

CCBE position paper on the proposal addressing situations of instrumentalisation in the field of migration and asylum

16/02/2023

SUMMARY

In this paper, the CCBE sets out its position regarding the proposal for an Instrumentalisation Regulation published by the European Commission in December 2021. In the first part, the CCBE expresses its general concerns about derogations that this proposal would allow and is critical about such an approach. In the second part, the CCBE formulates suggestions for improvements of specific provisions with regard to the issue of access to justice and access to a lawyer which are matters within the particular field of activity of the CCBE. In this regard the CCBE finds the lack of any provisions in the proposal regarding legal assistance for people subject to the special procedures to be a striking omission.

General observations

On 14 December 2021, the European Commission presented a proposal for a Regulation¹ addressing situations of instrumentalisation in the field of migration and asylum (hereafter “Instrumentalisation Regulation”).²

Although the proposed Instrumentalisation Regulation in theory upholds general principles and human rights, as stated for example in Recitals 4 and 13 of the proposal, it concerns derogation when Member States claim that under extreme situations of instrumentalisation they are not able to fulfil their obligations under EU law.

Derogation should only be accepted for a short period of time and for clearly specified situations, as the existing asylum directives contain sufficient mechanisms for all but the most extreme situations. Looking at the wording of the proposal, the CCBE is concerned that the emergency situation will be invoked often to apply an emergency procedure, characterised by weakened safeguards.

The CCBE considers the proposal to be overly broad and therefore, it runs the risk of being used to dilute existing protections for migrants and asylum seekers. For example, phrases like the one used in Recital 12 - *“In order to complement and ensure full coherence with the emergency asylum management procedure at the external border, the competent authorities of the Member State facing*

¹ COM/2021/890 final, 14.12.2022, available [here](#).

² The “instrumentalisation of migrants” would be defined in a newly amended Schengen Borders Code, Article 1 par. 27, available [here](#).

a situation of instrumentalisation of migrants should be provided with the necessary flexibility to carry out return procedures" - are of significant concern.

The CCBE is worried that suspension of rights at EU borders could form an unwelcome precedence for suspension of rights beyond EU borders and within the EU.

The basic rights at stake regarding the proposed regulation, looking at the EU Charter, are the following: respect for human dignity (Article 1), protection against inhuman treatment including refoulement (Article 4), right to liberty and security (Article 6), right for private and family life (Article 7), right to asylum (Article 18), protection against expulsion (Article 19), non-discrimination (Article 21), rights of the child (Article 24), the right to an effective remedy (Article 47).

The suspension or curtailing of basic rights must be subject to effective judicial review as to necessity and proportionality, bearing in mind that the protection given by Article 4 of the Charter (and Article 3 ECHR and ECtHR case law) is absolute. Implementation of the proposed regulation must imply effective judicial review, otherwise arbitrary human rights abuses cannot be addressed

The proposed regulation is intrinsically contradictory by seeking to uphold human rights while allowing short procedures without suspensive effect.

Moreover, the CCBE is concerned that in practice, this tentative to control the effects of instrumentalisation will lead to either pushbacks or border detention or both.

The explanatory memorandum says: *"The extension (of the border procedure) will help the member State to apply the fiction of non-entry for a longer period of time (...)"*. The CCBE is stricken by the use of the term "fiction of non-entry". This demonstrates that artificial, legal solutions are proposed in order to impede migrants to be considered as within the EU territory and consequently, limit their access to rights stemming from the EU law.

Finally, it is problematic that the proposal is for a regulation, which is the hardest form of EU law. A regulation should not leave room for ambiguity regarding derogation of basic and absolute rights thereby undermining the rule of law.

The proposal adds to an already complex set of rules that compose the New Pact on Migration and Asylum. It is unclear whether this proposal is necessary. The Pact includes for example a proposal to ensure that Member States are able to address situations of crisis and force majeure in the field of asylum and migration management within the EU. A new layer of rules and derogations will make the system even more complex to the detriment of legal certainty.

