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From: Presidency

To: JHA Counsellors (Asylum)

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Subject: Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL addressing situations of crisis, instrumentalisation and *force majeure* in the field of migration and asylum

- Presidency compromise text

For the purpose of discussions in the JHA Counsellors (Asylum) on 28 June 2023, delegations will find in the Annex a Presidency compromise text on the above-mentioned proposal.

As compared to the previous Presidency text, changes have been made to the articles 7, 8 and 9 and are marked in **bold**.

2020/0277 (COD)

Proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

addressing situations of crisis, instrumentalisation and *force majeure* in the field of migration and asylum

(Text with EEA relevance)

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)(c), (d) and (e) 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 Committee¹,

Having regard to the opinion of the Committee of the Regions²,

Acting in accordance with the ordinary legislative procedure,

Whereas:

¹ OJ C , , p. .

² OJ C , , p. .

HAVE ADOPTED THIS REGULATION:

CHAPTER I

GENERAL PROVISIONS

Article 1

Subject matter

1. This Regulation addresses situations of crisis, instrumentalisation and *force majeure* in the field of migration and asylum within the Union and provides for specific rules derogating from those set out in Regulations (EU) XXX/XXX [*Asylum and Migration Management*] and (EU) XXX/XXX [*Asylum Procedures Regulation*], and in Directives XXX [*recast Return Directive*] and XXX/XXX [*Reception Conditions Directive recast*].

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

2. For the purposes of this Regulation, a situation of crisis is to be understood:
 - (a) 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 and can have serious consequences for the functioning the Common European Asylum System or the Common Framework as set out in Regulation (EU) XXX/XXX [*Asylum and Migration Management*] (hereinafter "crisis"), or
 - (b) an imminent risk of such a situation.

3. For the purposes of this Regulation, a situation of instrumentalisation of migrants is to be understood as a situation where a third country or non-state actor encourages or facilitates the movement of third country nationals to the external borders 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; (hereinafter “instrumentalisation”)

Member States may apply derogations provided for in a Council Implementing Decision referred to in Article 9(5) of this Regulation in a a situation of instrumentalisation only in respect of third-country nationals or stateless persons who are subject to instrumentalisation and who are either apprehended or found in the proximity of the external border, meaning the Member State’s land borders, including river and lake borders, sea borders and its airports, river ports, sea ports and lake ports, provided that they are not internal borders, 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.

CHAPTER II

DEROGATIONS APPLICABLE IN A SITUATION OF CRISIS, INSTRUMENTALISATION OR *FORCE MAJEURE*

Article 2

Registration of applications for international protection in a situation of crisis, instrumentalisation or force majeure

1. By way of derogation from Article 27 of Regulation (EU) XXX/XXX [*Asylum Procedures Regulation*], applications shall be registered no later than four weeks after they are made in a situation of crisis or *force majeure* and no later than three weeks after they are made in a situation of instrumentalization.
2. Where applying paragraph 1 in a situation of instrumentalisation, the Member State concerned shall prioritise the registration of those applications [...] of persons with special reception needs as defined in [*Reception Conditions Directive recast*] [...] and [...] family members of minors. Member State concerned may also prioritise the registration of applications which are likely to be well founded. Member States concerned may prioritise such applications also in situations of crisis or *force majeure*.

Article 3

Measures applicable to the asylum border procedure in a situation of a situation of crisis, instrumentalisation or force majeure

1. In a situation of crisis or *force majeure*, by way of derogation from Article 41(b)(1) of Regulation (EU) XXX/XXX [*Asylum Procedures Regulation*], Member States may not be required to examine in a border procedure applications made by applicants referred to in Article 40(1)(i) of that Regulation.

