will be subject to a border procedure. This raises serious concerns regarding the right to asylum (Article 18 EU Charter), the prohibition of torture and inhuman or degrading treatment or punishment (Article 4 EU Charter, Article 3 ECHR), the right to liberty and security (Article 6 EU Charter, Article 5 ECHR), protection in the event of removal, expulsion or extradition (Article 19 EU Charter), the rights of the child (Article 24 EU Charter) and the right to an effective remedy (Article 47 EU Charter, Article 13 ECHR), as have been elaborated on in the Comments on the APR.<sup>15</sup>

Besides the impact on the rights of the individual, it also raises serious questions regarding the feasibility for the Member States affected. Taking into account that the amended APR proposal links the border procedure to the refusal of entry, individuals are likely to be detained or subject to a restriction of movement. The fear that this might lead to mass detention is not unfounded. It is hard to imagine how the expansion of the border procedure, to the majority of applicants will offer an adequate solution in times of crisis, rather than exacerbating humanitarian and human rights crisis at the external borders of the EU.

### ***Extension of asylum border procedure to 20 weeks***

In addition, in a situation of crisis or imminent risk thereof, Member States may apply the border procedure for an additional period of eight weeks, extending the period of twelve weeks provided for by the proposal amending the Asylum Procedures Regulation. This means that the asylum border procedure can add to 20 weeks. Taking into account the screening preceding the referral to the border procedure, which can be extended up to ten days, in times of crisis, the asylum procedure at the border can take up almost 22 weeks (more or less five months). Once again, the explanatory memorandum does not contain any clarifications as to how such a prolongation will adequately tackle a crisis. On the contrary, the problem is either exacerbated or at best deferred. Extending the asylum border procedure will also lead to problematic situations in regard to the treatment of asylum seekers waiting for the procedure

13 ECRE Comments on the Commission Amended Proposal for an Asylum Procedures Regulation regarding border asylum procedures and border return procedures COM (2020) 611, December 2020, available at: <https://bit.ly/3sxUtTP>

14 ECRE Comments on the Commission Amended Proposal for an Asylum Procedures Regulation regarding border asylum procedures and border return procedures COM (2020) 611, December 2020, available at: <https://bit.ly/3sxUtTP>; ECRE, Policy Note: Relying on a fiction: new Amendments to the Asylum Procedures Regulation, December 2020, available at: <https://bit.ly/3ilVEKJ>

15 ECRE Comments on the Commission Amended Proposal for an Asylum Procedures Regulation regarding border asylum procedures and border return procedures COM (2020) 611, December 2020, available at: <https://bit.ly/3sxUtTP>

to be carried out at the border. Member States have the possibility to detain those people, including minors. An extension of the asylum border procedure can therefore also lead to an extension of the time spent in custody.

Given its significant impact on the fundamental rights of the persons concerned, as well as the questions that arise as to whether this would be a suitable response in a crisis situation, ECRE propose the deletion of Article 4.

ECRE recommends deletion of Article 4 and Recitals 14 and 16.<sup>16</sup>

## Extension of the return border procedure (Article 5)

The proposal provides for the possibility to derogate from certain provisions on the border procedure to carry out return as set out in the proposed Asylum Procedures Regulation and in the Return Directive, “in order to facilitate the enforcement of such procedures in situations of crisis”. For this reason, the proposal extends the maximum duration of the border procedure for carrying out return by an additional period of eight weeks and introduces new specific and targeted cases (adding to those set out in the proposal for a recast Return Directive) in which the existence of a risk of absconding in individual cases can be presumed, unless proven otherwise. In the explanatory memorandum the European Commission stated that the “adjustments are needed to allow the competent authorities under strain to exercise their tasks diligently and cope with significant workload.” This justification is rather weak, as there are other more effective ways to handle increased workload. Second, why does increased workload lead to an extension of the detention period? This does not seem logical. Finally, why would there be more cases where the presumption of the risk of absconding applies, necessitating the change in the return border procedure? Or why does the Commission believe that a crisis situation means that more categories of people can be presumed to be likely to abscond?

### **Extension of the return border procedure to 20 weeks**

Article 5 lays down a possibility for Member States to derogate from certain provisions of the return border procedure established by Article 41a of proposed Asylum Procedures Regulation and of the Return Directive. Such derogations would apply to third-country nationals and stateless persons whose application was rejected in the context of the asylum crisis management procedure. The derogation also applies to those applicants subject to the border procedure of Article 41 of the proposed Asylum Procedures Regulation whose application is rejected before the adoption by the Commission of a decision declaring that the Member State concerned is confronted with a situation of crisis, and who have no right to remain and are not allowed to remain after the adoption of that decision (Article 5(2)).

As expressed in its Comments on the amended APR proposal, ECRE advocates for the deletion of the return border procedure.<sup>17</sup> It will lead to an increase in detention, to protection gaps and an increased risk of *refoulement* for individuals, as well as increasing the administrative burden on certain Member States.

