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From:	Presidency
To:	Delegations
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Subject:	Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL addressing situations of instrumentalisation in the field of migration and asylum - Presidency compromise text

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For the purpose of discussions in the JHA Counsellors on 9 November 2022, delegations will find in the Annex a Presidency compromise text on the above-mentioned proposal.

Suggested modifications are indicated as follows:

- new text compared to the Commission's proposal is in **bold**;
- new text compared to the previous version is in **bold underlined**;
- deleted text compared to the previous version is in ~~strikethrough~~.

Proposal for a

**REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**  
**addressing situations of instrumentalisation in the field of ~~migration~~ and asylum**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

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

Having regard to the proposal from the European Commission,

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

Having regard to the opinion of the European Economic and Social Committee<sup>1</sup>,

Having regard to the opinion of the Committee of the Regions<sup>2</sup>,

Acting in accordance with the ordinary legislative procedure,

Whereas:

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<sup>1</sup> OJ C , , p. .

<sup>2</sup> OJ C , , p. .

(1) A situation of instrumentalisation of migrants may arise where a third country **or non-state actor** instigates irregular migratory flows into the Union by actively encouraging or facilitating the movement of third country nationals **or stateless persons** to the external borders, onto or from within its territory and then onwards to those external borders **or to the territory of one or more Member States**, where such actions are indicative of an intention of a third country **or a non-state** actor to destabilise the Union or a Member State, where the nature of such actions is liable to put at risk essential State functions, including its territorial integrity, the maintenance of law and order or the safeguard of its national security.

**(1a) Situations in which non state actors are involved in organised crime, in particular smuggling, should not be considered as instrumentalisation of migrants when there is no aim to destabilise the Union or a Member State. Furthermore, humanitarian aid operations should not be considered as instrumentalisation of migrants when there is no aim to destabilise the Union or a Member State.**

(2) This Regulation follows the invitation of the European Council to the Commission in its conclusions of 22 October 2021 to propose any necessary changes to the Union's legal framework and concrete measures to ensure an immediate and appropriate response to the hybrid threat in line with Union law and international obligations. Furthermore, it contributes to establishing a comprehensive and permanent framework to equip the Member States concerned with the necessary tools to respond effectively and swiftly **in accordance with the procedure laid down in Article 7** to an instrumentalisation situation in full respect of fundamental rights and international obligations.

(3) One of those tools in this Regulation is the introduction of an emergency ~~migration and asylum~~ **and return** ~~management~~ procedure providing the possibility for Member States to have recourse to legal tools to face future situations of instrumentalisation of migrants.

(4) This Regulation respects the fundamental rights and observes the principles recognised by the Charter of Fundamental Rights of the European Union, in particular Articles 1, 4, 7, 24, 18 and 19(2) and (2) thereof as well as the Geneva Convention of 28 July of 1951. In order to reflect, in particular, the primary consideration that must be given to the best interests of the child, the need to respect family life, and to ensure the protection of the health of the persons concerned, this Regulation provides for specific rules and safeguards applying in respect of unaccompanied minors and minors and their family members, and of applicants whose state of health requires a specific and adequate support. The rules and guarantees set out in Regulation (EU) XXX/XXX<sup>1</sup> [*Asylum Procedure Regulation*] should continue to apply in respect of persons subject to the asylum emergency ~~asylum~~ **asylum-management** procedure, except where this Regulation provides otherwise. The rules set out in Directive XXX/XXX [*Reception Conditions Directive recast*]<sup>2</sup>, including those concerning the detention of applicants for international protection, should continue to apply, from the moment an application for international protection is made, except where this Regulation provides otherwise.

**(4a) The rules and guarantees set out in Regulation (EU) XXX/XXX [*Screening Regulation*], Regulation (EU) XXX/XXX [*Eurodac Regulation*] and Regulation (EU) XXX/XXX [*AMMR Regulation*] should continue to apply irrespective of derogations under this Regulation. This Regulation is without prejudice to the rules applicable under the *Crisis Regulation*; both regulations may be applied in parallel if conditions for their activation are met.**

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<sup>1</sup> OJ C , , p. .

<sup>2</sup> OJ C , , p. .

- (5) **Many applications for international protection are made at the external border or in a transit zone of a Member State, often by persons apprehended in connection with unauthorised crossings of the external border by land, sea or air or who are disembarked following search and rescue operations. In case of instrumentalisation** to assist the Member State facing an instrumentalisation situation with the orderly management of the flows, under the emergency asylum ~~management~~ procedure, it should be possible for the Member State concerned to decide in relation to third-country nationals or stateless persons that have been apprehended or found in the proximity of the external border with the third country instrumentalising migrants after an unauthorised crossing **by land, sea or air, or who are disembarked following search and rescue operations**, or who have presented themselves at border crossing points, to register applications for international protection only at specific registration points designated for this purpose situated in the proximity of the border, and provide an effective possibility for lodging an application for international protection only at the specific points that have been designated for such purposes and which should be easily accessible. An effective and genuine access to the international protection procedure must be ensured in accordance with Article 18 of the Charter of Fundamental Rights of the European Union and the Geneva Convention of 28 July of 1951. To this end, the Member State concerned should ensure that sufficient registration points, which may include border crossing points, are designated and open for such purpose. Applicants should be duly informed about the locations where their application will be registered and can be lodged.

