Crisis and force majeure regulation

OVERVIEW

In September 2020, the European Commission proposed a new pact on asylum and migration. The legislative package related to the pact includes a proposal for a regulation dealing with crisis and force majeure in the field of migration and asylum, aimed at establishing a mechanism for dealing with mass influxes and irregular arrivals of third-country nationals in a Member State.

The regulation would set out the solidarity mechanism procedure in the event of returns of irregular migrants applying the possibility for return sponsorship on behalf of another Member State, as established in the Asylum and Migration Management Regulation (AMR). It would also provide for shorter deadlines in comparison to usual procedures under the AMR, when applicable in a crisis situation and for some derogations in crisis situations concerning the asylum crisis management procedure, the return crisis management procedure, and the registration of international protection applications in crisis situations.

| Proposal for a regulation of the European Parliament and the Council addressing situations of crisis and force majeure in the field of migration and asylum |
|---------------------------------|---------------------------------|---------------------------------|---------------------------------|---------------------------------|---------------------------------|---------------------------------|
| **Committee responsible:** | Civil Liberties, Justice and Home Affairs (LIBE) | COM(2020) 613 | 23.9.2020 |
| **Rapporteur:** | Juan Fernando López Aguilar (S&D, Spain) | 2020/0277(COD) |
| **Shadow rapporteurs:** | Damian Boeselager (Greens/EFA, Germany) | Ordinary legislative procedure (COD) (Parliament and Council on equal footing – formerly ‘co-decision’) |
| | Konstantinos Arvanitis (The Left, Greece) | |
| **Next steps expected:** | Publication of draft report | |
Introduction

In September 2020, in her State of the Union address, Commission President Ursula von der Leyen announced a new pact on asylum and migration. As part of the package of legislative proposals related to the pact, on 23 September 2020 the European Commission adopted a proposal for a regulation addressing situations of crisis and force majeure in the area of migration and asylum. This proposal concerns the application of the solidarity mechanism, set out in the proposal for a regulation on asylum and migration management (AMR) for exceptional cases of the mass influx of irregular arrival of third-country nationals or stateless persons in a Member State, potentially posing a risk to the functioning of the common European asylum system (CEAS). The proposal also addresses force majeure situations in the field of asylum and migration management within the EU.

The proposed crisis and force majeure regulation is seen as one element in a comprehensive policy framework representing a fresh start on migration, with provisions for an effective, flexible and structured response in cases of a crisis involving a mass influx of third-country nationals or stateless persons arriving irregularly in a Member State and exceptional situations similar to the 2015 refugee crisis. It also seeks to address situations of force majeure in the field of asylum and migration management within the EU. In both cases, the aim is to ensure that Member States are able to manage situations of crisis and force majeure through a specific set of tools and measures.

Existing situation

The legislative act dealing with cases of an exceptional mass influx of irregular migrants is the 2001 Temporary Protection Directive. This directive provides for the possibility to evacuate displaced persons from third countries, should the asylum systems of certain frontline Member States become overburdened. This procedure is to be triggered by virtue of a Council decision adopted by a qualified majority, where there is a risk that the Union asylum system would be unable to cope with the mass influx or imminent mass influx of displaced persons. Since its adoption in 2001, the directive has never been triggered and remains unused.

Since the 2015 migration crisis, attempts to reform the EU asylum policy with the aim of establishing a more efficient framework resistant to future migratory pressures have been largely unsuccessful, in particular because of an inability to reform the Dublin system, which determines the EU Member State responsible for examining asylum applications.

Parliament's starting position

Parliament addressed the issue of an exceptional mass influx of irregular migrants in an April 2015 resolution on the latest tragedies in the Mediterranean and EU migration and asylum policies calling on Council to trigger the 2001 Temporary Protection Directive's solidarity mechanism in the case of mass and sudden inflows of displaced persons. In an April 2016 resolution on the situation in the Mediterranean and the need for a holistic EU approach to migration, Parliament reiterated that in cases of mass influx, the Commission, acting on its own initiative or after examination of a Member State's request, can propose that the Council trigger the Temporary Protection Directive. It also stressed the need for a revision of the directive as part of a revision of the Dublin system and for a clear definition of 'mass influx'.