16 Where these provisions would be upheld, the recommendations made by ECRE in its comments on the Proposal for an Asylum Procedures Regulation should be upheld. This includes inter alia excluding applicants who have been identified as in need of special procedural guarantees and/or present indications of vulnerability from accelerated examination or border procedures, as such procedures by definition do not present the necessary guarantees to ensure effective access of such applicants to their rights under the Regulation and the EU Charter of Fundamental Rights, as well as the exemptions of families with children (so every person below the age of 18). See: ECRE Comments on the Commission Amended Proposal for an Asylum Procedures Regulation regarding border asylum procedures and border return procedures COM (2020) 611, December 2020, available at: <https://bit.ly/3sxUtTP> ;

17 ECRE Comments on the Commission Amended Proposal for an Asylum Procedures Regulation regarding border asylum procedures and border return procedures COM (2020) 611, December 2020, available at: <https://bit.ly/3sxUtTP> ; ECRE, Policy Note: Relying on a fiction: new Amendments to the Asylum Procedures Regulation, December 2020, available at: <https://bit.ly/3ilVEKJ>



The derogatory provisions extend the maximum duration of the border procedure for carrying out return, including detention, by an additional period of 8 weeks, meaning that individual could be in the return border procedure for up to 20 weeks. It should also be noted that these 20 weeks, could be preceded by 20 weeks in the asylum border procedure, meaning that a person could be in a border procedure for up to 40 weeks, depending on how long the derogatory measures can be applied. According to Article 3(4) the Commission may authorise the application of the rules for six months, which can be extended for a period not exceeding one year.

As stated in the previous section, this means that in crisis situation (or imminent risk thereof) more people (75% threshold), can be subject to a border procedure for a longer period of time (around 9 months). This is thus likely to increase the pressure on Member States if these measures are not flanked with adequate solidarity measures (see below) and the necessary operational support. The absence of adequate solidarity measures is likely to exacerbate the situation and the risk to the rights of the individuals concerned, as they are likely to be subject to detention or measures imposing restriction of movement.

### ***Presumption of the risk of absconding***

Article 5(1, C) introduces new specific and targeted cases, additional to the ones set out in the proposal for a recast Return Directive, in which the existence of a risk of absconding in individual cases can be presumed, unless proven otherwise.

Article 6 of the proposal for the recast return directive includes “at least” 16 “objective criteria” to be used by Member States to assess the risk of absconding, which is to be determined on the basis of an “overall assessment of the specific circumstances of the individual case”.

In four of these cases, the proposal foresees a presumption of the risk of absconding. According to Article 6(2), Member States “shall” establish that a risk of absconding is presumed in an individual case, unless proven otherwise for four of the criteria listed:

- (i) when a person has been using false or forged identity documents, destroying or otherwise disposing of existing documents, or refusing to provide fingerprints as required by law;
- (ii) opposing violently or fraudulently the return procedures;
- (iii) not complying with a measure aimed at preventing the risk of absconding referred to in Article 9(3); and
- (iv) not complying with an existing entry ban.

Under the proposed Crisis Regulation, a fifth ground can now lead to a presumption of the risk of absconding, namely point (f): “explicit expression of intent of non-compliance with return-related measures applied by virtue of this Directive”.

The presumption not only shifts the burden of proof to the individual but means that criteria such as not complying with an existing entry ban could lead to individuals being penalised for having to flee their country of origin following persecution in the case that circumstances in the country change or if they had returned prematurely. For those reasons, ECRE opposes automatic presumption of absconding as it imposes a disproportionate burden of proof on returnees that may be extremely difficult to discharge and undermines the individual assessment required under Article 6(2) of the proposal of the recast Return Directive. As discussed in the ECRE Comments on the recast Return Directive, a wide interpretation of the risk of absconding leads to systematic detention and would reverse the presumption whereby detention should only be considered as a last resort, as well as rendering the concept of voluntary departure almost theoretical.<sup>18</sup> The application of this presumption risks violations of the right to liberty and security (Article 6 EU Charter, Article 5 ECHR).

In its comments on recast Return Directive, ECRE recommended deleting Article 6 and replacing it

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<sup>18</sup> See: ECRE comments on the commission proposal for a Recast return directive COM(2018) 634, November 2018, available at: <https://bit.ly/3qtFWGW>

with: “A risk of absconding should not be automatically assumed on the basis of the third country national’s past conduct. The existence of a risk of absconding shall be determined on the basis of an assessment of the specific circumstances of the individual case and on the basis of an exhaustive list of objective criteria laid down in national legislation that are conducive to a risk assessment of the individual’s future conduct or relate to the individual’s stated intention not to comply with the return decision.” In line with that recommendation, ECRE also suggests in this context to delete the (extended) presumption of the risk of absconding.

It should also be noted that it is not sure if this criterion will be maintained in the Return Directive after the recast as the trilogue negotiations have not yet started. It also remains uncertain that the presumption will be included at all in the Directive after the recast. Moreover, the explicit expression of intent of non-compliance with return-related measures is broad (as it is non-compliance with return-related measures and not only “return”, so it can cover all duties laid down in the Directive) and covers many cases, leading to systematic detention of most people arriving.

Given its significant impact on the fundamental rights of the persons concerned, as well as the questions that arise as to whether this is a suitable response in a crisis situation, ECRE proposes the deletion of Article 5.

ECRE recommends deletion of Article 5 and corresponding recitals.