- (6) In a situation of instrumentalisation of migrants, it is essential to prevent the entry of those who do not fulfil entry conditions, while ensuring the protection of fundamental rights. In order to ensure that the Member State facing such a situation has the necessary flexibility and avoid that a hostile third country targets specific nationalities or specific categories of third-country nationals or stateless persons, it should be possible ~~under the emergency migration and asylum management procedure set out in this Regulation~~ for the Member State concerned to take a decision in the framework of the border procedure, as set out in Article 41 of Regulation (EU) XXX/XXX [*Asylum Procedure Regulation*] on admissibility and the merits of all applications for international protection ~~by third-country nationals or stateless persons apprehended or found in the proximity of the border with the third country after an unauthorised crossing or who presented themselves at border crossing points~~. The principles and guarantees set out in Regulation (EU) XXX/XXX [*Asylum Procedure Regulation*] have to be respected.
- (7) ~~Where the emergency asylum management procedure is applied, the best interests of the child and the safeguards for applicants with **special procedural and special reception needs, including** medical conditions should be a primary consideration for the competent authorities. For this reason, the Member State facing a situation of instrumentalisation should exclude **not apply or should cease to apply** from the emergency asylum management procedure cases where there are medical reasons for not applying the border procedure in line with Article 41(9)(c) of Regulation (EU) XXX/XXX [*Asylum Procedure Regulation*] or where the necessary support cannot be provided to applicants with **special procedural needs in line with Article 41(9) b) of Regulation (EU) XXX/XXX [*Asylum Procedure Regulation*]**. This should also be the case if the health problems become apparent during the examination of the application. The Member State concerned **should** also prioritise the examination of applications from persons whose claims are likely to be well founded, or **with special reception needs in accordance with [Reception Conditions Directive recast], especially** unaccompanied minors, and minors, and **then** family members **of minors of minors** from minors and their family members, as well as from unaccompanied minors. If during the screening under Regulation (EU) XXX/XXX~~

~~[Screening Regulation]<sup>1</sup> or the examination of the application it becomes apparent that an applicant is in need of special procedural guarantees and adequate support cannot be provided in the context of the procedure at the border, in accordance with Article 41(9)(b) of Regulation (EU) XXX/XXX [Asylum Procedure Regulation], the Member State concerned should not apply, or cease to apply, the emergency asylum management procedure at the border.~~

**When confronted with instrumentalisation, the Member State concerned need to divert resources to manage the third country nationals or stateless persons arriving at its borders or that are already present in its territory. As a result, the Member State concerned may need time to reorganise their resources and increase their capacity, including with the support of the EU agencies. Furthermore, the number of applicants under the border procedure may be higher than under normal circumstances, and therefore the Member State facing a situation of instrumentalisation may need more time to be able to take decisions without allowing entry into the territory.** ~~In a situation of instrumentalisation of migrants, **In such situation, it** should be possible for the Member State concerned to register applications for international protection within an extended period of ~~four~~ **three** weeks. In addition, it should be possible to examine applications for international protection at the border for a maximum duration of ~~sixteen~~ **twenty** weeks. If the decision on the application, including a decision on a possible appeal against a negative decision, which should not have automatic suspensive effect, is not taken within the ~~sixteen~~ **twenty** weeks, entry to the territory should be granted, unless the person is subject to the return procedure **as stated in Article 41a of Regulation (EU) XXX/XXX [Asylum Procedure Regulation]**. These procedural timelines are conceived to help the Member State concerned to deal with the situation of instrumentalisation of migrants. When confronted with such a situation, the Member State concerned need to divert resources to manage the third country nationals arriving at its borders or that are already present in its territory. As a result, in such situations, the Member State concerned may need time to reorganise their resources and increase their capacity, including with the support of the EU agencies.~~

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<sup>1</sup> OJ C , , p. .