Parliament has consistently called for solidarity between Member States and for a binding mechanism for the fair distribution of asylum-seekers among all EU Member States (see its resolutions of 25 November 2009, 11 September 2012, 9 October 2013, 23 October 2013, 17 December 2014, 29 April 2015, 10 September 2015 and 12 April 2016).
Crisis and force majeure regulation

Council starting position

The Council has on a number of occasions (e.g. in June 2015, October 2015 and December 2015) stressed the need for better containment of growing migration flows and for a speedy conclusion of work on the package of seven legislative proposals aimed at reforming the CEAS.

The Council press office recently published a summary of the new pact on asylum and migration (November 2020) and the various elements of the package, describing in detail the reasons why these are needed.

Preparation of the proposal

The Commission conducted targeted consultations on the pact on migration and asylum. These involved Parliament (the political groups) as well as Member States, under the Romanian, Finnish, and Croatian Presidencies of the Council and in various forums – e.g. the Strategic Committee on Immigration, Frontiers and Asylum (SCIFA), the High-level Working Group on Asylum and Migration (HLWG), the irregular migration and expulsion working party (IMEX), the European Migration Network and the Readmission Expert Group. The Commission has also organised consultations with stakeholders from civil society organisations by means of a number of meetings and conferences.

The changes the proposal would bring

Considering the shortcomings in dealing with the mass arrival of refugees during the 2015 crisis, there seems to be a need for a structured approach at EU level to handling crises so as to avoid ad hoc responses. This should complement the legislative framework in this field by adding specific procedural rules (and derogations) other than the compulsory solidarity mechanism and the procedures that normally would apply. This approach would therefore complement the operational and technical support that the European Union Agency for Asylum (EUAA) can provide should a Member State’s asylum or reception systems become subject to disproportionate pressure.

More specifically, the crisis and force majeure regulation proposal would provide a definition for a crisis situation, i.e. the exceptional mass influx of third-country nationals/stateless persons arriving irregularly in a Member State and threatening the functioning of a Member State’s asylum, reception or return system, or the risk of such a mass influx. It would widen the scope for the relocation of the third-country nationals affected, to include international protection beneficiaries, irregular migrants, and vulnerable persons being granted immediate protection for up to one year, until the Member State responsible for examining the application under the AMR Regulation has been determined.

Concerning the return of irregular migrants, the solidarity mechanism procedure would reinforce the possibility for Member States to assist each other in carrying out returns, in the form of return sponsorship in crisis situations. According to this procedure under the crisis and force majeure regulation, Member States providing return sponsorship would commit to returning irregular migrants on behalf of another Member State. Activities necessary for this purpose (such as return counselling, policy dialogue with third countries, and support for assisted voluntary return and reintegration) would be conducted directly from the territory of the benefitting Member State. If return was not finalised within eight months, the irregular migrants would be transferred to the territory of the sponsoring Member State in view of finalising the enforcement of return. Whereas the AMR Regulation would provide for the removal of irregular migrants within eight months, return sponsorship in crisis situations would include the obligation to transfer the irregular migrant if the person concerned did not return or was not removed within four months.

The crisis and force majeure regulation proposal would provide for other shorter deadlines compared with the usual procedures under the AMR, when applicable in a crisis situation. These would concern the deadline for the Commission’s assessment of a Member State’s crisis situation, with serious consequences for the functioning of the CEAS, for the presentation of its report to the
Council and the European Parliament, for presentation of the solidarity response plan by Member States after the Commission assessment, and for adoption of a Commission implementing act on solidarity measures for each Member State referring to the number of persons to be relocated and/or subject to return sponsorship from the Member State in a crisis situation, and their distribution between Member States.

Regarding asylum and return procedures, the proposed crisis and force majeure regulation proposal would include a number of derogations following the adoption of a Commission implementing decision, with the aim of allowing the competent authorities under strain to exercise their tasks diligently and cope with a significant workload. One major derogation would be the possibility for Member States to suspend examination of applications for international protection of third-country nationals when those applicants face a risk of violence upon return to their country of origin and to grant them immediate protection, with the exception of cases where they represent a danger to the Member State’s national security or public order. Member States would have the possibility to derogate from the AMR Regulation in connection with the asylum crisis management procedure. In this case, the Member States would be able to take positive decisions on asylum applications lodged by third-country nationals from countries for which the proportion of positive first-instance decisions on international protection is 75% or lower. They would also have the possibility to prolong the maximum duration of the border procedure for examining applications by an additional eight weeks before the applicant is allowed to enter a Member State’s territory to complete the procedure for granting international protection (the proposed asylum procedures regulation would set the maximum time limit at 12 weeks).