## Delayed registration (Article 6)

Article 6 provides for the possibility for Member States to delay the registration of applications for international protection up to four weeks, by derogation from Article 27 of the proposed Asylum Procedures Regulation. This can be applied in a crisis situation (but not when there is imminent risk thereof).

Article 3(5) provides that the Commission may authorise the application of the rules laid down in Article 6 for a maximum period of four weeks. If a Member State considers it necessary to further extend the application of the rules laid down in Article 6, it shall submit a reasoned request to the Commission at the latest five days before the expiry of the four-week period. The Commission may authorise the prolongation of the application of the rules laid down in Article 6 for an additional maximum period of four weeks, which shall be renewable once. The period of application shall not exceed twelve weeks in total.

The wording leaves room for interpretation. It remains unclear whether the registration of an individual application can be delayed up to 12 weeks, or whether the measure which allows that a registration can be delayed for four weeks, can only be applied for a maximum of twelve weeks. In our reading it is the latter, as this provision occurs in a general article regarding time limits in which derogatory measures can be implied. Nevertheless, in order to avoid divergent interpretation, this should be further specified in the text.

It should also be noted that under the recast APD, an extension of the registration deadline is already provided for in case of a large number of applications. A claim is to be registered within three working days of the making, subject to different rules for applications made with authorities other than the one responsible for registration. Under the recast, the “making” and the “registration” of an asylum application do not necessarily coincide. The registration can be extended to ten working days in case of a simultaneous arrival of large numbers of applicants.<sup>19</sup> The same deadlines are maintained in the 2016 APR proposal.<sup>20</sup> The wording of the justification thereof changes from a “large” number of applicants, to a “disproportionate” number of applicants.

<sup>19</sup> Article 6(5) recast Asylum Procedures Directive.

<sup>20</sup> See: recital 22, 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), available at: <https://bit.ly/3o7nJO0>



In this regard it should be reiterated that both the recast APD and the recast RCD clarify that a person holds the status of “applicant” from the moment he or she makes an application, i.e. expresses the intention to seek protection.<sup>21</sup> The rights under those instruments are thus applicable from the moment the application has been made, regardless of when the registration takes place. This is also foreseen in the 2016 APR proposal.<sup>22</sup> An extension of the registration period to four weeks in times of crisis cannot thus lead to a derogation from rights under the APR and RCD. Access to reception should be made available from the moment of the making of the application. In this regard, ECRE reiterates its recommendation made in its Comments on the Screening Regulation, that the RCD should apply from the moment the person expresses his/her intention to apply for asylum, regardless of whether or not this expression of intent took place during the screening phase.<sup>23</sup> A delayed registration can in no case justify hindrance of access to the asylum procedure and the right to asylum.

While the rights of people seeking protection should not be affected by a delayed registration, in practice there is a risk that this occurs because the delayed registration creates a challenge for applicants to acquire proof of their status, necessary to access their rights. This potentially infringes their right to reception, protection from *refoulement*, and other rights that are attached to their status as asylum seeker. Therefore, ECRE recommends deleting Article 6.

If Article 6 is to be maintained, ECRE proposes amendments to Article 3 and Article 6 for clarification purposes, and to ensure full respect for the right to human dignity, as enshrined in Article 1 of EU Charter, the right to asylum (Article 18 Charter), and protection in the event of removal, expulsion or extradition (Article 19 Charter), as well as material reception conditions.

**Article 3 (5):** The Commission may authorise the application of the rules laid down in Article 6 for a maximum period of four weeks. If a Member State considers it necessary to further extend the application of the rules laid down in Article 6, it shall submit a reasoned request to the Commission at the latest five days before the expiry of the four-week period. The Commission may authorise the prolongation of the application of the rules laid down in Article 6 for an additional maximum period of four weeks, which shall be renewable once. The period of application shall not exceed twelve weeks in total, including, where paragraph 8 is applied, the period preceding the adoption of the implementing decision referred to in paragraph 2. **The registration of the individual application itself cannot be delayed for more than four weeks.**

**Article 6:** In a crisis situation as referred to in Article 1(2)(a) and in accordance with the procedure laid down in Article 3, applications made within the period during which this Article is applied shall be registered no later than within four weeks from when they are made by way of derogation from Article 27 of Regulation (EU) XXX/XXX [Asylum Procedures Regulation].

**In line with recital 22<sup>24</sup> of Regulation (EU) XXX/XXX [Asylum Procedures Regulation], and**

21 Article 2(d) recast Asylum Procedures Directive; Article 2(b) recast Reception Conditions Directive. Article 17(1) recast Reception Conditions Directive also stresses that material reception conditions shall be made available as soon as the applicant “makes” his or her claim.