Remarks regarding provisions of the proposal

Legal assistance

The CCBE notes the lack of provisions on the legal assistance and absence of lawyers or of the right to consult a lawyer in the proposal.

Trustworthy and transparent information for all the people trapped at the borders is essential to avoid panic and rumour-based actions. The proposed regulation supports a UNHCR presence and accepts that information is important as is identification of persons with special reception needs. However, border detention and danger of refoulement require access to qualified lawyers at the borders.

Recital 20 foresees that some organisations should have access to applicants, including those at the border. This recital should be amended to ensure that lawyers have access to third-country nationals falling under the scope of the regulation.

| Proposal | Amendment |
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| <p>(20) In order to support the Member State concerned in providing the necessary assistance to third country nationals falling under the scope of this Regulation, including by promoting voluntary return activities or by carrying out their humanitarian duties, UN agencies and other relevant partner organisations, in particular the International Organization for Migration and the International Federation of Red Cross and Red Crescent Societies, should have effective access to the border under the conditions set out in the Directive (EU) XXX/XXX [<i>Reception Conditions Directive recast</i>] and Regulation (EU) XXX/XXX [<i>Asylum Procedure Regulation</i>]. In accordance with Regulation (EU) XXX/XXX [<i>Asylum Procedure Regulation</i>], the United Nations High Commissioner for Refugees should be allowed access to applicants, including those at the border. To this end, the Member State concerned should work in close cooperation with UN agencies and relevant partner organisations.</p> | <p>(20) In order to support the Member State concerned in providing the necessary assistance to third country nationals falling under the scope of this Regulation, including by promoting voluntary return activities or by carrying out their humanitarian duties, UN agencies and other relevant partner organisations, in particular the International Organization for Migration and the International Federation of Red Cross and Red Crescent Societies, should have effective access to the border under the conditions set out in the Directive (EU) XXX/XXX [<i>Reception Conditions Directive recast</i>] and Regulation (EU) XXX/XXX [<i>Asylum Procedure Regulation</i>]. In accordance with Regulation (EU) XXX/XXX [<i>Asylum Procedure Regulation</i>], the United Nations High Commissioner for Refugees should be allowed access to applicants, including those at the border. To this end, the Member State concerned should work in close cooperation with UN agencies and relevant partner organisations. <i>Lawyers should also be allowed access to third country nationals falling under the scope of this Regulation.</i></p> |

Moreover, these provisions should be included among the articles of the proposal and not only in the recital. To ensure that rights of migrants and refugees are protected, organisations and lawyers should have access to third-country nationals falling under the scope of this Regulation.

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| <p>Amendment – New paragraph</p> <p>Article 6 par. 3</p> |
| <p><i>In order to support the Member State concerned in providing the necessary assistance to third country nationals falling under the scope of this Regulation, including by promoting voluntary return activities or by carrying out their humanitarian duties, UN agencies and other relevant partner organisations, in particular the International Organization for Migration and the International Federation of Red Cross and Red Crescent Societies, should have effective access to the border under the conditions set out in the Directive (EU) XXX/XXX [Reception Conditions Directive recast] and Regulation (EU) XXX/XXX [Asylum Procedure Regulation]. In accordance with Regulation (EU) XXX/XXX [Asylum Procedure Regulation], the United Nations High Commissioner for Refugees should be allowed access to applicants, including those at the border. To this end, the Member State concerned should work in close cooperation with UN agencies and relevant partner organisations. Lawyers should also be allowed access to third country nationals falling under the scope of this Regulation.</i></p> |

To ensure that migrants have access to proper information and understand the situation in which they find themselves, Member States should organise information points where migrants are provided with adequate information in the language that they understand. Organising such hubs would allow clear and orderly provision of information. Thus, Recital 14 and corresponding Article 6 should be amended as follows:

| Proposal | Amendment |
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| <p>Recital (14)</p> <p>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</p> | <p>Recital (14)</p> <p>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</p> |

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| <p>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.</p> | <p>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. <i>To this end, Member States should organise information provision points/hubs where lawyers' presence should be ensured to provide high quality legal information.</i></p> |
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| Proposal | Amendment |
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| <p>Article 6</p> <p>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.</p> | <p>Article 6</p> <p>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. <i>To this end, Member States should organise information provision points/hubs where lawyers' presence should be ensured to provide high quality legal information.</i></p> |

