Meijers Committee
standing committee of experts on international immigration,
refugee and criminal law

CM2013 Meijers Committee Comments on the Migration Pact – Crisis and Force Majeure Regulation

November 2020

In this document, the Meijers Committee presents its comments on the proposal for a crisis and force majeure regulation.[1]

The proposal aims to put in place a system with tools necessary to deal with crisis situations and situations of force majeure. A situation of crisis is to be understood as an exceptional situation of mass influx, rendering the Member State's asylum, reception or return system non-functional (Article 1(2)(a)). A situation of force majeure is a situation which renders it impossible to comply with the time limits set out in Article 27 of the Asylum Procedures Regulation. For crisis situations, the proposal includes derogations to the applicable procedural rules, an extension of the scope of application of the border procedure and a compulsory solidarity mechanism triggering the relocation of applicants for international protection. For force majeure situations, the proposal allows for the extension of time limits regarding the implementation of solidarity contributions and the implementation of the Asylum and Migration Management Regulation (previously: the Dublin Regulation). Article 10 of the proposal, replacing the Temporary Protection Directive forms a legal basis in EU law to offer immediate protection to certain groups of asylum applicants.[2]

The Meijers Committee expresses concerns and recommendations concerning

1. the extension of the scope of the **asylum border procedure** in situations of crisis;
2. the extension of **time limits** in situations of crisis as well as situations of force majeure;
3. the proposed **procedure** to determine the existence of situations of crisis as well as situations of force majeure.

1. Normalising the exception: extending of the scope of the asylum border procedure

In situations of crisis, the proposed regulation allows Member States to significantly extend the asylum border procedure. While in the Asylum Procedure Regulation the border procedure applies to, *inter alia*, applicants from third countries for which the share of positive asylum decisions in the total number of asylum decisions is below 20 percent, this Regulation allows Member States to raise this variable to 75 percent if found to be in a state of crisis.

[1] 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 final.

[2] Council Directive 2001/55/EC on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof

In our comment[3] on the proposed Asylum Procedure Regulation, our Committee expresses its concerns regarding the general asylum border procedure. Already in a 'normal' situation, the border procedure has broad grounds for applicability. For instance, the mandatory application of the border procedure in case the applicant has 'misled' the authorities, without further specification, risks to be applied to all asylum seekers who travel without valid identity papers. The border procedure may also apply to children above the age of 12, which risks violating those children's rights. Furthermore, the ground linked to a recognition rate of below 20 percent leads to a negative bias about the protection needs of applicants from certain countries. Already in normal situations, the border procedure risks:

1. To deprive applicants of sufficient time to substantiate their application,
2. To overburden the status determination authorities and, consequently,
3. To violate the principle of *non-refoulement*.

Such risks of fundamental rights violations are exacerbated by short time limits and the increased use of detention.

Under the present proposal, the border procedure in situations of crisis may be extended to all applicants whose EU-wide first instance recognition rate is 75 percent or lower. The explanatory memorandum to the proposal states that this extension is not intended to constitute a basis for a wider ground for accelerated procedures on the merits of asylum applications, but only to allow Member States to rapidly channel applicants into a "regular asylum procedure at the border".

According to the Meijers Committee, the border procedure cannot be viewed as a regular asylum procedure and should not be normalised in situations of crisis. The border procedure by and of itself seriously restricts the fundamental rights of asylum seekers. Especially in a situation of crisis, a heavily increased use of border procedures risks to result in severe human rights violations.

The Meijers Committee recalls that, according to the explanatory memorandum to the Asylum Procedure Regulation, the purpose of the border procedure is to quickly assess *abusive asylum requests* by applicants coming from third countries *with a low recognition rate* in order to *swiftly return those without a right to stay in the Union*. In the same memorandum, the border procedure is explicitly distinguished from normal asylum procedures. The border procedure is meant to "allow asylum and migration authorities to more efficiently assess genuine claims inland". The memorandum concludes that the asylum border procedure should be applied to asylum claims that are clearly abusive, or where the applicant poses a threat to security or is unlikely to be in need of international protection due to his or her nationality's recognition rate.[4]

As the border procedure is meant to apply strictly to bogus asylum applications, the Meijers Committee is very concerned by the proposal to extend the border procedure to the vast majority of asylum applicants in situations of crisis. As a result of the increase of the variable to 75%, the border procedure may apply to all asylum seekers from, *inter alia*, Iraq, Iran, Libya, Afghanistan and Somalia. These asylum seekers, who are likely in need of international protection, will be subject to all legal restrictions

[3] CM2014 Comments on the amended proposal for an Asylum Procedures Regulation, available here.