22 See: article 27, 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), available at: <https://bit.ly/3o7nJO0>

23 ECRE, ECRE comments on the commission proposal for a screening regulation COM(2020) 612, December 2020, available at: <https://bit.ly/3awOJVg>

24 Recital 22 reads as follows: *Access to the common procedure should be based on a three-step approach consisting of the making, registering and lodging of an application. Making an application is the first step that triggers the application of this Regulation. A third-country national or stateless person is considered to have made an application when expressing a wish to receive international protection from a Member State. Such a wish may be expressed in any form and the individual applicant need not necessarily use specific words such as international protection, asylum or subsidiary protection. The defining element should be the expression by the third country national or the stateless person of a fear of*

**Article 16 Directive XXX/XXX/EU (Reception Conditions Directive)<sup>25</sup> the applicant should benefit from rights under this Regulation (EU) XXX/XXX [Asylum Procedures Regulation] and Directive XXX/XXX/EU (Reception Conditions Directive) as soon as he or she makes an application, regardless of when the registration takes place.**

## CHAPTER 3: DEROGATIONS IN CASE OF FORCE MAJEURE

### What is *force majeure*?

The proposal does not define *force majeure* although Recital 4 refers to situations that arise due to circumstances beyond the control of the Union and its Member States. In its explanatory memorandum the Commission, refers to events such as the COVID-19 pandemic and the political crisis witnessed at the Greek-Turkish border in March 2020 as situations of *force majeure*. It should be noted that the latter cannot properly be regarded as a situation of *force majeure*, as it was neither unforeseen and nor unforeseeable (common elements in most interpretations of *force majeure*), given the many warnings and predications about such a situation arising.

ECRE advocates for the deletion of the provisions on *force majeure* because they constitute a misuse of the concept and create a vague and open-ended justification for derogations from basic standards. As explained in the first chapter, provisions in EU law already provide for exceptions in emergency situations.

If it is maintained *force majeure* should at least be defined. The concept of *force majeure* varies in use across the EU which could lead to diverging interpretations. Definitions of the concept should take into consideration established usage and the jurisprudence of the European Court of Justice<sup>26</sup> and the European Court of Human Rights, in order prevent its misuse to support unjustifiable derogation from EU law.<sup>27</sup> In addition, the derogations should be reduced and only granted in truly exceptional situations.<sup>28</sup>

In the Regulation, where a Member State claims *force majeure*, it shall notify the Commission. After the "reasoned" notification, several derogations are possible:

- Extension of registration time limit (Article 7)
- Extension of time limits set out in Regulation (EU) XXX/XXX [Asylum and Migration Management] (Article 8)
- Extension of the timeframes for solidarity measures (Article 9)

### Extension of registration time limit (Article 7)

As in a crisis situation, the proposal also provides for a four-week extension for Member States to register applications for international protection in situations of *force majeure*, where it is impossible

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*persecution or serious harm upon return to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence. In case of doubt whether a certain declaration may be construed as an application for international protection, the third-country national or stateless person should be expressly asked whether he or she wishes to receive international protection. The applicant should benefit from rights under this Regulation and Directive XXX/XXX/EU (Reception Conditions Directive) 26 as soon as he or she makes an application.*

25 Or as per Article 17 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 (recast)

26 See for an extensive analysis: ECRE/ELENA, derogating from EU Asylum law in the name of "emergencies": The legal limits under EU law, June 2020, <https://bit.ly/39zcs4W>

27 For more information see: ECtHR, Guide on Article 15 of the European Convention on Human Rights, August 2020, available at: <https://bit.ly/3awlrnR>

28 See also: Caritas Europa, Position Paper Caritas Europa's analysis and recommendations on the EU Pact on Migration and Asylum, December 2020, p. 9, available at: <https://bit.ly/3nZojx1>

for a Member State to apply the registration deadline. Member States facing *force majeure* must inform the Commission of the situation and indicate precise reasons for the application of the derogations. The Member State shall likewise inform the Commission of the termination of the situation of *force majeure*, upon which the extended time limit for registrations should no longer be applied.

Contrary to a crisis situation, the Member State does not have to ask for a prolongation of the period during which a four-week delay maybe applied, but instead indicates the period during which it will be applied. It is up to the Member State to assess whether *force majeure* applies and when the situation characterised by *force majeure* has terminated. This unilateral approach creates the strong risk that a Member State will invoke *force majeure* in situations which do not constitute exceptional and unforeseeable situations, simply in order to derogate from its obligations, and that the legal regime for *force majeure* will be applied for longer than needed. Therefore, additional guarantees need to be incorporated in the proposal to 1) ensure that *force majeure* is not invoked in situations which do not qualify as such and 2) to avoid an unreasonably long use of the *force majeure* regime.

As regards the four-week delay in registering an individual application the same concerns apply as those set out in the corresponding section on crisis situations. While the rights of an individual applicant should not be affected by a delayed registration, in practice there is a risk that they will be. Therefore, ECRE recommends deleting Article 7.

ECRE advocates for the deletion of all derogation measures related to *force majeure*. However, if Article 7 is maintained, ECRE proposes amendments to it to better ensure respect for the right to human dignity, as enshrined in Article 1 of EU Charter, the right to asylum (Article 18 Charter), and protection in the event of removal, expulsion or extradition (Article 19 Charter).