Scope of the proposal

In Article 2 par.1, the distance from the border where the foreigner was found that justifies the application of the analysed regulation should be precisely indicated in the legal act. Otherwise, there is a risk of an abuse of the Instrumentalisation Regulation, i.e. of its application in relation to foreigners found at a considerable distance from the border. For example, it could be specified further, in line

with the case law of the CJEU regarding the application of the Schengen Borders Code and Return Directive, that “there must be a direct temporal and spatial link with the crossing of the border. That situation therefore concerns third-country nationals who have been apprehended or intercepted by the competent authorities at the very time of the irregular crossing of the border or near that border after it has been so crossed.”³

Moreover, the proposal allows Member States to restrict the places where it is possible to register applications for international protection (Recital 5). Like in the Article 2 par.1, it should be better specified what is considered as “proximity”. In addition, the CCBE considers that allowing countries to restrict the registration of application to only specific points in a situation of instrumentalisation of migrants may increase the difficulty to apply for asylum and may even lead to people being unable to ask for international protection.

The CCBE notes that Article 7 par. 5 of the proposal sets the limit for the prolongation of the application of derogations (months). However, there is no provision saying how many times the prolongation can be enacted through a new Council Implementing Decision. Therefore, there is a serious risk that the derogations could be applied for periods as long as years which would deny the exceptional character of the measures.

| Proposal | Amendment |
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| <p>Article 7 par.5</p> <p>The Commission shall keep the situation of instrumentalisation of migrants under constant monitoring and review. Where the Commission considers it appropriate, it may propose the repeal of the Council Implementing Decision referred to in paragraph 3 or the adoption of a new Council Implementing Decision authorising the prolongation of the application of the specific derogations referred to in Articles 2, 3 and 4 for a period, which shall not exceed six months. The Member State concerned shall provide the Commission specific information needed for it to carry out this review and to make the proposal for repeal or prolongation as well as any other information the Commission may request.</p> | <p>Article 7 par.5</p> <p>The Commission shall keep the situation of instrumentalisation of migrants under constant monitoring and review. Where the Commission considers it appropriate, it may propose the repeal of the Council Implementing Decision referred to in paragraph 3 or the adoption of a new Council Implementing Decision authorising the prolongation of the application of the specific derogations referred to in Articles 2, 3 and 4 for a period, which shall not exceed six months. <i>The application of the specific derogations can be prolonged only once.</i> 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.</p> |

³ CJEU, Case C-47/15, Affum, 07.06.2016, par.72, available [here](#).

Other aspects

- The CCBE is concerned that lodging an appeal does not suspend the enforcement of the decision. Bearing in mind the deadline for issuing decisions by the asylum authorities being shortened to a minimum and the significant inflow of cases to be considered, the lack of the suspension of the execution of the decision of the first instance authority raises the risk of violation of fundamental human rights, including the return of a foreigner to a country where his basic human rights will be violated.
- One may also ask whether people who are victims of instrumentalisation by a third country does not itself constitute a presumption of inhuman treatment and, therefore, a basis for the person to claim to be allowed to enter the EU country.
- The CCBE is worried about the extension of the border procedure which presents risks in terms of safeguards for migrants' rights.
- The CCBE is worried that this is another proposal that introduces grounds that lead to migrants being deprived of liberty.

Regarding the position of the Council

- The CCBE is worried about reports that the Council, in its position⁴, wants to broaden the definition of a situation of instrumentalisation proposed by the Commission to include non-state actors ("A situation of instrumentalisation of migrants may arise where a third country **or non-state actor** instigates irregular migratory flows into the Union (...)"). The CCBE considers that there is a risk that such an amendment would significantly broaden the definition of situations that fall within the proposal. Some states could for example invoke cases of NGOs saving lives at sea as cases of instrumentalisation.

⁴ Council Presidency, Progress report, 07.12.2022, available [here](#).