2. In a situation of crisis or *force majeure*, by way of derogation from Article 41(2)(b) of Regulation (EU) XXX/XXX [*Asylum Procedures Regulation*], Member States may in a border procedure take decisions on the merits of an application in cases where the applicant is of a nationality, or, in the case of stateless persons, a former habitual resident of a third country, for which the proportion of decisions granting international protection by the determining authority is, according to the latest available yearly Union-wide average Eurostat data, 75% or lower, in addition to the cases referred to in Article 40(1) of Regulation (EU) XXX/XXX [*Asylum Procedures Regulation*];
3. In a situation of instrumentalisation, by way of derogation from [Article 41(2)(a) and (b), Article 41(5) and Article 41(9)(a) of Regulation (EU) XXX/XXX [*Asylum Procedure Regulation*], and in accordance with Article 41(13) and (14) of Regulation (EU) XXX/XXX [*Asylum Procedure Regulation*]] Member States may decide at the locations at the external border, in the proximity to the external [...] border[...] or transit zones or if the Member State concerned cannot accommodate them in those locations in other designated locations within its territory on the admissibility and on the merits of all applications made by any third country national or stateless person registered within the period during which this point is applied.
4. Where applying paragraphs 2 or 3, the Member State concerned shall prioritise the examination of those applications for international protection [...] lodged by persons with special procedural or special reception needs as defined in [*Reception Conditions Directive recast* and in *Asylum Procedure Regulation*] [...] and [...] family members of minors]. The Member State concerned may also prioritise the examination of applications for international protection which are likely to be well-founded or manifestly unfounded.

5. In a situation of crisis, instrumentalisation or *force majeure*, by way of derogation from Article 41c(2) of Regulation (EU) XXX/XXX [*Asylum Procedures Regulation*], the duration of the border procedure shall last no more than twenty weeks including appeal starting from the date of the registration of that application. [...] Following this period, the applicant shall be authorised to enter the Member State's territory for the completion of the procedure for international protection
6. In a situation of *force majeure* or instrumentalisation, by way of derogation from [Article 12(5) of Regulation (EU) XXX/XXX [*Asylum Procedure Regulation*]] the [...] 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.

Article 4

Extension of time limits set out for take charge requests, take back notifications and transfers in a situation of a situation of crisis or force majeure

1. In a situation of crisis or *force majeure* by way of derogating from Articles 29,30,31 and 35 of Regulation (EU) XXX/XXX [*Asylum and Migration Management*] Member States shall
 - (a) submit a take charge request as referred to in Article 29 within four months of the date on which the application was registered;
 - (b) reply to a take charge request as referred to in Article 30 within two months of receipt of the request;

- (c) 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;
 - (d) carry out a transfer as referred to in Article 35 within one year of the acceptance 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.
2. Where the Member State referred to in paragraph 1 does not comply with the time limits set out in paragraph 1, points (a), (b) and (d), 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.
 3. Where, because of the persistence of the situation of crisis or of *force majeure* or for any other reason, the transfer does not take place within one year of the acceptance 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, by way of derogation from Article 35 of Regulation (EU) XXX/XXX [*Asylum and Migration Management*], the Member State responsible shall be relieved of its obligations to take charge of or to take back the person concerned and responsibility shall be transferred to the requesting or notifying Member State.
 4. In a situation of crisis, by way of derogating from Articles XXX of Regulation (EU) XXX/XXX [*Asylum and Migration Management*],

[placeholder for a derogation from responsibility of the country of first entry and/or a possibility to suspend transfers to the responsible Member State]

Article 5

*Material reception conditions
in a situation of a situation of crisis, instrumentalisation or force majeure*

1. In a situation of crisis, instrumentalisation or *force majeure*, 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*]], [...], 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 [*Asylum Procedure Regulation*]] in case derogation under Article 2(c) is not applied set other modalities for material reception conditions [...] in relation to applicants apprehended or found as a result of instrumentalisation according to this Regulation [...] or who have presented themselves at border crossing points. 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. The derogation from [Article 17(2)(c) of Directive XXX/XXX [*Reception Conditions Directive recast*]] is without prejudice to the access of legal advisers in accordance with [Articles 8(4), 14(1) and 16(3) of Regulation (EU) XXX/XXX [*Asylum Procedure Regulation*]] and the access of UNHCR in accordance with Article 18 of Regulation (EU) XXX/XXX [*Asylum Procedure Regulation*]].