Furthermore, the number of applicants under the border procedure will be higher than under normal circumstances, and therefore the Member State facing a situation of instrumentalisation may need more time to be able to take decisions without allowing entry into the territory. However, the Member State concerned should prioritise the registration of applications of **persons with special reception needs in accordance with [Reception Conditions Directive recast], especially unaccompanied minors and minors, and then family members of minors.**

- (8) In accordance with Article 8(3)(d) of Directive XXX/XXX [*Reception Conditions Directive recast*], an applicant may be detained in order to decide, in the context of a procedure, on the applicant's right to enter the territory. **That Directive also provides that Member States may detain an applicant only when it proves necessary and on the basis of an individual assessment of each case. Member States may detain an applicant, only if other less coercive alternative measures cannot be applied effectively**—Article 8(2) of that Directive also provides that Member States may detain an applicant only, if other less coercive alternative measures—like restrictions to freedom of movement under its Article 7—cannot be applied effectively. The rules and safeguards regarding detention set out in Directive XXX/XXX [*Reception Conditions Directive recast*], in particular those concerning unaccompanied minors, minors and their families should be respected. Alternatives to detention, such as restrictions in the freedom of movement in accordance with Article 7 of Directive XXX/XXX [*Reception Conditions Directive recast*], may be as effective as detention in a situation of instrumentalisation of migrants and should therefore be considered by the authorities, particularly for minors. In any case, if detention is applied and the guarantees and conditions for detention are not met or cannot be met at the border, the emergency asylum management procedure should not apply or should cease to apply, as foreseen in Article 41(9)(d) of Regulation (EU) XXX/XXX [*Asylum Procedure Regulation*].



- (9) ~~When confronted with instrumentalisation, the Member State concerned need to divert resources to manage the third country nationals or stateless persons arriving at its borders or that are already present in its territory. As a result, the Member State concerned may need time to reorganise their resources and increase their capacity, including with the support of the EU agencies. Furthermore, the number of applicants under the border procedure may be higher than under normal circumstances, and therefore the Member State facing a situation of instrumentalisation may need more time to be able to take decisions without allowing entry into the territory.~~ In a situation of instrumentalisation of migrants, ~~In such situation, it~~ should be possible for the Member State concerned to register applications for international protection within an extended period of four ~~three~~ weeks. In addition, it should be possible to examine applications for international protection at the border for a maximum duration of sixteen ~~twenty~~ weeks. If the decision on the application, including a decision on a possible appeal against a negative decision, which should not have automatic suspensive effect, is not taken within the sixteen ~~twenty~~ weeks, entry to the territory should be granted, unless the person is subject to the return procedure ~~as stated in Article 41a of Regulation (EU) XXX/XXX [Asylum Procedure Regulation]~~. These procedural timelines are conceived to help the Member State concerned to deal with the situation of instrumentalisation of migrants. When confronted with such a situation, the Member State concerned need to divert resources to manage the third country nationals arriving at its borders or that are already present in its territory. As a result, in such situations, the Member State concerned may need time to reorganise their resources and increase their capacity, including with the support of the EU agencies. Furthermore, the number of applicants under the border procedure will be higher than under normal circumstances, and therefore the Member State facing a situation of instrumentalisation may need more time to be able to take decisions without allowing entry into the territory. However, the Member State concerned should prioritise the registration of applications of ~~persons with special reception needs in accordance with [Reception Conditions Directive recast], especially unaccompanied minors and minors, and then family members of minors.~~

Where the emergency asylum ~~management~~ procedure is applied, the best interests of the child and the safeguards for applicants with **special procedural and special reception needs, including** medical conditions should be a primary consideration for the competent authorities. For this reason, the Member State facing a situation of instrumentalisation should ~~exclude~~ **not apply or should cease to apply** ~~from~~ the emergency asylum ~~management~~ procedure cases where there are medical reasons for not applying the border procedure in line with Article 41(9)(c) of Regulation (EU) XXX/XXX [*Asylum Procedure Regulation*] **or where the necessary support cannot be provided to applicants with special procedural needs in line with Article 41(9) b) of Regulation (EU) XXX/XXX [Asylum Procedure Regulation]**. This should also be the case if the health problems become apparent during the examination of the application. The Member State concerned **should** also prioritise the examination of applications from persons whose claims are likely to be well founded, or **with special reception needs in accordance with [Reception Conditions Directive recast], especially** unaccompanied minors, and minors, and **then** family members **of minors of minors** ~~from minors and their family members, as well as from unaccompanied minors~~. If during the screening under Regulation (EU) XXX/XXX [*Screening Regulation*]<sup>1</sup> or the examination of the application it becomes apparent that an applicant is in need of special procedural guarantees and adequate support cannot be provided in the context of the procedure at the border, in accordance with Article 41(9)(b) of Regulation (EU) XXX/XXX [*Asylum Procedure Regulation*], the Member State concerned should not apply, or cease to apply, the emergency asylum management procedure at the border.

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<sup>1</sup> OJ C , , p. .

