Emergency measures on migration
Article 78(3) TFEU

SUMMARY

On 1 December 2021, the Commission proposed a Council decision on emergency measures to help Latvia, Lithuania and Poland face the complex migratory situation at their respective borders with Belarus. The measures provide for an extension of the registration period for asylum applications; the application of the border asylum procedure to process all asylum claims; reception conditions covering only basic needs; and simplified and quicker national return procedures for rejected asylum-seekers.

The proposal is based on Article 78(3) of the Treaty on the Functioning of the EU (TFEU), which provides for the adoption of provisional measures in the event of a 'sudden increase of arrivals of third-country nationals'. Article 78(3) TFEU was first used during the 2015 migration crisis to help Greece and Italy. On the basis of this article and in line with Article 80 TFEU, the Council of the EU at the time adopted binding decisions providing for the relocation from these two countries of 160 000 people so as to ensure a fair and balanced distribution of, and sharing of responsibility for, asylum-seekers who were already present in the EU. Despite most Member States' willingness to relocate asylum-seekers, some challenged the Council decision before the Court of Justice of the EU (the Court) or refused to implement the decision. As a result, the Court's jurisprudence helped to clarify the concept and scope of 'provisional measures' within the meaning of Article 78(3) TFEU.

Greece was the first EU Member State to unilaterally invoke Article 78(3) TFEU, in response to a sudden increase of arrivals of third-country nationals from Turkey in March 2020. The Greek emergency legislative act was heavily criticised because Article 78(3) TFEU is not intended to enable Member States to take emergency measures unilaterally. It requires the Council to take a decision on a Commission proposal and after consulting Parliament.

This Briefing expands on and updates an 'at a glance' note from March 2020, written by Anja Radjenovic.
Background

Since May 2021, the Belarusian regime of Aliaksandr Lukashenka has been organising flights from the Middle East to Minsk and deliberately orchestrating migrants’ onward travel to the EU-Belarus border. Belarusian authorities have been distributing short-term tourist visas and organising much more frequent flight connections to the country. The asylum-seekers and migrants initially receive accommodation in state-owned hotels and are then transported to the Belarus-EU border zone, where the country shares its borders with Latvia, Lithuania and Poland. Here, migrants try to cross the border, ‘trapped between border forces’ from both sides of the border and being exposed to winter weather conditions. At least 13 people are reported to have died already near the Poland-Belarus border since the start of this crisis. There have also been reports of pushbacks by all countries involved. The situation has led to serious humanitarian consequences and fundamental rights violations. The Council of the EU has already adopted sanctions against Belarus over human rights abuses and the instrumentalisation1 of migrants.

According to the European Border and Coast Guard Agency (Frontex), the total number of illegal crossings detected at the EU’s external borders in the first 10 months of 2021 rose by nearly 70 % to 160 000 compared with the same period in 2020. Of these, close to 8 000 migrants and asylum-seekers were detected on the EU’s eastern border. Although this number is 15 times higher than the previous year, it is a relatively low figure compared with the number of detections along other migration routes, such as the central Mediterranean route (55 000 illegal crossings detected) and the western Balkan route (48 500). It is also a relatively low figure compared with the figures referred to in the 2015 Council Decision – also based on Article 78(3) TFEU – that introduced provisional measures in the area of international protection for the benefit of Italy and Greece (see the section below on the 2015 migration crisis). According to the decision, Italy and Greece were facing a massive increase in arrivals of third-country nationals with a subsequent sharp increase in migratory pressure. To substantiate this claim, the Commission referred to statistical data provided by Frontex and by the European Asylum Agency (EASO), according to which in July and August 2015 alone, the irregular crossings of Italy’s and Greece’s external borders increased by 20 % and 250 % respectively, compared with May and June 2015. In absolute figures, 34 691 irregular border crossings were detected at the border with Italy and 137 000 at the border with Greece. Similarly, the Commission reported that, between January and July 2015, requests for international protection increased by 27 % in Italy and by 30 % in Greece.

