

NGOs call on Member States: Agreeing on the Instrumentalisation Regulation will be the final blow to a COMMON European Asylum System (CEAS) in Europe

September 2022

In December 2021, the European Commission presented a proposal for a Regulation addressing situations of instrumentalisation in the field of migration and asylum. The proposal introduces a mechanism which allows Member States to derogate from their responsibilities under EU asylum law in situations of “instrumentalisation” of migration. The mechanism is permanently available to Member States who can invoke it in multiple situations, essentially enabling them to derogate at will from their obligations.

We understand that there is broad support among Member States for the proposed Regulation and that the Czech Presidency aims at adoption of a common position by December. This would make it one of the fastest moving legislative files related to asylum in Council. The proposal allows states to derogate from the proposed Asylum Procedures Regulation of 2016 and amended APR proposal of 2020 (APR), the proposed recast of the Reception Conditions Directive (rRCD) of 2016, and the proposed recast Return Directive (rRD) of 2018. The derogations are substantial and substantive, significantly affecting the rights of people seeking protection.

The undersigned NGOs strongly oppose the introduction and use of the concept of instrumentalisation and its codification in EU law; we further reject reforms of EU law based on allowing widespread derogation from EU law for the following reasons:

- **It is disproportionate:** The restriction of the fundamental rights of the people affected by the proposal is so extensive as to raise doubts as to the necessity and proportionality of the measures. We challenge the argument that actions of third country governments which use people, including those seeking international protection, to destabilise the EU should result in a significant negative impact on the rights of those people, including by the lowering of asylum standards and making it more difficult for people to apply for international protection in Europe;
- **It is counterproductive:** Derogations available on a permanent basis will undermine the CEAS and in particular its common nature. As per the warning of the CJEU in relation to the misuse of Article 78(3), the reforms create the risk of arbitrariness with Member States applying different standards, and opting in and out of the CEAS at will. Non-compliance with EU standards is already rampant and Member States will use “instrumentalisation” to justify not applying the rules;
- **It is unnecessary:** The current legal framework already provides flexibility for Member States to deal with changing events at their border, including already allowing for derogations, albeit tightly circumscribed by the Treaties and jurisprudence. In certain circumstances, Member States may specify where asylum applications should be lodged, extend the registration deadline for asylum applications and set lower standards for material reception conditions;
- **It is misguided:** Countries frequently manipulate displaced people. It has happened throughout history and continues, affecting individual Member States, the EU collectively, and many other countries around the world. There is no logical reason why manipulation of people should necessitate a different asylum regime. Actions by third country governments to destabilise the EU should be met by policy measures directed at those third country governments rather than at people seeking protection, themselves victims of such actions;

- **It is unfair (to applicants and some Member States):** The significant divergence in respect for legal obligations in the field of asylum creates differential treatment of people searching protection based on their mode of arrival. It also results in increased responsibilities for the Member States that do respect the law. A system where some Member States frequently derogate – and thus apply lower standards – by claiming to face instrumentalisation, is likely to have an impact on Member States which continue to apply higher standards, as lack of respect for the standards of EU and international law create a push factor.

In addition, there is a risk that these reforms will undermine respect for EU law as a whole. Introducing a model based on allowing derogations at will in a wide range of circumstances (most of the situations at the EU's borders), may set a precedent, especially when rule of law is facing challenges across Europe. There is no evidence that regulating for derogations will encourage better implementation or compliance with EU asylum law in general.

Finally, a legal framework that allows countries to reduce standards for the treatment of people seeking asylum and refugees when instrumentalisation is involved (a very common occurrence) is likely to be replicated elsewhere in the world, thus undermining the global protection system.

Member States with an interest in the improvement of the CEAS should focus on agreeing on reforms that support asylum systems to function effectively, and that protect rights, increase compliance and contribute to trust among Member States in this conflictual policy area. An agreement on the proposed Instrumentalisation Regulation has the opposite effect and dismantles asylum in Europe, by allowing Member States to opt in and out of the CEAS.

Signatories:

11.11.11

Action for Women Hellas

Amnesty International

Arsis - Association for the Social Support of Youth

AsyLex

Boat Refugee Foundation (Stichting Bootvluchteling)

Caritas Europa

Center for Research and Social Development IDEAS

Changemakers Lab

Child Circle

Conselho Português para os Refugiados (Portuguese Refugee Council)

Convive Fundación Cepaim

Danish Refugee Council (DRC)

Diotima Centre for Gender Rights & Equality

Dutch Council for Refugees

ECRE

Estonian Refugee Council

European Evangelical Alliance

European Lawyers in Lesvos (ELIL)

Fenix Humanitarian Legal Aid

Finnish Refugee Advice Centre

FOCSIV Italian federation christian organisations international volunteere service

France terre d'asile
Greek Council for Refugees (GCR)
Greek Forum of Migrants
Greek Forum of Refugees
HIAS Greece
Human Rights Watch
HumanRights360
I Have Rights
International Rescue Committee
Irida Women's Center
JRS Europe
Legal Centre Lesbos
Lighthouse Relief
METAdrasi
Mobile Info Team
Network for Children's Rights
Northern Lights Aid
Norwegian Refugee Council
OPU - Organizace pro pomoc uprchlikum
Oxfam
PIC - Legal Center for the Protection of Human Rights and the Environment
Platform for International Cooperation on Undocumented Migrants (PICUM)
PRO ASYL
Red Acoge
Refugee Legal Support (RLS)
Refugee Support Aegean (RSA)
Refugees International
SAFE PASSAGE INTERNATIONAL AMKE
Save the Children
Second Tree
Spanish Commission for Refugees (CEAR)
Still I Rise
Stowarzyszenie Interwencji Prawnej (Association for Legal Intervention)
Swedish Refugee Law Center
The Border Violence Monitoring Network
The Swedish Network of Refugee Support Groups (FARR)
Transgender Europe
Vluchtelingenwerk Vlaanderen
Yoga and Sport With Refugees