Article 6

Measures applicable to the return border procedure in a situation of crisis or instrumentalisation

1. In a situation of crisis or instrumentalisation,
 - (a) By way of derogation from Article 41a(2) of Regulation (EU) XXX/XXX [*Asylum Procedures Regulation*], the maximum period during which third-country nationals or stateless persons shall be kept at the locations referred to in that Article may be prolonged by an additional period of maximum eight weeks;
 - (b) By way of derogation from Article 41a(7) of Regulation (EU) XXX/XXX [*Asylum Procedures Regulation*], the period of detention set in that Article shall not exceed the period referred to in point (a);
 - (c) In addition to the cases provided for by Article 6(2) of Directive XXX [*recast Return Directive*], Member States shall establish that a risk of absconding is presumed in an individual case, unless proven otherwise, when the criterion referred to in Article 6(1), point (f) of Directive XXX [*recast Return Directive*] is fulfilled or when the applicant, third-country national or stateless person concerned is manifestly and persistently not fulfilling the obligation to cooperate established by Article 7 of that Directive.
2. Paragraph 1 shall also apply to applicants, third-country nationals and stateless persons subject to the procedure referred to in Article 41 of Regulation (EU) XXX/XXX [*Asylum Procedures Regulation*] whose application has been rejected before the adoption by the Commission of a decision issued in accordance with Article 3 of this Regulation, and who have no right to remain and are not allowed to remain after the adoption of that decision.

CHAPTER III

SOLIDARITY MEASURES APPLICABLE IN A SITUATION OF CRISIS OR INSTRUMENTALISATION

Article 7

Solidarity and support measures in a situation of crisis or instrumentalisation

1. Where a Member State is facing a situation of crisis or instrumentalisation, it may request support and solidarity measures from other Member States in order to manage that situation. The Member State facing that situation may request the following types of contributions:
 - a) relocations, to be conducted following the procedures set out in Articles 57 and 58 of Regulation (EU) XXX/XXX [*Asylum and Migration Management*],
 - (i) of applicants for international protection;
 - (ii) where bilaterally agreed by the contributing and benefitting Member State concerned, of beneficiaries of international protection who have been granted international protection less than three years prior to the adoption of the Council implementing act establishing the Solidarity Pool, or for the purpose of return of illegally staying third-country nationals or stateless persons;
 - b) responsibility offsets, as referred to in Article 44h of Regulation (EU) XXX/XXX [*Asylum and Migration Management*] and following the procedure set out in Article 58a thereof;

- c) **financial contributions aiming at projects that are relevant to address the situation of crisis or instrumentalisation in the Member State concerned or in relevant third countries, in full respect of human rights, to be provided by other Member States following the rules set out in Article 44(i) of Regulation (EU) XXX/XXX [*Asylum and Migration Management*];**
 - d) **alternative solidarity measures as referred to in Article 44a(2)(c) of Regulation (EU) XXX/XXX [*Asylum and Migration Management*], specifically needed to address the crisis or the instrumentalisation situation and following the rules set out in Article 44j(2) and (3) of Regulation (EU) XXX/XXX [*Asylum and Migration Management*]; such measures shall be counted as financial solidarity, and their concrete value shall be established based on objective criteria;**
 - e) **measures aimed at responding to the situation of crisis or instrumentalisation, including specific measures to support return, through cooperation with third countries or outreach to the relevant third countries;**
 - f) **any other measures considered adequate to address the situation of crisis or instrumentalisation and support the Member State concerned.**
2. **The Member State facing a situation of crisis or instrumentalisation shall send a reasoned request to the Commission specifying the type and level of solidarity measures needed.**

The Member State facing that situation may submit this reasoned request together with the request referred to in Article 9(1).