#### Article 7:

1. Where a Member State **considers it** is facing a situation of force majeure which renders it impossible to comply with the time limits set out in Article 27 of Regulation (EU) XXX/XXX [Asylum Procedures Regulation], that Member State ~~notify the Commission~~ **shall submit a detailed reasoned request, to the Commission for the purpose of applying the derogation from Article 27 of Regulation (EU) XXX/XXX [Asylum Procedures Regulation]. After such notification, Where, on the basis of the examination carried, the Commission considers, such a request justified,** by way of derogation from Article 27 of Regulation (EU) XXX/XXX [Asylum Procedures Regulation], applications may be registered by that Member State no later than four weeks from when they are made. In the notification, the Member State concerned shall indicate the precise reasons for which it considers that this paragraph has to be applied and indicate the period of time during which it will be applied. **This period should be as short as possible and cannot take longer than the time reasonably needed to swiftly address a force majeure situation.**

2. Where a Member State referred to in paragraph 1 is no longer facing a situation of force majeure as referred to in that paragraph which renders it impossible to comply with the time limits set out in Article 27 of Regulation (EU) XXX/XXX [Asylum Procedures Regulation], that Member State shall, as soon as possible, notify the Commission of the termination of the situation. After such notification, the extended time limit set out in paragraph 1 shall no longer be applied.

**In line with recital 22<sup>29</sup> of Regulation (EU) XXX/XXX [Asylum Procedures Regulation], and**

<sup>29</sup> Recital 22 reads as follows: Access to the common procedure should be based on a three-step approach consisting of the making, registering and lodging of an application. Making an application is the first step that triggers the application of this Regulation. A third-country national or stateless person is considered to have made an application when expressing a wish to receive international protection from a Member State. Such a wish may be expressed in any form and the individual applicant need not necessarily use specific words such as international protection, asylum or subsidiary

**Article 16 Directive XXX/XXX/EU (Reception Conditions Directive)<sup>30</sup>, the applicant should benefit from rights under this Regulation (EU) XXX/XXX [Asylum Procedures Regulation] and Directive XXX/XXX/EU (Reception Conditions Directive) as soon as he or she makes an application, regardless of when the registration takes place.**

## **Extension of time limits set out in Regulation (EU) XXX/XXX [Asylum and Migration Management] (Article 8)**

Where it is impossible for a Member State to apply the procedure for sending and replying to take charge requests and take back notifications within the time limits set out in the proposed Regulation on Asylum and Migration Management, or to comply with the time limit to transfer an applicant to the Member State responsible, specific derogations are set out to allow Member States to extend these time limits under strict conditions.

Member States facing situations of *force majeure* must inform the Commission of the situation and indicate precise reasons for the application of the derogations. They shall likewise inform the Commission of the termination of the situation of *force majeure*, after which the extended time limits should no longer be applied.

It concerns the following time lines:

- submit a take charge request as referred to in Article 29 within four months of the date on which the application was registered (instead of two months, or one month from a Eurodac hit)
- reply to a take charge request as referred to in Article 30 within two months of receipt of the request (instead of one month)
- submit a take back notification as referred to in Article 31 within one month of receiving the Eurodac hit or confirm the receipt within one month of such notification (instead of two weeks)
- carry out a transfer as referred to in Article 35 within one year of the acceptance (instead of six months) of the take charge request or of the confirmation of the take back notification by another Member State or of the final decision on an appeal or review of a transfer decision where there is a suspensive effect in accordance with Article 33(3) of that Regulation (instead of six months).

Where the Member State does not comply with these time limits, the responsibility for examining the application for international protection pursuant to Regulation XXX/XXX [Asylum and Migration Management] shall lie with it or be transferred to it.

It is questionable whether the extension of a time limit from six months to one year is suitable for managing a situation of genuine *force majeure*, which refers to events that arise due to circumstances beyond the control of the Union and its Member States. It is also unclear why an event would continue for such a long time.

The fact that a Member State invoking *force majeure* can take a full year to execute a "Dublin" transfer to another Member State will lead to uncertainty, stress and anxiety for asylum applicants

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*protection. The defining element should be the expression by the third country national or the stateless person of a fear of persecution or serious harm upon return to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence. In case of doubt whether a certain declaration may be construed as an application for international protection, the third-country national or stateless person should be expressly asked whether he or she wishes to receive international protection. The applicant should benefit from rights under this Regulation and Directive XXX/XXX/EU (Reception Conditions Directive) 26 as soon as he or she makes an application.*

30 Or as per Article 17 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 (recast)

awaiting transfers, and will also have serious implications for their right to family life and family unity. In situations of *force majeure* the logical approach would be to speed up family reunion requests, especially those of children and vulnerable groups. Executing them as priority would benefit the asylum seekers and the concerned states. This requires accelerating rather than delaying transfers of family reunion claims for which other Member States have already accepted responsibility, making use of the discretionary clauses of the RAMM, and reviewing the possible expiration of the transfer time limits so they do not lead to disruption of family unity.

In its comments on the RAMM, ECRE has presented specific recommendations regarding the shortened time limits as proposed in the RAMM.<sup>31</sup>

## Extension of the timeframes for solidarity measures (Article 9)

When a Member State facing a situation of *force majeure* is unable to fulfil its obligations in the solidarity mechanisms in the RAMM or foreseen in this Regulation, it may notify the Commission of the situation and extend the timeframe for the implementation of the solidarity measures by a maximum of six months.