According to the European Commission, as of 21 November 2021, 7 831 third-country nationals had entered the territories of Latvia, Lithuania and Poland in 2021, compared with 257 in the whole of 2020. In addition, 42 741 attempts to cross had been prevented by the three Member States, and up to 10 000 more migrants may be currently stranded in Belarus, with further arrivals on a daily basis. When it comes to asylum applications, 2 676 had been registered in Lithuania, 579 in Latvia and 6 730 in Poland. As a result, the three countries declared a state of emergency. Latvia, Lithuania and Poland were also among 12 EU Member States who sent a letter to the Commission Vice-President Margaritis Schinas and Home Affairs Commissioner Ylva Johansson on 7 October, asking them to allow and fund from the EU budget ‘physical barriers as a measure for protection of the EU external borders’, arguing that such a measure would serve ‘the interest of the whole EU’. They also called for ‘further preventive measures’ to ‘prevent unauthorised border crossings, to counter cross-border criminality and to take measures against persons who have crossed the border illegally’.

In addition to the proposed emergency measures, the EU has already granted Latvia, Lithuania and Poland emergency financial assistance. Lithuania activated the EU’s civil protection mechanism in July, and operational support from EU agencies has been deployed to the countries affected who requested their assistance. This financial and operational support has been complemented by foreign policy actions and diplomatic efforts towards the main countries of origin and transit, to prevent further arrivals of their nationals through Belarus. The European Council – in its October conclusions – stated that it ‘will not accept any attempt by third countries to instrumentalise
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migrants for political purposes’. The Heads of State or Government furthermore condemned ‘all hybrid attacks at the EU’s borders’ and called on the European Commission to ‘propose any necessary changes to the EU’s legal framework and concrete measures underpinned by adequate financial support to ensure an immediate and appropriate response in line with EU law and international obligations, including the fundamental rights’.

In response, the Commission put forward a proposal on 1 December for a Council decision on temporary asylum and return measures to assist Latvia, Lithuania and Poland in addressing the ‘emergency situation’ at their borders with Belarus. The measures, based on Article 78(3) TFEU, will enter into force once adopted by the Council following consultation of the Parliament. This is the second time that this legal basis has been used since the entry into force of the Lisbon Treaty. Its predecessor – Article 64(2) of the Treaty establishing the European Community (TEC) – was never used. Article 78(3) TFEU was first used in 2015 to help Italy and Greece face unprecedented arrivals of asylum-seekers. However, whereas Council Decisions 2015/1523 and 2015/1601 referred to both Article 78(3) TFEU and Article 80 TFEU, the current proposal on provisional emergency measures for the benefit of Latvia, Lithuania and Poland, includes no reference to the latter. According to Article 80 TFEU, policies in the field of border checks, asylum and immigration ‘shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States’. In fact, the Court, in its 2017 ruling on the challenges brought to Council Decision 2015/1601, confirmed that when Member States are faced with an emergency situation within the meaning of Article 78(3) TFEU, the burdens entailed by the provisional measures adopted under that provision for the benefit of that or those Member States must, as a rule, be divided between all the other Member States, in accordance with the principle of solidarity and fair sharing of responsibility between the Member States, since, in accordance with Article 80 TFEU, that principle governs EU asylum policy’ (para 291).

Council began examining the Commission proposal on 6 December. The decision – if adopted – will apply for six months after its entry into force. However, depending on how the situation in the three Member States evolves, the Commission could repeal or prolong the decision, ‘where appropriate’. Proposed derogations to the EU acquis

The proposed Council decision introduces some derogations to existing legislative acts (EU secondary law), which is in principle possible, as confirmed by the Court in 2017, providing those derogations abide by certain criteria (see section below on the Court’s interpretation of Article 78(3) TFEU). The proposed derogations concern:

- Directive 2013/32/EU on asylum procedures

The proposal provides for an extension of the time limit for registering the application of up to four weeks (instead of the current three to ten days) as well as an extension of the time

States of emergency: Latvia, Lithuania and Poland

**Latvia** declared an emergency situation in four administrative territories for an initial period, from 11 August to 10 November 2021, by means of Cabinet of Ministers Order No 518 adopted on 10 August 2021, in accordance with the Law on Emergency Situations and State of Exception. On 21 October, the emergency situation was extended until 10 February 2022.

**Lithuania** declared a state of emergency on 10 November, based on Articles 67, 144 and 145 of the Constitution and Articles 6, 7 and 28 of the 2002 Law on the State of Emergency. On 7 December it was prolonged until 15 January 2022.

**Poland** declared a state of exception on 2 September within a total of 183 localities. The decree forbids anyone who is not a permanent resident of the areas subject to the state of exception from entering them, and it is prohibited to take photographs or make videos of that area. The state of exception expired on 2 December but elements were introduced into ordinary legislation – a new Article 12a in the 1990 Protection of the State Border Act, in force as of 1 December 2021, effectively providing for a ‘permanent state of exception’. A ministerial decree from 30 November – in force until 1 March 2022 – further prohibits non-residents from entering the same 183 localities. According to the ombudsman, Professor Marcin Wiącek and the Legislative Bureau of the Senate, the new law and the decree based on it are unconstitutional.