- (10) Any violent acts at the border must be avoided at all costs, not only to protect the territorial integrity and security of the Member State facing a situation of instrumentalisation but also to ensure the security and safety of the third-country nationals or stateless persons, including families and children that are awaiting their opportunity to apply for asylum in the Union peacefully. ~~Where the Member State concerned is confronted at its external border with violent actions, including in the context of attempts by third-country nationals to force entry en masse and using disproportionate violent means, the Member State concerned should be able to take the necessary measures in accordance with their national law to preserve security, law and order, and ensure the effective application of this Regulation.~~ **Member State concerned may, in particular in a situation of instrumentalisation of migrants, where third-country nationals or stateless persons attempt to force entry en masse by using disproportionate violent means, take the necessary measures to preserve security, law and order and ensure the effective application of this Regulation.**
- (11) ~~Where a Member State is faced with a flow of third-country nationals or stateless persons at the border due to instrumentalisation,~~ **In a situation of instrumentalisation,** it might not be possible for the Member State in practice to ensure the material reception conditions normally required as the Member State's capacities might be overstretched. For this reason, in such situation ~~of instrumentalisation,~~ the Member State concerned should be able to set modalities for material reception conditions that differ from those provided for in Directive XXX/XXX [*Reception Conditions Directive recast*] in cases other than those referred to in Article 17(9) of that Directive **while covering their basic needs** ~~while providing third-country nationals and stateless persons with temporary shelter which should be adapted to seasonal weather conditions and covering their basic needs, in particular by providing food, water, clothing, adequate medical care, and assistance to vulnerable persons, in full respect of the right to human dignity. Without prejudice to the obligations set in that regard upon Member States by this Regulation,~~ Member States should also ensure access and allow for the provision of humanitarian assistance ~~by the humanitarian organisations in line with the existing needs of the persons concerned.~~ **Access of legal advisers is guaranteed in accordance with Article 8(4), 14(1) and 16(3) of Regulation (EU) XXX/XXX [*Asylum Procedure Regulation*]. The role of UNHCR as well as organisations working on its behalf is specifically described in Article 18 of Regulation (EU) XXX/XXX [*Asylum Procedure Regulation*].**

(12) In order to complement and ensure full coherence with the emergency asylum procedure at the external border, the competent authorities of the Member State facing a situation of instrumentalisation of migrants should be provided with the necessary flexibility to carry out return procedures **following the asylum procedure, in case the application has been rejected or in respect of whom the procedure came to an end without international protection being granted**. For this reason, in a situation of instrumentalisation, the Member State concerned should be allowed to derogate from the application of **Article 41a of Regulation (EU) XXX/XXX [~~amended~~ *Asylum Procedure Regulation*], Directive XXX/XXX [*the Return Directive recast*], and apply national law transposing Article 2 (2) a) and Article 4 (4) of Directive XXX/XXX [*the Return Directive recast*] instead. Article 4 (4) contains fundamental guarantees that shall be respected also in these cases.** ~~in relation to third country nationals and stateless persons whose application for international protection was rejected in the context of an emergency asylum procedure as set out in this Regulation.~~ **Where a subsequent application is made merely to delay or frustrate the return, it is possible for Member States to apply the rules set out in Articles 42 and 43 of Regulation (EU) XXX/XXX [*Asylum Procedure Regulation*].**

(13) When applying the derogation **in the area of return** to the application of Directive XXX/XXX [*Return Directive recast*], the Member State concerned should ensure full respect of the Charter of Fundamental Rights of the European Union and their international obligations. **With regard to third-country nationals to whom national law transposing Article 2(2)(a) of Directive XXX/XXX [*Return Directive recast*] is applied, Member States shall according to Article 4 (4) of Directive XXX/XXX [*Return Directive recast*] ensure the treatment and level of protection are no less favourable than as set out in Article 10(4) and (5) (limitations on use of coercive measures), Article 11(2)(a) (postponement of removal), Article 17(1)(b) and (d) (emergency health care and taking into account needs of vulnerable persons), and Articles 19 and 20 (detention conditions) and they shall respect the principle of non-refoulement.** This includes full respect of the principle of *non-refoulement* and taking due account of the best interests of the child, family life and the state of health of the third-country national concerned as otherwise set out for derogations in the Return Directive. The Member State also needs to ensure that the treatment and level of protection in relation to limitations on the use of coercive measures, postponement of removal, emergency health care and needs of vulnerable persons and detention conditions, are no less favourable than those set out in Directive XXX/XXX [*Return Directive recast*].