While this sounds quite logical, as mentioned above, it is necessary to define the concept of *force majeure* and rules on its extension to avoid it being used or unduly extended by a Member State in order to avoid responsibilities and obligations.

## CHAPTER 4: QUID SOLIDARITY? (ARTICLE 2)

Contrary to what would be expected in crisis situations and situations of *force majeure*, the proposed solidarity measures, are not extensive. The proposal extends solidarity measures to encompass applicants in border procedures (of whom there are likely to be more due to other provisions in the Regulation. It also reinforces the possibility for Member States to provide assistance in carrying out returns in the form of return sponsorship. According to the normal rules established in the RAMM, Member States providing return sponsorship commit to returning people on behalf of another Member State, carrying out all the activities necessary for this purpose directly from the territory of the benefitting Member State (e.g. return counselling, leading policy dialogue with third countries, providing support for assisted voluntary return and reintegration). If return is not finalised within eight months, the people sponsored will be transferred to the territory of the sponsoring Member State in view of finalising the enforcement of return. Return sponsorship in situations of crisis provided for in the Regulation differs from RAMM because the obligation to transfer the person is triggered if they do not return or are not removed within four months.

It should also be noted that according to Article 2 of the Proposal this only applies in times of crisis.

The comments on these measures should be read in line with ECRE Comments on the RAMM which includes extensive analysis of the proposed solidarity mechanisms.

## How will compulsory solidarity be triggered?

The Regulation aims to simplify the procedure and shorten the timeframes that are set out for triggering the compulsory solidarity mechanism for situations of migratory pressure in the RAMM.

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31 See: ECRE comments on the Commission Proposal for a Regulation on asylum and migration management COM(2020) 610 2020/0279 (COD).



To trigger solidarity in a crisis, the Commission must establish that a Member State is confronted with a crisis situation. The Commission assesses the "reasoned request" from the Member State requesting the application of the specific rules for compulsory solidarity and determines whether there is a situation of crisis on the basis of substantiated information, in particular the information gathered by the Commission pursuant to the EU Mechanism for Preparedness and Management of Crises related to Migration (Migration Preparedness and Crisis Blueprint), by EASO pursuant to Regulation (EU) No 439/2010, the European Border and Coast Guard Agency pursuant to Regulation (EU) 2019/1896 and the Migration Management report referred to in the RAMM.

Member States would be required to submit a Crisis Solidarity Response Plan within one week of the finalisation of the assessment on the existence of a situation of crisis in the Member State and after the convening of the Solidarity Forum by the Commission. Following this, the Commission shall adopt the implementing act setting out the solidarity measures for each Member State within one week.

The implementing act shall determine the number of persons to be relocated and/or subject to return sponsorship from the Member State in a crisis situation, determine the distribution of those persons between Member States using the distribution key based on 50% population and 50% GDP as defined in the RAMM.

Where a Member State is itself under pressure and benefitting from solidarity support measures, including when it is benefitting from such measures under the RAMM, it shall be excluded from the obligation to contribute to relocation or return sponsorship under the Crisis Regulation.

## **What is the scope of the compulsory solidarity?**

With respect to relocation, the scope is widened compared to the situations of migratory pressure in the RAMM, as it also applies to applicants for international protection in the border procedure, irregular migrants, and persons granted immediate protection under the Regulation (see below). Transfer of irregularly staying third-country nationals or stateless persons subject to return sponsorship from the Member State in crisis to the sponsoring Member State would occur if return has not been successfully completed within four months, i.e. a period shorter than the one set in the RAMM (eight months).

Unlike the solidarity provisions of the RAMM, the Crisis Regulation does not include solidarity measures in the field of capacity building, operational support and cooperation with third countries. The Commission considered that these measures are of a longer-term nature, and are thus more adapted to situations of pressure. Since in times of crisis there is a need to quickly alleviate the situation, the Commission indicated that the Regulation should focus on these aspects of solidarity.<sup>32</sup>

As elaborated on in its Comments on the RAMM, ECRE does not support the inclusion of return sponsorship as a solidarity option. ECRE's primary concerns are the impact of return sponsorship on the fundamental rights of applicants and the feasibility of the concept. In line with its proposals to delete return sponsorship in the proposed RAMM, ECRE proposes its deletion from this Regulation as well. The same goes for the relocation of "illegally staying third country nationals" (Article 45(2)(b) RAMM) as "relocation for return" generates serious fundamental rights concerns as well.

Consequently, ECRE proposes amendments to Article 2(5),(6) and (7) as below.

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<sup>32</sup> The explanatory memorandum further foresees that, any needs that arise in the field of capacity building, operational support and cooperation with third countries would be covered under the EU mechanism for Preparedness and Management of Crises related to Migration (Migration Preparedness and Crisis Blueprint and the Union Civil Protection Mechanism (UCPM)).

**Article 2 (5):** By way of derogation from Article 51(3)(b)(ii), Article 52(1) and 52(3) first sub-paragraph and Article 53(3)(a) of Regulation (EU) XXX/XXX [Asylum and Migration Management], relocation shall include not only persons referred to in points (a) and (c) of Article 45(1) of that Regulation, but also persons referred to in points (a) **and (b)** of Article 45(2).