Proposed derogations to the EU acquis
limit – to 16 weeks – for processing an application at the border or transit zone. According to the proposal, the provisions of the Asylum Procedures Directive 'are not designed to deal with situations where the Union's integrity and security is under attack as a result of the instrumentalisation of migrants'. It is worth noting that Article 43(2) of the Asylum Procedures Directive establishes that in the absence of an asylum application decision, the applicant should be granted the right to enter the territory of the Member State so as to ensure that the application is processed in accordance with the other provisions of the same directive. Moreover, the proposal for a Council decision states that, contrary to the existing provisions, a court or tribunal in the Member State concerned may decide in relation to a border procedure whether or not the applicant may remain in the territory even though an appeal is pending, de facto denying the suspensory effect of the appeal.

Directive 2013/33/EU on reception conditions

The proposal introduces the possibility for the Member States concerned to cover basic needs only (such as food, water, clothing and medical care) and to derogate from the existing provisions in Directive 2013/33/EU aimed at providing applicants with an adequate standard of living, guaranteeing their subsistence and protecting their physical and mental health.

Directive 2008/115/EC on the return procedure

The proposal introduces the possibility for the Member States concerned not to apply the common standards laid down in the Return Directive to those individuals whose application has been rejected under article 2 of the same proposal. Nonetheless, the principle of non-refoulement should be respected and also the best interest of minors, family life and health conditions.

The proposed Council decision furthermore states that all procedures carried out in line with the proposal must respect fundamental rights and international obligations. Exceptions are envisaged for applicants with special needs or vulnerabilities and there are other specific guarantees provided for by EU law, such as emergency healthcare, the use of coercive measures and detention conditions.

Stakeholder reactions to the Commission proposal

Oxfam has expressed deep concerns about 'the EU allowing Member States to use the lives of migrants as pawns in a geopolitical game with Belarus'. Stopping, detaining and criminalising people trying to find safety in Europe breaks international and European asylum law, the organisation says. The European Council of Refugees and Exiles (ECRE), in a preliminary comment, defines the proposal as 'profoundly frustrating' for activists, non-governmental organisations and civil society at large for several reasons, including the fact that it restricts the right to asylum. ECRE furthermore criticises the Commission for trying to please the Member States with these temporary measures because 'the Member States don't actually seem to want these proposals'. Poland indeed qualified the measures as insufficient during the first preparatory meeting in the Council, on 6 December, as it had 'proposed suspending asylum applications, not extending them'. Amnesty International reacted strongly to the proposal too, and argued that the situation at the borders with Belarus was used by certain Member States as an 'excuse to weaken protections of asylum-seekers and push their anti-migrant agenda'. According to Human Rights Watch (HRW), the proposal could 'systematise abuse of peoples' rights at EU borders' and also create a 'terrible precedent'. In the explanatory memorandum of the proposal for a Council decision, the Commission writes that the extension of the duration of the border procedure to 16 weeks 'will help the Member State to apply the fiction of non-entry for a longer period of time providing for more flexibility to deal with the increased workload'. HRW interprets this as the Commission acknowledging 'the questionable justification for these derogations – that people in these border procedures aren't already in the EU'.

The crisis and force majeure proposal

The new pact on migration and asylum, proposed by the European Commission in September 2020, provides for a new crisis mechanism in the field of migration and asylum, a crisis and force majeure
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regulation. The proposal introduces a mechanism to deal with mass influxes and irregular arrivals of third-country nationals in a Member State and to ensure that 'an effective and efficient system is permanently in place to deal with a situation of crisis'. The proposal – based on Article 78(2)(c), (d) and (e) and Article 79(2)(c) TFEU – clarifies that the new mechanism is not intended to limit the possibility for the Council to adopt provisional measures based on Article 78(3) TFEU to help Member States facing emergency situations as defined in the same article.