**(13a) The rules set out in this Regulation are without prejudice to the possibility for Member States to derogate from the application of Directive XXX/XXX [*Return Directive recast*] by virtue of Article 2(2)(a) of that Directive, in relation to third-country nationals and stateless persons who are apprehended or intercepted by the competent authorities in connection with the irregular crossing by land, sea or air of the external border of a Member State and following search and rescue operations, who have not applied for international protection and who have not subsequently obtained an authorisation or a right to stay in that Member State.**

- (14) Where a Member State applies one or more of the measures in this Regulation, the Member State should inform third-country nationals and stateless persons thereof. ~~In particular, the Member State facing a situation of instrumentalisation should inform third-country nationals or stateless persons~~ in a language which the third-country national or stateless person understands or is reasonably supposed to understand about the derogations applied, the points accessible for registering and lodging an application for international protection, in particular the location of the nearest points where their application can be registered and lodged, ~~the possibility to appeal the decision on the application~~, and the duration of the measures. Information panels may be used for this purpose. **Member States are obliged to address special procedural need of the applicants that may arise and provide information by an appropriate manner accordingly. Moreover Article 8 of the Regulation (EU) XXX/XXX [Asylum Procedure Regulation] should apply.**
- (14a) In a situation of instrumentalisation, it is of particular importance that all measures are taken to prevent secondary migration while at the same time providing full support to one or more Member State faced with the arrival of third-country nationals or stateless persons as a consequence of such situation. Furthermore this Regulation does 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.**
- (15) In case of instrumentalisation of migrants, the Member State facing a situation of instrumentalisation should have the possibility to request from other Member States support and solidarity measures that are most suited to its needs to manage the instrumentalisation situation. The support and solidarity measures could take all forms to address the situation of instrumentalisation, including capacity-building measures, **relocation**, support for return and support on the external dimension of the crisis and measures aimed at responding to instrumentalisation situation through cooperation with third countries or outreach to third countries whose nationals are being instrumentalised.

- (16) The other Member States which are not themselves facing a situation of instrumentalisation should be invited to contribute for the benefit of a Member State facing a situation of instrumentalisation by means of support and solidarity measures corresponding to the needs identified. The Commission should coordinate those support and solidarity measures as soon as possible after receiving the request from the Member State facing a situation of instrumentalisation.
- (17) A Member State facing a situation of instrumentalisation of migrants may request support from the EU Asylum Agency, the European Border and Coast Guard Agency or Europol in accordance with their mandates. **In particular and as** appropriate, the Asylum Agency may propose assistance on its own initiative in accordance with Article 16(1)(d) of Regulation XXX/XXX [*EUAA Regulation*], whereas the European Border and Coast Guard Agency may propose assistance in the field of return in accordance with Articles 48, 50, 52 and 53 of Regulation (EU) 2019/1896 in agreement with the Member State concerned and Europol may propose assistance in accordance with Article 6(1) of Regulation (EU) 2016/794.

(18) If the application of the relevant derogations set out in this Regulation is requested by the Member State concerned **on the basis of conclusive evidence demonstrating the existence of a situation of instrumentalisation**, and taking into account whether the European Council has acknowledged that the Union or one or more of its Member States are facing a situation of instrumentalisation of migrants, the Commission should, where appropriate, bring forward a proposal authorising a Member State to apply the derogatory rules provided for in this Regulation. **The Commission should also be able to make a proposal where it considers it appropriate on the basis of information provided by the requesting Member State. Moreover to ensure a high level of political scrutiny and support and expression of the Union's solidarity, it is necessary in both cases to take into account whether the European Council has acknowledged that the Union or one or more of its Member States are facing a situation of instrumentalisation of migrants.** To ensure a high level of political scrutiny and support and to reinforce the expression of the Union's solidarity towards the Member State facing an instrumentalisation of migrants **The instrumentalisation of migrants is liable to put at risk the essential functions of a Member State, including the maintenance of law and order or the safeguard of its national security.** Therefore, implementing powers should be conferred upon the Council **to adopt an Implementing Decision authorising a Member State to apply the derogations provided for by this Regulation. The Council should also be empowered to repeal, or prolong by up to 6 months, the derogations provided for in this Regulation on the basis of the Commission proposal depending on whether the circumstances justifying the introduction of the derogations persist or have come to an end.** **Prolongation decision may include amendment of the derogations applied** Therefore, the Implementing Decision authorising the Member States to apply derogatory rules should be adopted by the Council. **In exercising their powers and carrying out their responsibilities, the Commission and Council should be guided at all times by the principle of proportionality.**



