



**RSA Comments on the Commission proposal for a
Regulation addressing situations of crisis and *force
majeure* in the field of migration and asylum**

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General Comment

The European Commission tabled on 23 September 2020 a proposal for a Regulation addressing situations of crisis and *force majeure* in the field of migration and asylum,¹ as part of the package of legislative proposals of the New Pact on Migration and Asylum.² Under the proposal, Member States may derogate from a series of obligations laid down in the *asylum acquis*. The proposal appears to incorporate elements of an initiative tabled by the governments of Greece, Cyprus and Bulgaria in June 2020 for the inclusion of an “emergency clause” in the Pact on Migration and Asylum.³

Read in the light of the full package of legislative proposals, the proposal introduces different categories of circumstances permitting derogations from EU law rules, without detailing how the categories relate to one another:

- a. **“Disproportionate number”** of third-country nationals or stateless persons who apply for asylum simultaneously, which makes it difficult in practice for a Member State to comply with a deadline;⁴
- b. **“Migratory pressure”** as a large number of arrivals of third-country nationals or stateless persons, or a risk of such arrivals, as a result of the geographical location of a Member States and the specific developments in third countries, which places a burden even on well-prepared asylum and reception systems and requires immediate attention;⁵
- c. **“Crisis”** as an exceptional situation of mass influx of third-country nationals or stateless persons of such a nature and scale as to render a Member State’s asylum, reception or return system non-functional, or to have serious consequences for the functioning of the Common European Asylum System;⁶
- d. **“Force majeure”** as abnormal and unforeseeable circumstances outside the Member State’s control, the consequences of which could not have been avoided in spite of the exercise of all due care.⁷

Beyond **significant ambiguity in the overlapping derogation regimes**, RSA highlights **serious risks of abusive interpretation of the proposal to support policies consisting of infringements of fundamental rights and the asylum acquis**. The incorrect description by the Commission of the “political crisis” at the Greek-Turkish border in March 2020 as *force majeure* is illustrative of such risks. These events were invoked by Greece to suspend access to the asylum procedure by way of emergency decree contrary to

¹ European Commission, *Proposal for a Regulation of the European Parliament and of the Council addressing situations of crisis and force majeure in the field of migration and asylum*, COM(2020) 613, 23 September 2020.

² European Commission, *New Pact on Migration and Asylum*, COM(2020) 609, 23 September 2020.

³ Ministry of Migration and Asylum, ‘Πρωτοβουλία για συμπερίληψη ρήτρας έκτακτης ανάγκης στο Ευρωπαϊκό Σύμφωνο Μετανάστευσης και Ασύλου’, 5 June 2020, available at: <https://bit.ly/2Se5XuE>.

⁴ Articles 27(3), 28(3) and 34(3)(a) Asylum Procedures Regulation proposal.

⁵ Article 2(w) Asylum and Migration Management Regulation proposal.

⁶ Article 2(2)(a) Crisis Regulation proposal.

⁷ Recital 7 Crisis Regulation proposal.

international and EU law,⁸ even though circumstances were neither unforeseeable nor impossible to avoid with the exercise of due diligence.

With the exception of Article 10 on “immediate protection”, Refugee Support Aegean (RSA) recommends rejection of the proposal in its entirety, as it is contrary to the requirements for the use of Regulations, contrary to the EU asylum *acquis* and liable to exacerbate mass confinement of people at the external borders of the EU.

Analysis of key provisions

1. Delaying registration of asylum applications

Articles 6 and 7 of the proposal permit derogations from time limits set out in the Asylum Procedures Directive for registration of asylum applications for a maximum of four weeks in situations of crisis or *force majeure*.⁹ Bearing in mind that both the Directive in force and its proposed reform foresee a strict extension of the registration deadline by seven working days in cases of large numbers of persons applying for protection,¹⁰ the proposal delays access to the asylum procedure for a **disproportionate period of time**. The Commission does not justify why a much longer extension of registration deadlines is provided in case of “mass influx” compared to a “disproportionate number of arrivals”.

In addition, according to the existing *acquis*, namely the Asylum Procedures Directive, the Reception Conditions Directive and the Qualification Directive,¹¹ as well as the Commission proposals under negotiation,¹² asylum seekers enjoy the full set of rights guaranteed by EU law from the moment they make an application, regardless of its registration. These rights include reception conditions, information, legal assistance, access to the United Nations High Commissioner for Refugees or civil society organisations offering services. Delaying registration by way of derogation only affords national authorities more time to complete the recording of the individual's intention to seek international protection. **In no way does it affect their status as asylum seekers during that period**. Therefore, the proposed provision only creates (a) **barriers on applicants to provide proof of their status and to access their rights**, with potentially critical consequences vis-à-vis protection from *refoulement*, and (b) **confusion and ambiguity to asylum and reception authorities as regards the necessary measures to be taken** to discharge their obligations towards asylum seekers.