However, the EPRS horizontal substitute impact assessment of the new pact on migration and asylum, published in August 2021, while assessing the proposed instrument in respect of existing measures, raised some concerns of coherence. The impact assessment pointed out that the new proposed instrument for crisis and force majeure uses the same legal basis as the instruments to which it proposes derogations. Moreover, 'it is not clear how the establishment of a permanent mechanism to address crisis relates to Article 78(3) TFEU. The definition of crisis in the Crisis and Force Majeure Regulation and the situations in which screening may be extended from a maximum duration of five days to ten are not identical. It is not clear why a separate instrument is required'. The Meijers Committee, a standing committee of experts on international immigration, refugee and criminal law, also expressed concerns about the proposed procedures to determine whether a Member State is in a situation of crisis or in a situation of force majeure and recommended making the Commission's assessment of crisis situations subject to democratic control by the European Parliament.

On 30 November, the draft report for the crisis and force majeure proposal was presented in the Civil Liberties, Justice and Home Affairs Committee (LIBE) of the European Parliament. In his draft report, which at the time of writing is still subject to amendments, the rapporteur – Juan Fernando López Aguilar (S&D, Spain), chair of the committee – proposes defining the notion of a crisis more clearly, and suggests that it should be the Commission that – by delegated act – declares this situation. He has furthermore stated that in a situation of crisis, three mechanisms can be triggered: 1) solidarity by compulsory relocation (which can also be triggered in advance, when a crisis situation is imminent); 2) a single and temporary extension of the registration period; and 3) the granting of prima facie international protection. He furthermore proposes deleting all return assistance policies and return sponsorship programmes from the original Commission proposal. The next step in the legislative process is for amendments to be tabled, after which the report will be discussed and voted in committee.

Looking back

The 2015 migration crisis

Article 78(3) TFEU was first used during the 2015 migration crisis, when Italy and Greece, situated on the EU's external borders, were confronted with unprecedented arrivals of asylum-seekers fleeing persecution or serious harm. To alleviate migratory pressure on the two frontline Member States, which had borne the brunt of the increase in refugee arrivals, the European Commission tried to ensure a fair and balanced distribution and sharing of responsibility for asylum-seekers who were already present in the EU. On the basis of the Commission proposals, the Council adopted two decisions for a duration of two years, regarding:

- a temporary relocation scheme applying to a total of 40 000 people from Italy (24 000) and Greece (16 000) (Decision 2015/1523); and
- a second emergency mechanism designed to relocate a further 120 000 people seeking international protection from Italy and Greece (Decision 2015/1601).

The decisions involved a limited and temporary derogation from certain provisions of the Dublin Regulation, a derogation already accepted by the CJEU, in particular as regards the criterion for determining the Member State responsible for examining an asylum application. According to that criterion, Italy and Greece would be responsible for examining the applications of the vast majority of asylum-seekers, based on their point of irregular entry into the EU. In 2019, the European Court
of Auditors reported that, by November 2019, 34,705 eligible migrants had been relocated to 22 Member States and 3 associated countries (Liechtenstein, Norway and Switzerland), a figure falling far short of the obligations set out in the two decisions.

One Member State's attempt to trigger Article 78(3) TFEU

The March 2016 EU-Turkey deal between the European Council and Turkey was designed to stem irregular migratory arrivals to Europe via Turkey. The Turkish authorities’ decision in February 2020 to stop implementing the deal led to a significant increase in migrant arrivals along the Greek-Turkish border and rising tensions. This prompted Greece to announce that it would not be accepting any new asylum applications for one month as from 1 March 2020, and that it was 'invoking' Article 78(3) TFEU to ensure full European support'. Under the Greek Emergency Legislative Act, asylum-seekers no longer had the possibility to register an asylum claim, and newly arrived people would be returned to their country of origin or transit without registration, due process or procedural safeguards. However, as underlined by the European Council on Refugees and Exiles and the United Nations High Commissioner for Refugees, Article 78(3) TFEU should – if invoked – lead to provisions in compliance with EU primary law, including the Charter of Fundamental Rights. The article 'cannot ... provide a legal basis for the suspension of the right to asylum' or for expulsions against the principle of non-refoulement. As the European Parliament has to be consulted it must be 'prepared to promote positive alternatives when this happens'. It is worth noting that Article 78(3) TFEU is not intended to enable Member States to take emergency measures unilaterally as it requires the Council to take a decision, based on a Commission proposal, after consulting the European Parliament. Along the same lines, on 22 September 2020, Oxfam and other rights groups complained to the Commission and argued infringement of EU law by Greece, including by the emergency legislative act. In an opinion of 17 March 2020, the Council of Europe furthermore stated that the measures adopted by the Greek act appeared to be 'contrary to several provisions of the European Convention of Human Rights' (ECHR) and, according to the UN Refugee Agency (UNHCR), to international and EU refugee law. The act ceased to be in force on 1 April 2020.