Article 2 (6): By way of derogation from Article 54 of Regulation (EU) XXX/XXX [Asylum and Migration Management], the share calculated in accordance with the formula set out in that Article shall also apply to measures set out in Article 45(2), points (a) **and (b)** of that Regulation.

~~**Article 2 (7): By way of derogation from Article 55(2) of Regulation (EU) XXX/XXX [Asylum and Migration Management], the deadline set therein shall be set at four months.**~~

Such amendments would mean that the relocation of applicants who are not subject to the border procedure and the relocation of beneficiaries of international protection who have been granted international protection in cases of migratory pressure, would only be complemented by the mandatory relocation of applicants for international protection subject to the border procedure (which remains optional in cases of migratory pressure).

Questions might thus arise regarding the added value of this provision. As noted above in times of crisis a Member State can expand the border procedure in scope and extend it in time. This will lead to an increase of the number of applicants in border procedures, as the majority of applicants might be subject to a border procedure, which leads to fundamental rights concerns.<sup>33</sup> Instead of providing for mandatory relocation of applicants in a border procedure in crisis the Commission could instead have opted for increasing mandatory relocation of applicants of international protection. This would be more human rights compliant and reduce the administrative and logistical burden falling on Member states applying the border procedure.

## CHAPTER 5: IMMEDIATE PROTECTION STATUS (ARTICLE 10)

Article 10 provides for the granting of immediate protection status to displaced persons who in their country of origin face an exceptionally high risk of being subject to indiscriminate violence, in a situation of armed conflict, and who are unable to return to a third country. This only applies in a crisis situation. The need to apply the article and the precise group of people concerned is to be determined by the Commission in an implementing act. Member States may, during the period of application determined by the implementing act, suspend the examination of applications for international protection and grant immediate protection to those persons who meet the respective criteria. With this proposal, the Temporary Protection Directive, which has never been applied, would be repealed.<sup>34</sup>

The suspension can be extended to maximum one year, at which point the examination should resume (Article 10(3)). The Commission foresees that the provision will ensure protection for the persons concerned while alleviating pressure on the Member State to examine a large number of asylum applications at once. Persons granted immediate protection remain applicants for international protection at the same time, but would enjoy the set of economic and social rights that are applicable to subsidiary protection beneficiaries as laid down in Regulation (EU) XXX/XXX [Qualification Regulation].

33 ECRE Comments on the Commission Amended Proposal for an Asylum Procedures Regulation regarding border asylum procedures and border return procedures COM (2020) 611, December 2020, available at: <https://bit.ly/3sxUtTP>

34 For a comparison between temporary and immediate protection see: Dr Meltem Ineli-Ciger, Assistant Professor, Faculty of Law, Suleyman Demirel University, « What a difference two decades make? The shift from temporary to immediate protection in the new European Pact on Asylum and Migration », 11 November 2020, available at: <https://bit.ly/3o1uqkp>



The right to family reunification is not provided for in the Qualification Directive or the proposed Qualification Regulation, but in the Directive on the right to family reunification. This entails that persons granted immediate protection would not be able to invoke their right to family life during this time. It is therefore of utmost importance that the suspension of the examination of asylum applications remains as short as possible, and that once examinations are resumed, the asylum authorities proceed to a swift examination of the application for international protection. In the best interest of the child, family reunification should begin for unaccompanied minors in the period that they are granted immediate protection.

The Commission further clarifies in the explanatory memorandum that the granting of immediate protection does not relieve the Member State of the obligation to determine the Member State responsible for examining the application pursuant to Regulation (EU) XXX/XXX [Asylum and Migration Management], but allows the person concerned to have the status while the procedure pursuant to that Regulation is carried out. Where another Member State is determined as the Member State responsible, the immediate protection ceases when the transfer pursuant to that Regulation is carried out. Should the persons concerned move on to other Member States and apply for international protection there, the Member State responsible would also be obliged to take them back pursuant to Regulation (EU) XXX/XXX [Asylum and Migration Management]. In both situations, the person should be entitled to a full examination of his/her protection claim and be awarded the appropriate status.

The granting of immediate protection is welcome as it provides people in need of protection with greater and swifter access to rights, including access to employment, to education, to procedures for recognition of qualifications and validation of skills, social security and social assistance, healthcare, etc. while they await a decision on their application for international protection. The definition should be widened to include applicants who are, on the basis of readily apparent, objective circumstances in the country of origin, at risk of harm that brings them within the applicable refugee definition. By expanding the definition, immediate protection could also be granted to, for example, religious minorities facing persecution in certain countries.

Questions arise however. Notwithstanding concerns about temporary protection regimes related to the quality of protection, the provisions on immediate protection are useful. But will they be used? The Temporary Protection Directive (TPD) was an option in 2015 but was not invoked. The question thus arises as to whether integrating immediate protection into the Crisis Regulation makes it more likely to be used than the TPD.

ECRE recommends amending Article 10 as follows.