- (19) The Council Implementing Decision should include an authorisation of the specific derogations that the Member State facing a situation of instrumentalisation of migrants could apply, and set the date from which they should apply, as well as their duration.
- (20) In order to support the Member State concerned in providing the necessary assistance to third country nationals **or stateless persons** falling under the scope of this Regulation, including by promoting voluntary return activities or by carrying out their humanitarian duties, UN agencies, **UNHCR in particular**, and other relevant partner organisations **entrusted by Member States**, in particular the International Organization for Migration and the International Federation of Red Cross and Red Crescent Societies, should have effective access to the border under the conditions set out in the Directive (EU) XXX/XXX [*Reception Conditions Directive recast*] and Regulation (EU) XXX/XXX [*Asylum Procedure Regulation*]. ~~High Commissioner for Refugees should be allowed access to applicants, including those at the border.~~ To this end, the Member State concerned should ~~work in close~~ **maintain** cooperation with UN agencies and relevant partner these organisations.
- (20a) As regards Cyprus, Council Regulation (EC) No 866/2004 of 29 April 2004 on a regime under Article 2 of Protocol 10 to the Act of Accession provides for specific rules that apply to the line between the areas of the Republic of Cyprus in which the Government of the Republic of Cyprus exercises effective control and those areas in which the Government of the Republic of Cyprus does not exercise effective control. Although the line does not constitute an external border, it follows that a situation where a third-country or non state actor encourages or facilitates the movement of third country nationals or stateless persons to cross the line should be considered as instrumentalisation.**

- (21) [In accordance with Articles 1 and 2 of Protocol No 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, and without prejudice to Article 4 of that Protocol, Ireland is not taking part in the adoption of this Regulation and is not bound by it or subject to its application.]

OR

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

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

HAVE ADOPTED THIS REGULATION:

## CHAPTER I

### General Provisions

#### *Article 1*

#### **Subject matter**

- 1.** This Regulation provides for specific rules **exceptionally** derogating from those set out in Regulation (EU) XXX/XXX [*Asylum Procedure Regulation*], Directive (EU) XXX/XXX [*Reception Conditions Directive recast*] and Directive (EU) XXX/XXX [*Return Directive recast*] that may be applied by a Member State in a situation of instrumentalisation of migrants **where necessary for responding to such a situation. It also provides for specific rules on support and solidarity measures that may be taken in such situation.**
  
- 2.** **Situation of instrumentalisation of migrants** ~~which~~ means a situation where a third country or non-state actor encourages or facilitates the movement of third-country nationals **or stateless persons** to the external borders as defined in Article 2(2) of Regulation (EU) 2016/399 [Schengen Borders Code] or to a Member State, with the aim of destabilising the Union or a Member State where such actions are liable to put at risk essential functions of a Member State including the maintenance of law and order or the safeguard of its national security as defined in [Article 2(27)] of the Schengen Borders Code ~~where necessary for responding to such a situation. It also provides for specific rules on support and solidarity measures that may be taken in such situation.~~

**This Regulation shall not affect the fundamental principles and guarantees established by the acts from which derogations are allowed pursuant to this Regulation.**

## CHAPTER II

### Emergency ~~migration and~~ asylum and return procedure in a situation of instrumentalisation of migrants

#### Article 2

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

1.—In a situation of instrumentalisation of migrants as referred to in Article 1, the Member State faced with the arrival of third-country nationals or stateless persons at its external border as a consequence of such situation may apply, in relation to third-country nationals or stateless persons who are apprehended or found in the proximity of the external border **as defined in Article 2(2) of Regulation (EU) 2016/399 [Schengen Borders Code]** ~~with the third-country instrumentalising migrants~~ in connection with an unauthorised crossing **by land, sea or air, or who are disembarked following search and rescue operations** or who have presented themselves at border crossing points **as result of instrumentalisation**, one or more of the following derogations, ~~in accordance with the procedure laid down in Article 6:~~

- a) by way of derogation from Article 27 of Regulation (EU) XXX/XXX [*Asylum Procedure Regulation*], register applications for international protection made within the period during which this point is applied no later than ~~four~~ **three** weeks after the application is made.

Where applying this derogation, the Member State concerned shall prioritise the registration of **those applications likely to be well founded and those of persons with special reception needs in accordance with [Reception Conditions Directive recast]** ~~unaccompanied minors, and minors and their family members of minors, and those with special reception needs as defined in [Reception Conditions Directive recast].~~ Member State concerned may also prioritise the registration of applications which are likely to be well founded.

- b) by way of derogation from Article 41(2)(a) and (b) and Article 41(5) of Regulation (EU) XXX/XXX [~~amended~~ *Asylum Procedure Regulation*]<sup>1</sup>, **and in accordance with Article 41(13) and (14) of Regulation (EU) XXX/XXX [*Asylum Procedure Regulation*] decide at the locations at the external border, in the proximity to the external ~~their~~ borders or transit zones or if a Member State cannot accommodate them in those locations in other designated locations within its territory on the admissibility ~~and, on the merits, or the determination of responsibility of Member State under [AMMR]~~ of all applications **made by any third country national or stateless person** registered within the period during which this point is applied.**

Where applying this derogation, the Member State concerned shall prioritise the examination of **those** applications for international protection ~~likely to be well-founded and those~~ lodged by **persons with special reception needs in accordance with [Reception Conditions Directive recast] unaccompanied minors, and minors and their family members of minors and by those with special reception needs as defined in [Reception Conditions Directive recast].** The Member State concerned may also prioritise the examination of **applications for international protection which are likely to be well-founded or manifestly unfounded.**