Challenges to Article 78(3) TFEU as a legal basis

Despite most Member States' willingness to relocate asylum-seekers based on the two emergency relocation schemes, Slovakia and Hungary objected and challenged Council Decision 2015/1601, which had been adopted by qualified majority. The Court rejected their cases in a judgment of September 2017 (C-643/15 and C-647/15) focusing on the legal basis for the adoption of the decision as well as procedural and substantive issues (see below). According to some experts, the judgment takes an innovative approach in that it reaffirms solidarity between the Member States as a binding principle and the distribution of applicants for international protection as mandatory, thus confirming the principle of solidarity going beyond financial measures. Similar views were expressed by Henri Labayle in the EU Immigration and Asylum Law and Policy blog. He stated that the Court's judgment regarding the Council's decision to use a binding mechanism based on Article 78(3) TFEU, read in conjunction with the principle of solidarity enshrined in Article 80 TFEU, clearly confirms the binding nature of the principle of solidarity in EU migration policy. Nonetheless, Hungary, Czechia and Poland decided not to cooperate in the implementation of the decision, which resulted in the European Commission referring them to the Court for non-compliance with their legal obligations on relocation. Following the Commission's referral, in November 2019 Advocate-General Eleanor Sharpston issued the opinion that, by refusing to comply with the mechanism for the mandatory relocation of applicants for international protection, the three Member States had failed to fulfil their obligations under EU law, including by not complying with the principle of solidarity, which 'necessarily sometimes implies accepting burden-sharing'. In April 2020, the Court de facto confirmed the Advocate-General's opinion and ruled that the three countries had failed to fulfil their relocation obligations stemming from Council Decision 2015/1523 and also from Council Decision 2015/1601 establishing provisional measures in the area of international protection for the benefit of Italy and Greece.
Court sheds light on Article 78(3) TFEU

Article 78(3) states that: 'In the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament'.

It offers a specific legal basis for taking emergency measures in the field of migration and, read together with Article 80 TFEU, helps with implementing the principle of solidarity in the area of international protection. The article allows the Council to take decisions by qualified majority; it does not apply the ordinary legislative procedure (OLP), common for decisions in the area of border checks, asylum and immigration. While Denmark opts out of measures adopted pursuant to Article 78(3) TFEU (Protocol No 22), Ireland may opt in (Protocol No 21). Associated states (Iceland, Liechtenstein, Norway and Switzerland) have no obligation to take part but may decide voluntarily to participate.

Following joined Cases C-643/15 and C-647/15 brought by Slovakia and Hungary and supported by Poland, the Court used the occasion to clarify both the procedural aspects and scope of Article 78(3) TFEU. On the procedural aspects, the Court recalled (paragraph 56) that EU law adopts an exclusively formalistic view about what is to be considered a legislative act. Regardless of their content, acts adopted by a legislative procedure, either ordinary (OLP) or special, shall constitute legislative acts (Article 289(3) TFEU). Contrary to Article 78(2) TFEU for instance, Article 78(3) TFEU does not mention expressly either the ordinary or a special legislative procedure, thus measures adopted based on that article must be classified as non-legislative acts (paragraph 66). It follows that certain obligations linked to the adoption of legislative acts are not applicable (paragraphs 59 and 193), for example, the participation of national parliaments in accordance with Protocols 1 and 2 to the Lisbon Treaty, and the obligation for the Council to meet in public when deliberating and voting on a legislative act (Article 16(8) TEU).

