

ALLEVIATING OR EXACERBATING CRISES? THE REGULATION ON CRISIS AND FORCE MAJEURE

ECRE'S ASSESSMENT OF RISKS INHERENT IN THE CRISIS
REGULATION AND RECOMMENDATIONS FOR A SIGNIFICANT
REDRAFTING

I. INTRODUCTION

In September 2020, the European Commission (the Commission) presented a New Pact on Migration and Asylum (the Pact). It aims to develop a comprehensive approach to external borders, asylum and return, the Schengen area of free movement, and external policies. The Pact was presented along with a set of legislative proposals, including the proposal for a Regulation addressing situations of crisis and force majeure in the field of migration and asylum (the Crisis Regulation). The Crisis Regulation creates two additional legal regimes to add to the standard legal regime presented in the Regulation on asylum and migration management (the RAMM). The first is for situations of crisis or the imminent risk thereof, and the second covers situations deemed to be force majeure. The main purpose of the Regulation is to allow Member States to derogate from certain obligations that exist under the RAMM legal regime when they are experiencing a situation of crisis or force majeure, and to adjust solidarity requirements at the same time.

A positive element in the proposal is the introduction of an immediate protection status to be granted to people arriving in situations of crisis. If people can swiftly apply for international protection, immediate protection would enable people to access employment, education, social assistance and healthcare. The Temporary Protection Directive which covered similar ground but has never been invoked is to be withdrawn, however. ECRE also maintains that the use of prima facie recognition could be a more suitable tool for situations of crisis.

For the reasons discussed below ECRE fears that allowing the derogations specified will exacerbate rather

than alleviate crises, and likely increase risks of fundamental rights violations. The need for the Crisis Regulation can also be questioned. If the Regulation moves forward, ECRE argues for re-drafting to develop an alternative crisis prevention mechanism with strengthened solidarity provisions and which does not depend on expanding the scope and duration of the border procedure. ECRE argues for withdrawal of the proposals for a legal regime covering force majeure; at very least, there needs to be a check on the unilateral invocation of force majeure, given the implications for protection and for other Member States.

II. ANALYSIS

NECESSARY OR LEGALLY REDUNDANT?

ECRE is not convinced that these additional legal regimes are necessary or useful. First, there are already provisions in the Treaties and in secondary legislation for emergency situations and force majeure. These provisions allow for derogations which are strictly limited by CJEU jurisprudence. Thus, these two additional regimes appear to be legally redundant; including them in the Pact normalises what should be exceptions. It is also a risk to give Member States reasons and legal bases for avoiding obligations, given that a lack of compliance is a fundamental problem for the Common European Asylum System (CEAS).

OVERLY BROAD DEFINITION OF CRISIS

Crises are described as exceptional situations of mass influx of third-country nationals or stateless persons arriving irregularly in a Member State, that could render a Member State's asylum, reception or return system non-functional or have serious consequences for the functioning of the Common European Asylum System (CEAS) and the EU's "migration management system". The definition of crisis in the Regulation is broad and vague, meaning that situations of pressure may be inaccurately deemed to be crises, and that interpretations will vary across the Member States.

The Regulation also allows for the use of derogations in cases where there is "an imminent risk" of a crisis. Considering that most of the derogations proposed would have undermine fundamental rights, their use cannot be justified when there is a mere "risk" of a crisis.

Examples of crises in the text refer to 2015. The so-called crisis of 2015 and those tied to the 1992-1996 and 2000-2001 displacements were all times when the vast majority of those arriving and seeking protection were refugees. Any future potential crises are likely to be similar. Thus, it is likely that refugees will be the group most affected by measures allowing for derogation from obligations in times of crisis.

PERMISSIBLE DEROGATIONS IN THE CRISIS LEGAL REGIME

Delayed registration

Registration of applications for international protection can be delayed for up to four weeks after the making of the application. ECRE believes there is a risk that the delayed registration will create an obstacle to accessing rights because applicants often need proof of their status. Thus, the delay could infringe rights to reception, protection from refoulement, and other rights attached to asylum seeker status.

Extension and expansion of the border procedure

In a crisis, Member States may expand the use of the asylum border procedure as they can derogate from APR provisions limiting its use. The derogations allow them to take decisions on the merits of an application in a border procedure where the applicant is of a nationality with an EU-wide first instance recognition rate of 75% or lower (rather than 20% in the RAMM), potentially greatly increasing the number of persons subject to a border procedure.

The proposal includes no specific reasons for extending the scope of the asylum border procedure, nor does it explain how this measure will help address a crisis. It is likely that in the case of a genuine crisis there would be a significant increase in arrivals and that a higher percentage of those arriving would be refugees (because these are precisely the situations that trigger large-scale arrivals). Thus, although the border procedure in the Pact aims to assist with cases where there are low(er) protection rates, in fact the proposal advocates for an expansion of border procedures at times when protection rates are likely to be high.

In the proposal, the asylum border procedure can be extended to 20 weeks. Combined with the screening

preceding the referral to the border procedure, which can be extended to 10 days in times of crisis, the asylum procedure at the border could take almost 22 weeks. Not only is there no clarification as to how the prolongation will adequately tackle any crisis, there would also be considerable impact on the fundamental rights of the persons concerned. The border procedure for carrying out returns can be extended by eight weeks too, bringing it to up to 20 weeks. Cumulatively this makes nine months contained in border procedures for people arriving in a time of crisis.

In general, ECRE opposes mainstreaming border procedures as a core instrument of the EU's common asylum and return policies and is strongly against mandatory border procedures and the deliberate joining together of asylum and return procedures. This model inevitably leads to an increase in detention and to lower quality procedures, with a consequent increased risk of refoulement for individuals. The amended APR proposal links the border procedure to a refusal of entry, meaning individuals are likely to be detained, or subject to a restriction of movement. Thus, the Regulation could lead to large-scale detention, exacerbating humanitarian crises at the external borders, rather than resolving them.