- c) by way of derogation from Article 41(11) of Regulation (EU) XXX/XXX [~~amended~~ *Asylum Procedure Regulation*], the maximum duration of the emergency asylum ~~management~~ procedure for the examination of applications registered within the period during which **the derogation in accordance with** this point is applied shall be ~~sixteen~~ **twenty weeks including appeal starting from the date of the registration of that application.** ~~Following that period, provided that the applicant is not subject to the return procedure in accordance with Article 4, the applicant shall be authorised to enter the Member State's territory for the completion of the procedure for international protection.~~

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<sup>1</sup> Refers to the text of the proposal as amended by the Commission in 2020.

- d) by way of derogation from Article 12(5) of Regulation (EU) XXX/XXX [~~amended Asylum Procedure Regulation~~] the substantive personal interview may be omitted also in case where the determining authority is able to take a positive decision on the basis of the evidence available with regard to the subsidiary protection status.

~~2. Where applying this Article, the principles and guarantees of Regulation (EU) XXX/XXX [Asylum Procedure Regulation] shall apply.~~

### Article 3

#### Material Reception Conditions

By way of derogation from Articles 16 and 17(1), (2) point (c) and paragraphs (6) to (8) of Directive XXX/XXX [*Reception Conditions Directive recast*], and ~~in accordance with the procedure laid down in Article 6, the Member State faced with the arrival of third country nationals or stateless persons at their external border as a consequence of a situation of instrumentalisation of migrants, the Member State may temporarily~~ **from the moment the application for international protection is made until registration and then for the maximum period as referred in Article 2(c) or from the moment the application for international protection is made until registration and then for the period as referred in Article 41(11) of Regulation (EU) XXX/XXX [~~amended Asylum Procedure Regulation~~] in case derogation under Article 2(c) is not applied** set other modalities for material reception conditions ~~different from those provided for in Articles 16 and 17 of that Directive in relation to applicants apprehended or found, as a result of instrumentalisation according to this Regulation, in the proximity of the external border with the third country instrumentalising migrants in connection with an unauthorised crossing or who have presented themselves at the border crossing points, and are subject to the measures in Article 2 of this Regulation, provided these.~~ Member States **shall** cover the applicants' basic needs, in particular food, water, clothing, adequate medical care, and temporary shelter adapted to the seasonal weather conditions, and in full respect of human dignity.

## Article 4

Emergency return ~~management~~ procedure in a situation of instrumentalisation of migrants

**The Member State concerned faced with the arrival of third-country nationals or stateless persons at its external border in a situation of instrumentalisation may decide not to apply Article 41a of Regulation (EU) XXX/XXX, Directive XXX/XXX [the Return Directive recast], and apply national law transposing Article 2 (2) a) and Article 4 (4) of Directive XXX/XXX [the Return Directive recast] instead, in respect of third-country nationals or stateless persons that are the subject of instrumentalisation, who applied for international protection and whose applications were subsequently rejected and who have no right to remain and are not allowed to remain.**

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

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

*Article 5*

**Support and solidarity measures**

1. Where a Member State is facing a situation of instrumentalisation of migrants, it may request support and solidarity measures from other Member States in order to manage that situation **and indicate the nature of the support and solidarity measures needed**. Support **from the other Member States** and solidarity contributions for the benefit of a Member State facing a situation of instrumentalisation of migrants **is voluntary and** may include the following types of contributions:
  - a) capacity-building measures in the field of asylum, reception and return;
  - b) operational support in the field of asylum, reception and return;
  - c) measures aimed at responding to instrumentalisation situation, including specific measures to support return, through cooperation with third countries or outreach to third countries whose nationals are being instrumentalised; or
  - d) any other measures, ~~including relocations~~, considered adequate to address the instrumentalisation situation and support the Member State concerned, **and relocations**.
2. The Member State facing a situation of instrumentalisation shall send a request to the Commission for support and solidarity contributions from other Member States specifying the solidarity measures requested.



3. Without prejudice to the solidarity provisions of **other instruments** Regulation (EU) XXX/XXX [*Crisis and force majeure Regulation*], the Commission, as soon as possible after receiving the request for support and solidarity measures as referred to in paragraph 2, shall invite other Member States to contribute by means of the support and solidarity measures referred to in paragraph 1 that correspond to the needs of Member State facing a situation of instrumentalisation. The Commission shall coordinate the support and solidarity measures referred to in this Article.
  