2. Expanding the border procedure

In addition to the undue extension of the scope of the border procedure under normal circumstances proposed in the amended Asylum Procedures Regulation proposal,

⁸ RSA, *Rights denied during Greek asylum procedure suspension*, April 2020, available at: <https://bit.ly/2G1W94u>.

⁹ Articles 3(5), 6 and 7(1) Crisis Regulation proposal

¹⁰ Article 27(1) and (3) Asylum Procedures Regulation proposal.

¹¹ Article 2(c) Asylum Procedures Directive; Article 2(b) Reception Conditions Directive; Article 2(i) Qualification Directive; CJEU, Case C-179/11 *Cimade and Gisti*, 27 September 2012, para 39.

¹² Article 2(b) Asylum Procedures Regulation proposal.

Articles 4 and 5 of the Crisis Regulation proposal allow for the use of border procedures to more categories of asylum applications and for longer periods of time. On the one hand, the Commission suggests an increased maximum duration of twenty weeks for the asylum border procedure and a separate twenty weeks for the border procedure for return.¹³ Read in conjunction with the aforementioned provisions on registration, these extensions impose **deprivation of liberty and the applicability of the fiction of “non-entry” of the applicant into the territory of the Member States for over one year.** This effectively entrenches a regime of exceptionality, in clear dereliction of Member States’ duty to resort to detention as a last resort and for the shortest time possible.¹⁴

On the other hand, the proposal permits Member States to use border procedure for in-merit processing of any application, except for claims of nationals of countries subject to an EU-wide average recognition rate over 75%.¹⁵ Accordingly, the proposal allows for **generalised use of reduced procedural safeguards and deprivation of liberty to the near total population of asylum seekers.** The possibility to trigger such a derogation will lead to a **continuation of the failed approach implemented over the past four years in Greece through successive invocation of crisis factors as basis for the uninterrupted use of the exceptional procedure set out in Article 60(4) L 4375/2016 and Article 90(3) of the International Protection Act (IPA).**¹⁶

3. Granting “immediate protection”

Article 10 of the proposal, providing for the suspension of examination of asylum applications for up to one year¹⁷ and the granting of “immediate protection” to displaced persons from third countries who face a high degree of risk of being subject to indiscriminate violence in exceptional situations of armed conflict and who cannot return to their country of origin,¹⁸ offers Member States the possibility to rapidly grant the rights attached to international protection status when individual refugee status determination becomes particularly difficult in practice.

That said, the grant of “immediate protection” without changing the applicant’s status to an international protection status is liable to create further fragmentation of “asylum seeker” status as an up until now indivisible EU protection status.¹⁹ Such fragmentation will create serious risks of confusion for administrative authorities as regards eligibility for documentation such as residence permits (*Άδεια Διαμονής Ενιαίου Τύπου*, ADET), tax identification numbers (*Αριθμός Φορολογικού Μητρώου*, AFM), social security numbers (*Αριθμός Μητρώου Κοινωνικής Ασφάλισης*, AMKA) and so forth. **Full prima facie recognition of international protection status in the cases covered by Article 10 of the proposal promotes both rapid access to rights attached to international protection and administrative efficiency.**²⁰

¹³ Articles 4(1)(b) and 5(1)(a) Crisis Regulation proposal.

¹⁴ Article 9(1) Reception Conditions Directive; Article 15(1) Return Directive.

¹⁵ Article 4(1)(a) Crisis Regulation proposal.

¹⁶ Article 80(26) L 4375/2016, as amended by Article 86(20) L 4399/2016, Article 96(4) L 4485/2017, Article 28(23) L 4540/2018, Article 7(3) L 4587/2018. On the application of Article 90(3) IPA, see Joint Ministerial Decision 1333/2019.

¹⁷ Article 10(3) Crisis Regulation proposal.

¹⁸ Article 10(1) Crisis Regulation proposal.

¹⁹ CJEU, Case C-179/11 *Cimade and Gisti*, 27 September 2012, para 40.

²⁰ The granting of international protection without an individual interview is foreseen by Article 14(2) Asylum Procedures Directive and is used in Greek administrative practice for certain countries of origin, based on Article 77(7) IPA.

At the same time, the activation of “immediate protection” status requires Commission initiative. Given this, the regime risks remaining ‘dead letter’ similar to that of the Temporary Protection Directive under repeal,²¹ due to the lack of political will for its use. The proposal also fails to expressly connect “immediate protection” to a specific relocation mechanism between EU Member States, which is necessary to ensure timely and efficient responsibility-sharing towards an effective response to the exceptional circumstances covered by Article 10.

²¹ ICF, *Study on the Temporary Protection Directive*, January 2016, 19-23, available at: <https://bit.ly/31xuolz>.



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