[4] This is confirmed by recital 40b to new proposal for an Asylum Procedure Regulation

that follow from the general border procedure, except for the time limits of the accelerated procedure. These restrictions may include:

- restrictions on spatial mobility (all applicants will be kept at or in proximity to the external border or transit zones),[5]
- restrictions on legal remedies (applicants will be provided with only one level of appeal),[6]
- practical impediments to consult with legal respresentatives,
- no protection from the safeguards of the Return Directive,[7]
- increased use of detention.

Apart from these legal restrictions, the massive extension of the border procedure in situations of mass-influx will likely lead to overcrowded reception centres at the border. This proposal thus leads to unacceptable risks to produce 'new Moria's', the only difference being that EU law now authorizes this state of affairs.

Recommendation

- Do not extend the scope of border procedures in situations of crisis.

2. Increasing uncertainty: extension of time limits

Both in situations of crisis and force majeure, the proposal authorizes the extension of a wide array of time limits. While it is understandable that in such situations normal time limits may not be met, the Meijers Committee has concerns about certain specific proposals in this regard.

Extension of the registration deadline

In crisis situations, the deadline for Member States to register asylum applications is extended from three days to four weeks. The proposal does not specify how it is ensured that the fundamental rights of asylum seekers, for instance regarding reception conditions, will be protected before registration has taken place. Asylum seekers thus risk to be deprived of basic fundamental rights during the first month after arrival.

Extension of 'Dublin' deadlines

In force majeure situations, time limits for implementing so-called Dublin-procedures are considerably extended. Most significantly, Member States in a state of force majeure can take a full year to execute a Dublin-transfer to another Member State. Such extensions will unnecessarily lead to much uncertainty, stress and anxiety for Dublin claimants awaiting transfers. Furthermore, it will likely lead to more secondary movements within the Union, as more Dublin claimants will no longer tolerate their situation. This does not serve the goals of the Common European Asylum System.

[5] Art. 41 (13) Asylum Procedure Reulation.

[6] Art. 53 (9) Asylum Procedure Regulation.

[7] Art. 41a (7) Asylum Procedure Regulation.

Recommendation

- Refrain from allowing the extensions of time limits regarding the registration of asylum applications and Dublin procedures.

3. What is a crisis? The procedure to determine situations of crisis and force majeure

The Meijers Committee has concerns regarding the proposed procedures to determine whether a Member State is in a situation of crisis or in a situation of force majeure.

In the proposal, the European Commission is ultimately authorized to decide whether a Member State is in a situation of crisis. Our Committee sees this as an improvement to the Temporary Protection Directive, on the basis of which this decision is to be made by the Council. Experience has shown that it has not been possible to find a sufficient amount of consensus in the Council on this question and that, as a result, the Directive has never been used in practice.[8] Nonetheless, there are risks attached to the currently proposed procedure.

First of all, the relevant factors the Commission has to take into account when assessing whether there is a situation of crisis are vague and open-ended. According to the proposal, the European Commission must take into account the same factors as laid down in Article 50 (3) of the Asylum and Migration Management Regulation for assessing 'migratory pressure'. The proposal does not specify how to assess the specific situation of 'crisis', apart from the definition laid down in Article 1.

Establishing a proper procedure in this regard is especially important as the proposal, contrary to the Temporary Protection Directive, may lead to serious restrictions on the fundamental rights of asylum seekers, as explained above. In this light, the Meijers Committee finds that the determination of crisis situations should be subject to democratic control by the European Parliament.

Regarding situations of *force majeure*, the proposal authorizes Member States to unilaterally declare themselves to be in such a situation. While it is true that Member States are themselves in the best position to assess their asylum capacities, it is unclear why this cannot go hand in hand with European scrutiny. Leaving this assessment solely to Member States leads to risks of abuse and to widely differing interpretations within the Union. Furthermore, it is not consistent with the proposed procedures for the establishment of situations of recurring arrivals, migratory pressure and crisis, where the Commission at every turn has the final say. The Meijers Committee thus recommends to make the assessment of situations of *force majeure* by individual Member States dependant on the approval of the European Commission.

Recommendations

- Make the Commission's assessment of a crisis situation subject to democratic approval by the European Parliament.
- Make the assessment of situations of *force majeure* dependant on the approval of the European Commission.

[8] See the European Commission Final Report of the Study on the Temporary Protection Directive, available here