4. A Member State facing a situation of instrumentalisation of migrants may, **where applicable in accordance with the rules set out in regulations on respective agencies**, request support from the EU Asylum Agency, from the European Border and Coast Guard Agency, or from Europol in accordance with their mandates. ~~As appropriate, the EU Asylum Agency may propose assistance on its own initiative in accordance with Article 16(1)(d) of Regulation XXX/XXX [EUAA Regulation]. The European Border and Coast Guard Agency may propose assistance in the area of return in accordance with Articles 48, 50, 52 and 53 of Regulation (EU) 2019/1896 to the Member State concerned. Europol may propose assistance in the area of law enforcement cooperation in accordance with Article 6(1) of Regulation (EU) 2016/794.~~

## Article 6

### Specific provisions and guarantees

1. Where applying the derogations referred to in Articles 2, 3 and 4, the Member State concerned shall duly inform third-country nationals or stateless persons in a language which the third-country national or stateless person understands or is reasonably supposed to understand about the measures applied, the location of the registration points, including the border crossing points, accessible for registering and lodging an application for international protection, and the duration of the measures. **Information may be provided via information panels, this being without prejudice to Article 19(2) of Regulation (EU) XXX/XXX [Asylum Procedure Regulation].**
  - 1a. **The derogation in accordance with Article 2 point (a) is without prejudice to the deadlines set out in Article 10(1)(b) of [amended Regulation on EURODAC].**
  - 1b. **The derogations in accordance with Article 2 do not affect the process of determining the Member State responsible within the framework of [AMMR]. In case the process of determining the Member State responsible is longer than the maximum duration of the emergency asylum procedure, the process shall be completed in the territory of the determining Member State ~~concerned~~.**
2. The Member State facing a situation of instrumentalisation of migrants shall not apply Articles 2, 3 and 4 longer than what is strictly necessary to address the situation of instrumentalisation of migrants, and in any case, no longer than the period set out in the Council Implementing Decision referred to in paragraph 4 of Article 7.

## CHAPTER III

### Procedural rules

#### *Article 7*

#### Authorisation procedure

1. A Member State faced with the arrival of third-country nationals or stateless persons ~~at its external border~~ as a consequence of a situation of instrumentalisation of migrants, may request the authorisation to apply the derogations provided for in Articles 2, 3 and 4.
2. Where the Commission considers it appropriate, on the basis of ~~the information provided by the requesting Member State facing a situation of instrumentalisation of migrants~~, the Commission shall, without delay, make a proposal for a Council Implementing Decision referred to in paragraph 3.  
**2a. Without prejudice to paragraph 2, where the requesting Member State submits to the Commission conclusive evidence demonstrating the existence of the conditions referred to in Article 1(2), the Commission shall, on the basis of that evidence, without delay, make a proposal for an appropriate Council Implementing Decision referred to in paragraph 3.**
3. **As a matter of urgency**, the Council shall assess ~~this~~ **the** proposal ~~as a matter of urgency and adopt as a matter of urgency~~ an Implementing Decision authorising the Member State concerned to apply the specific derogations provided for in Articles 2, 3 and 4.
4. The Council Implementing Decision referred to in paragraph 3 shall **state the grounds on which it is based, and shall** set the date from which the rules laid down in Articles 2, 3 and 4 may be applied, as well as the time period for their application, which shall not exceed an initial period of six months **and the scope to whom the derogations apply.**

5. The Commission **and the Council** shall keep the situation of instrumentalisation of migrants under constant monitoring and review. Where the Commission considers it appropriate **on the basis of relevant information**, it may propose the repeal of the Council Implementing Decision referred to in paragraph 3 or the adoption of a new Council Implementing Decision authorising the prolongation **or amendment** of the application of the specific derogations referred to in Articles 2, 3 and 4 for a period, which shall not exceed **an additional period of six months**. **Where the requesting Member State submits conclusive evidence to the Commission demonstrating the continued existence of the conditions referred to in Article 1(2), the Commission shall, on the basis of such evidence, submit a proposal for a new Council Implementing Decision to prolong or amend the application of the specific derogations referred to in Articles 2, 3 and 4 for a period, which shall not exceed an additional period of six months.** The Member State concerned shall provide the Commission specific information needed for it to carry out this review and to make the proposal for repeal or prolongation as well as any other information the Commission may request. ~~The Council may also take the decisions referred to in this paragraph on its own initiative, on the basis of information from the Member State concerned.~~
6. Ongoing **individual** procedures in accordance with Articles 2 and 4 shall continue to be dealt with in accordance with the derogations provided for in this Regulation notwithstanding the ending of a derogation in accordance with this Article.
7. **In exercising their powers and carrying out their responsibilities pursuant to this Article, the Commission and Council shall be guided at all times by the principle of proportionality.**

*Article 8*

**Cooperation and assessment**

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

## CHAPTER IV

### Final provisions

#### *Article 9*

#### Entry into force

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

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

Done at Strasbourg,

*For the European Parliament*  
*The President*

*For the Council*  
*The President*

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