It is unclear how the extension in scope and length of border procedures will either alleviate a crisis or assist the affected Member State. Rather, it appears more likely to significantly increase the operational and administrative burden for a Member State experiencing a crisis, as well as contributing to political challenges, such as protests from local populations. The Pact objective mostly likely to be served by the measure is the effort to reduce onward movement as more people will be contained at borders should there be an increase in arrivals of refugees, as in 2015.

ECRE urges the Commission and co-legislators to withdraw proposals for expanded use of border procedures, including in times of crisis. It recommends that, instead, Member States invest in regular asylum procedures, to make them fair and efficient, compliant with rights, and adequately resourced. A functioning asylum system should be ready to manage increased arrivals of people seeking protection.

Presumption of the risk of absconding

Under the Crisis Regulation, a fifth ground is added those leading to a presumption of the risk of absconding: "explicit expression of intent of non-compliance with return-related measures applied by virtue of this Directive." ECRE is already concerned about the expansion of grounds that allow a Member State to presume that an individual is an absconding risk. The presumption shifts the burden of proof to the individual who now has to demonstrate that they do not pose a risk in order to avoid detention which may be extremely difficult to discharge and undermines the individual assessment required under the proposal for the Recast Return Directive.

The ground introduced by the crisis legal regime means that individuals will be captured by the presumption even when they have good reasons for not complying with measures such as an existing entry ban, for example when they have fled their country of origin following persecution after circumstances in the country changed or after they returned prematurely.

ECRE strongly opposes automatic presumption of risk of absconding and the addition of grounds by the Regulation, all of which leads to systematic detention and reverses the presumption that detention should be a last resort.

SOLIDARITY

The proposal simplifies the procedure and timeframes for triggering the solidarity mechanism proposed for situations of migratory pressure in the RAMM. However, the measures appear inadequate, focusing on applicants in border procedures, whilst other elements of the proposal simultaneously increase the number of people in a border procedure. The proposal also reinforces the possibility for Member States to provide "solidarity" in the form of return sponsorship, exactly when refugee relocation needs are high.

ECRE does not support return sponsorship or relocation for return as solidarity options in either this proposal or the RAMM because of the impact on the fundamental rights of applicants, and doubts about workability. Fundamental rights concerns relate to the prolongation of the return process and related detention measures; the prolonged state of limbo for the applicant; and the challenges attached to accessing an effective remedy that all arise when a person with a return decision is to be transferred to another Member State.

Immediate protection

Finally, the granting of immediate protection included in the proposal is generally to be welcomed as it would

provide people in need of protection with swifter access to employment, education, recognition of qualifications, social security, social assistance and healthcare while they wait for a definite decision on their application for international protection. This immediate protection status should be as short as possible, however, with an examination of the application as soon as feasible, to ensure that those concerned are swiftly granted the appropriate status and can proceed with family reunification, where relevant. ECRE also believes that a regime providing prima facie recognition would be a better option than immediate protection.

The *force majeure* legal regime

ECRE advocates for the deletion of the force majeure legal regime. The regime allows extension of the registration time limit; extension of time limits set in Dublin procedures; and an extension of the timeframes for solidarity measures. Again, there is a risk that the proposed delays will restrict access to rights, as they create an additional hurdle for applicants needing to prove their status to access rights. Other concerns arise as follows.

First, the risk of abuse of the concept remains high. As force majeure is not defined, the Regulation creates a vague and open-ended justification for derogations from basic asylum standards. Given that many Member States already flagrantly violate EU law in this area, providing them with a legal basis to do so appears at best unwise. The risk is exacerbated because the Regulation provides that a Member State claiming it faces a situation of force majeure, can simply notify the Commission and then operate under the force majeure regime with the relevant derogations. Effectively, the Member State in question can unilaterally invoke force majeure.

Second, the force majeure section of the Regulation rests on a misuse of the concept of force majeure derived from political opportunism. The concept became prominent during the COVID-19 crisis, particularly in the very different context of contract law. Certain Member States have already attempted to claim force majeure in order to circumvent their obligations under EU asylum law but it has no place here, and the introduction to the Regulation is misguided in suggesting that the arrivals of people from Turkey in early 2020 (pre-COVID) as situation of force majeure. Although definitions of force majeure vary, a central element in all cases is that the event or situation allowing derogation is unforeseeable, whereas most situations of crisis in the area of asylum and migration are both predictable and predicted.

III. RECOMMENDATIONS

- » ECRE does not support the introduction of a separate legal instrument with far-reaching derogations in situations of (risk of) crisis or *force majeure*.
- » The Regulation should be significantly redrafted to develop a crisis prevention mechanism which alleviates pressure on countries in crisis and does not rely on delaying registration or expanding the scope and duration of border procedures.
- » The concept of crisis should be clearly defined and all references to “an imminent risk” of crisis should be removed.
- » The possibility of delaying registration should be deleted. If maintained, it should be amended for clarification purposes, as well as to ensure full respect for and access to rights to people awaiting registration.
- » Return sponsorship and relocation for return should be deleted from the solidarity provisions both here and in the RAMM as they raise fundamental rights concerns.
- » Immediate protection is welcome however establishing prima facie recognition would be a more suitable tool for crises.
- » The *force majeure* legal regime should be deleted as the provisions are based on a misuse of the legal concept of *force majeure* and create open-ended justifications for Member States seeking to evade their obligations under EU and international law.
- » At very least, situations of *force majeure* should be defined and provisions added so that an assessment is carried out by the Commission to confirm whether a Member State is facing such a situation, rather than allowing unilateral invocation of it.