On the crisis management procedure for returns, Member States would be allowed to prolong the detention of third-country nationals/stateless persons with rejected applications under the asylum crisis management procedure by additional eight weeks. Moreover, on registration of international protection applications in crisis situations, Member States affected would be allowed to postpone registration at the latest for four weeks from when these were made. Extended deadlines would also apply for Member States submitting take charge requests (up to four months after the application’s registration), Member States replying to such requests (up to two months of the request’s receipt), take back notifications (one month of receiving Eurodac confirmation), and the transfer to the Member State responsible from the notifying Member State (within a year of acceptance of a take charge request/take back confirmation from another Member State). Other provisions would allow transfers to Member States that are in force majeure situations to be frozen and their obligation to undertake solidarity measures suspended for up to six months.

Advisory committees

The European Economic and Social Committee and the European Committee of the Regions have not yet presented their opinions on the proposal.

National parliaments

The deadline for the submission of reasoned opinions on grounds of subsidiarity by national parliaments was 11 January 2021. A reasoned opinion was adopted by the Hungarian parliament on 21 December 2020. It noted that Member State competences were restricted because the solidarity contribution, calculated on the basis of an artificial distribution key, is partly limited to the forms of relocation and return sponsorship. It further noted that the migration pact does not take into account Member States’ national identities or constitutional traditions and that the geographic, economic and demographic conditions of the Member States are given less recognition, adding that the migration pact also limits Member States’ competences concerning decisions on asylum procedures and residence permits.
Stakeholder views

During preliminary consultations on the new pact on migration and asylum, many Member States and stakeholders stressed the need for a well-managed migration system, including the principle that in times of crisis caused by a mass influx of persons onto the territory of a Member State, relocation should be the default solidarity measure in order to quickly relieve the pressure from that Member State, as well as for taking into account the lessons learned from the Covid-19 pandemic and to ensure that the legislative framework can deal with future situations of force majeure.

Stakeholders such as the European Council of Refugees and Exiles (ECRE) recommend that for the upcoming negotiations on the pact, co-legislators should limit possibilities for Member States to derogate from responsibilities to register asylum applications or process asylum claims in order to avoid creating incentives for operating in crisis mode and for lowering asylum standards.

The Meijers Committee (standing committee of experts on international immigration, refugee and criminal law) from the Netherlands is concerned that applicable border procedures, even in a 'normal' situation, deprive applicants of sufficient time to substantiate their applications, overburden status-determination authorities and, consequently, violate the principle of non-refoulement. They also note with concern that the asylum border procedure applicable to abusive asylum claims or to cases where an 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, should not be extended to the border procedure concerning the vast majority of asylum applicants in situations of crisis. The Committee is also worried about asylum-seekers being deprived of basic fundamental rights as a result of the possibility of extending time limits (e.g. the deadline for Member States to register asylum applications or the extension of the deadline for implementing Dublin-transfer to another Member State in force majeure situations). Finally the Committee has concerns about the lack of a further specific definition of 'crisis' and the need to establish a proper procedure in this regard, because unlike the Temporary Protection Directive, the proposal may lead to serious restrictions on asylum seekers' fundamental rights. In this light, it finds that the determination of crisis situations should be subject to democratic control by the European Parliament. The Meijers Committee recommends making the assessment of situations of force majeure by individual Member States dependant on the approval of the European Commission in order to avoid risks of abuse and widely differing interpretations within the Union.

Legislative process

The Commission's legislative proposal (COM(2020) 613) was adopted on 23 September 2020 and falls under the ordinary legislative procedure (2020/0277 (COD). In the European Parliament, the proposal has been assigned to the Committee on Civil Liberties, Justice and Home Affairs (LIBE) and is to be discussed within the committee before the rapporteur (Juan Fernando López Aguilar – S&D, Spain) issues a draft report.
EP SUPPORTING ANALYSIS


OTHER SOURCES

*Addressing situations of crisis and force majeure in the field of migration and asylum*, European Parliament, Legislative Observatory (OEIL).


ENDNOTES

1 This section aims to provide a flavour of the debate and is not intended to be an exhaustive account of all different views on the proposal. Additional information can be found in related publications listed under ‘EP supporting analysis’.

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