**Article 10:** In a crisis situation as referred to in Article 1(2)(a), and on the basis of an implementing act adopted by the Commission in accordance with paragraph 4 of this Article, Member States may suspend the examination of applications for international protection in accordance with Regulation (EU) XXX/XXX [Asylum Procedures Regulation] and Regulation (EU) XXX/XXX [Qualification Regulation] in respect of displaced persons from third countries who are facing a high degree of risk of being subject to indiscriminate violence, in exceptional situations of armed conflict, **and to displaced persons from third countries on the basis of readily apparent, objective circumstances in the country of origin or at risk of harm that brings them within the applicable refugee definition**, and who are unable to return to their country of origin, **or, in the case of stateless asylum seekers, their country of former habitual residence**. In such a case, Member States shall grant immediate protection status to the persons concerned, unless they represent a danger to the national security or public order of the Member State. Such status shall be without prejudice to their ongoing application for international protection in the relevant Member State.

While the granting of immediate protection is welcome, ECRE primarily advocates for the introduction of prima facie recognition. As described by UNHCR:

***“A prima facie approach means the recognition by a State or UNHCR of refugee status on the***

***basis of readily apparent, objective circumstances in the country of origin or, in the case of stateless asylum seekers, their country of former habitual residence. A prima facie approach acknowledges that those fleeing these circumstances are at risk of harm that brings them within the applicable refugee definition.”<sup>35</sup>***

Within an EU context this could be extrapolated to subsidiary protection. Recognising refugee status on a prima facie basis has been a common practice of both States and UNHCR for over 60 years. In general, “prima facie” means “at first appearance”, or “on the face of it.”

UNHCR’s Handbook on Procedures and Criteria for Determining Refugee Status describes group determination on a prima facie basis as follows:

***“[s]ituations have [...] arisen in which entire groups have been displaced under circumstances indicating that members of the group could be considered individually as refugees. In such situations the need to provide assistance is often extremely urgent and it may not be possible for purely practical reasons to carry out an individual determination of refugee status for each member of the group. Recourse has therefore been had to so-called “group determination” of refugee status, whereby each member of the group is regarded prima facie (i.e. in the absence of evidence to the contrary) as a refugee.”<sup>36</sup>***

A prima facie approach is particularly suited to situations of large-scale arrivals of refugees, which are characterised by the arrival across an international border of persons in need of international protection in such numbers and at such a rate as to render individual determination of their claims impracticable.

German practice in 2015-2016 can serve as an example. When Germany was confronted with an increase in asylum applications<sup>37</sup> its asylum system was overwhelmed. To ease the pressure on the asylum authorities, it was decided to conduct written procedures for Syrian and Eritrean nationals and religious minorities from Iraq. Instead of having to conduct personal interviews, which can take several hours, these applicants, who were basically considered prima facie refugees, were registered and had to fill in a form concerning their personal information and reasons for flight. After handing in the form, they would usually be recognised as refugees in accordance with the Geneva Convention shortly afterwards.<sup>38</sup> Despite being very successful the use of this approach ended in early 2016. Despite rumours of abuse, statistics show that status awarded was confirmed in over 99% of the cases. Germany uses a mandatory review process after three years to verify whether there are reasons for withdrawal of the protection status, such as false nationality. In 2019, decisions on cases decided in written procedures were confirmed in 99.8% of cases. In 2020, the confirmation quota for decisions taken in written procedures was 99.6%.<sup>39</sup> This shows that there was no abuse of the system because of false registration or similar claims. The written procedures have proven to be an easy and effective way to ease pressure in the asylum system and were also beneficial to refugees who were quickly granted full status.

ECRE will elaborate on prima facie recognition and other tools in its forthcoming policy paper on reworking the Crisis Regulation to provide an alternative crisis prevention system.

35 See also: UN High Commissioner for Refugees (UNHCR), Guidelines on International Protection No. 11: Prima Facie Recognition of Refugee Status, 24 June 2015, HCR/GIP/15/11, available at: <https://bit.ly/3s9cd6O>

36 UN High Commissioner for Refugees (UNHCR), Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, April 2019, HCR/1P/4/ENG/REV. 4, § 44, available at: <https://bit.ly/37ngpb9>

37 2014: 173.072 new applications; 2015: 441.899 new applications (36% Syrian applicants) (2.5 increase); 2016: 745.545 new applications (36% Syrian applicants) (1.6 increase). Information provided by Pro Asyl, February 2021.

38 See for more information: BAMF and EMN, The Changing Influx of Asylum Seekers in 2014-2016: Responses in Germany Focussed Study by the German National Contact Point for the European Migration Network (EMN), 2018, available at: <https://bit.ly/2Ni0Fig>

39 Deutscher Bundestag Drucksache 19/22842 19. Wahlperiode, Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Ulla Jelpke, Dr. André Hahn, Gökay Akbulut, weiterer Abgeordneter und der Fraktion DIE LINKE. – Drucksache 19/21913 – Ergänzende Informationen zur Asylstatistik für 2019 und das laufende Jahr 2020 – Schwerpunktfragen zu Widerrufsprüfungen, 25 September 2020, Question 3c, p.12, available at: <https://bit.ly/2Ztk7Mc>





**ecre**

European Council  
on Refugees and Exiles

**European Council on Refugees and Exiles**

Avenue des Arts 7/8

Brussels 1210

Belgium

T.+32 232 900 40

[ecre@ecre.org](mailto:ecre@ecre.org)

[www.ecre.org](http://www.ecre.org)