- 3. Following the submission of the reasoned request referred to in the first subparagraph of paragraph 2, the Commission, in close cooperation with the requesting Member State concerned and relevant Union agencies, shall expeditiously assess the situation and the type and level of the solidarity measures needed and, in consultation with the requesting Member State, prepare, where appropriate, a Solidarity Response Plan indicating the type and level of the solidarity and support measures needed.**
- 4. Where it is established in the Council implementing decision referred to in Article 9(5) that the requesting Member State is facing a situation of crisis or instrumentalisation, the following rules shall apply:**
- (i) Where the Solidarity Pool under Regulation (EU) XXX/XXX [*Asylum and Migration Management*] contains unallocated solidarity pledges or solidarity pledges that have not been implemented yet and are available, the Member State facing a situation of crisis or instrumentalisation shall make use of the Solidarity Pool. Where as a result of the requesting Member State making use of those pledges, the solidarity needs of other Member States that are benefitting Member States pursuant to Articles 44c or 44d of the Regulation (EU) XXX/XXX [*Asylum and Migration Management*] cannot be addressed, the High level Migration Forum shall be reconvened as matter of urgency, following the procedure set out in Article 44g of the Regulation (EU) XXX/XXX [*Asylum and Migration Management*].**
 - (ii) Where the Solidarity Pool does not contain enough solidarity pledges to cover the needs identified in the Solidarity Response Plan referred to in paragraph 2, the Member States facing a situation of crisis or instrumentalisation shall make use of contributions contained in the Council implementing decision as referred to in Article 9(5)(d).**

- (iii) Where the relocation pledges or responsibility offsets are below the relocation needs established in the Solidarity Response Plan included in the Council Implementing Decision, the contributing Member States shall take responsibility for applications for international protection for which the Member State facing a situation of crisis or instrumentalisation has been determined as responsible up to the relocation needs identified in the Solidarity Response Plan established in the Council Implementing Decision. Article 44h(5) to (7) of Regulation (EU) XXX/XXX [*Asylum and Migration Management*] shall apply *mutatis mutandis*.

CHAPTER IV

PROCEDURAL RULES AND FINAL PROVISIONS

Article 8

Notification procedure

1. Where a Member State is facing a situation of **crisis**, *force majeure* or **instrumentalisation** which renders it impossible to comply with **the time limits in Article 27** of Regulation (EU) XXX/XXX [*Asylum and Migration Management*], that Member State shall notify the Commission that it **is applying the derogation provided for in Article 2**.
2. **The derogation provided for in Article 2 may only be applied pursuant to paragraph 1 of this Article for as long as the situation of crisis, *force majeure*, or instrumentalisation exists and in any event no longer than two weeks. Where such situation no longer exists the** Member State concerned shall, as soon as possible, notify the Commission of the termination of the situation. After such notification, the derogations shall no longer be applied.

Article 9

Authorisation procedure and adoption of implementing acts [...]

1. A Member State [...] facing a situation of crisis, *force majeure* or instrumentalisation [...], may, given those exceptional circumstances, request the authorisation to apply the relevant derogations provided for in Articles 2 to 6.
2. [...] Where the requesting Member State submits to the Commission conclusive evidence demonstrating the existence of the conditions referred to in Article 1(2) or Article 1(3) **or of a situation of *force majeure***, the Commission shall, on the basis of that evidence, without delay, make a proposal for an appropriate Council Implementing Decision referred to in paragraph 5 including the relevant derogations required for the specific situation.
3. **The Commission proposal referred to in paragraph 2 shall include:**
 - (a) **a description of the situation faced by the Member State concerned and whether it is a situation of crisis, instrumentalisation or force majeure;**
 - (b) **where relevant, the relevant derogations required for the specific situation that the Member State concerned should be authorised to apply;**
 - (c) **where relevant, the Solidarity Response Plan and the relevant solidarity measures and their level required for the specific situation while ensuring the respect of the full discretion of Member State in choosing between the types of solidarity measures.**

When setting up the solidarity needs of the Member State facing a situation of crisis or instrumentalisation, the Commission shall take into account whether the Member State concerned is already a benefitting Member State pursuant to Articles 44c and 44d of Regulation (EU) XXX/XXX [*Asylum and Migration Management*] and the level of unallocated pledges or solidarity pledges not yet implemented and available.

Where the Solidarity Pool does not contain enough solidarity pledges to cover the needs identified in the Solidarity Response Plan referred to in Article 7(2), additional needs shall be included in the proposal.

4. The Commission may also make such a proposal where it considers it appropriate on the basis of [...]information provided by the requesting Member State and any other information available to it.
5. As a matter of urgency, the Council shall assess [...]the proposal [...]and depending on the outcome of such assessment adopt an Implementing Decision authorising the Member State concerned to apply the specific derogations provided for in Articles 2 to 6 **and allowing the Member State to benefit from the specific solidarity measures provided for in Article 7.**

The Council Implementing Decision shall:

- (a) **establish the existence of a situation of crisis, instrumentalisation or *force majeure* as appropriate;**
- (b) **identify the Member State or Member States affected by the situation referred to in point (a) of this paragraph and benefitting from the measures set out in the Decision;**
- (c) **where relevant, the specific derogations provided for in Articles 2 to 6 that the Member State concerned is authorised to apply;**
- (d) **where relevant, the Solidarity Response Plan, including the specific solidarity measures provided for in Article 7 required to address the situation and their levels, as well as the specific contributions by each Member State not subject to the specific situation referred to in point (b) of this subparagraph pledged in accordance with the mandatory fair share set out in Article 44k of the Regulation (EU) XXX/XXX [*Asylum and Migration Management*].**

In implementing letter d, contributing Member States shall have full discretion in choosing between the types of solidarity measures or a combination of them. However, only those listed in Article 7) 1 a) b) c) d) shall count towards the mandatory fair share. Member States pledging alternative solidarity measures shall indicate their financial value based on objective criteria.

6. The Council Implementing Decision referred to in paragraph 5 shall state the grounds on which it is based, and shall set the date from which the rules laid down in Articles 2 to 7 may be applied, as well as the time period for their application, which shall not exceed an initial period of six months.

In case of instrumentalisation the Decision shall specify the third-country nationals or stateless persons subject to instrumentalisation.

7. The Commission and the Council shall keep the situation of crisis, *force majeure* or instrumentalisation [...] 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 4 or the adoption of a new Council Implementing Decision authorising the amendment or prolongation [...] of the specific derogations referred to in Articles 2 to 7 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) or (3) **or** *force majeure*, the Commission shall, on the basis of such evidence, submit a proposal for a new Council Implementing Decision to amend or prolong the specific derogations referred to in Articles 2 to 7 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.

8. Member States shall continue for the the maximum period as referred to in Article 5 to apply the procedural derogations set out in the Council implementing decision referred to in paragraph 4 in respect of those applicants whose applications for international protection have been registered within the period during which those derogations may be applied until a final decision is taken on their application or until the third-country nationals or stateless persons concerned are returned in accordance with Article 5.
9. In exercising their powers and carrying out their responsibilities pursuant to this Article, the Commission and the Council shall ensure at all times that the principle of proportionality is respected.

Article 10

Specific provisions and guarantees

1. In a situation of instrumentalisation, where applying the derogations referred to in Articles 2 to 7, 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 [articles 8 and 19(2) of Regulation (EU) XXX/XXX [*Asylum Procedure Regulation*]].
2. The extension of the time limit for registration of applications for international protection in accordance with Article 2 is without prejudice to [the obligations to comply with the deadlines set out in Article 10(1)(b) of [*Regulation on EURODAC*]].

3. The derogations in accordance with Article 2 do not affect the process of determining the Member State responsible within the framework of [*Asylum and Migration Management*]. 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.
4. The Member State facing a situation of instrumentalisation [...] shall not apply Articles 2 to 7 longer than what is strictly necessary to address the situation of instrumentalisation [...], and in any case, no longer than the period set out in the Council Implementing Decision referred to in 5.

Article 11

Cooperation and assessment

1. The Commission, relevant European Union institutions and agencies and the Member State facing a situation of crisis or instrumentalisation [...] 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 crisis or instrumentalisation [...] shall maintain [...] close cooperation with the United Nations High Commissioner for Refugees and any other [...] organisations entrusted by the Member State [...] with tasks [...] in accordance with this Chapter and [...] Regulation (EU) XXX/XXX [*Asylum Procedure Regulation*] and Directive XXX/XXX [*Reception Conditions Directive recast*].

Article 12

Entry into force

This Regulation shall enter into force on the twentieth 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 Brussels,

For the European Parliament
The President

For the Council
The President