The Court confirmed in the same ruling the possibility in principle for the Council to derogate from a legislative act on the basis of Article 78(3) TFEU. While the scope of provisional measures based on that article ‘must be sufficiently broad in scope to enable the EU institutions to adopt all the provisional measures necessary to respond effectively and swiftly to an emergency situation’ (paragraph 77), ‘both the material and temporal scope of such derogations must nonetheless be circumscribed’ (paragraph 78). The temporary derogations should be limited to respond ‘swiftly and effectively’ to a specific crisis. It follows that such derogations 1) cannot replace or amend a legislative act permanently and, 2) cannot be used to merely circumvent the legislative procedure set in Article 78(2) TFEU, i.e. the ordinary legislative procedure (paragraph 78). Still, as pointed out by leading academic experts in the field, the measures could not derogate from EU primary law, because of the hierarchy of EU norms. While the derogations must be temporary, the Council enjoys broad discretion in determining the period of application in each case, based on the specific circumstances of the emergency situation (paragraph 92). The Court also affirmed that the response to an emergency situation can evolve and be adapted to the evolving circumstances, as long as the response maintains its provisional nature (paragraph 134). While the current Article 78(3) TFEU, as modified by the Treaty of Lisbon, does not envisage a specific time limit, the previous Article 64(2) of the Treaty establishing the European Community (TEC) limited the emergency measures to a maximum of six months. While the 2015 decisions were meant to apply for no more than two years, the current Commission proposal on provisional emergency measures for the benefit of Latvia, Lithuania and Poland will be applicable for six months only after its entry into force. However, the same proposal provides for the possibility, where appropriate, to repeal or prolong the proposed decision by means of a new Council decision (article 9(3) of the Commission proposal).

Overall, the Court in its ruling referred no less than eight times to the broad ‘discretion’ enjoyed by the EU institutions, in particular when the ‘institutions adopt measures in areas which entail
choices, in particular of a political nature, on their part and complex assessments' (paragraphs 124 and 207). As regards the scope of the provision, the Court held that Article 78(3) TFEU does not define the nature of the provisional measures (paragraph 70) and that the wording of Article 78(3) TFEU does not support a restrictive interpretation of the provision itself as only covering accompanying measures supporting legislative acts adopted according to Article 78(2) TFEU. On the contrary, in order to ensure the effectiveness of that provision, it is necessary to look at its purpose, i.e. to provide the EU institutions with an instrument to respond swiftly and effectively to a given sudden crisis. In fact, the Court recalled that the provisions of Article 78(2) and 78(3) TFEU are distinct, with different objectives; while the former is aimed at regulating 'generally and for an indefinite period, a structural problem arising in the context of the European Union’s common policy on asylum', the latter is geared towards swiftly responding with 'provisional, non-legislative, measures' to a particular emergency situation (paragraph 73). Moreover, the Court clarified that even if the sudden inflow takes place during a migratory crisis over a number of years, it falls within the scope of Article 78(3) TFEU if it makes the normal functioning of the EU common asylum system impossible (paragraph 114) because of the significant pressure, regardless of whether the national systems are affected by other concurrent and structural weaknesses, such as the lack of reception capacities or difficulty in processing the applications (paragraph 127). In its reasoning, the Court recalled several times that statistics were used by the Council to qualify the arrivals of third-country nationals as unforeseeable, thus as 'sudden' (paragraph 122).

European Parliament position

The European Parliament has been a strong supporter of the mandatory emergency relocation measures proposed by the Commission. It voted in favour of the Commission’s first relocation proposal and decided to follow a fast-track procedure as well as to advance in parallel all other measures proposed by the Commission. As regards the second emergency measure, Parliament adopted a resolution by urgent procedure, approving the Commission’s proposal without amendments. The Parliament’s approval in such a short time was designed to send a strong signal to Member States that there was no time to waste and that urgent action was needed. On 18 May 2017, owing to the low level of relocations by Member States (11 % of the total obligation by April 2017), Parliament adopted a resolution urging Member States to fulfil their obligations regarding relocation. It acknowledged that some progress had been made, but expressed its disappointment regarding Member States’ unfulfilled commitments to solidarity and responsibility-sharing.

On the new crisis and force majeure mechanism, rapporteur Fernando López Aguilar insisted that the most important element of the proposed regulation was for a Member State facing a serious challenge to its asylum system to be able to count on the highest degree of solidarity from the other Member States. Members of the European Parliament (MEPs) have expressed concern about the situation at the EU's borders with Belarus, with a majority agreeing on the urgent need to help the people trapped between border forces at the Polish-Belarussian border and the need to put an end to pushbacks. A debate during Parliament's November 2021 plenary session on the conclusions of the European Council meeting of 21-22 October, highlighted divisions on the nature of the crisis, with some considering it a migration crisis and a hybrid attack on the EU, and others seeing it rather as a humanitarian crisis. The proposed Council decision on provisional emergency measures for the benefit of Latvia, Lithuania and Poland will be debated at Parliament's December 2021 plenary session.
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MAIN REFERENCES


ENDNOTE

1 The Commission, in its third progress report on the implementation of the EU security union strategy, announced that it would include a definition of ‘instrumentalisation’ in the proposed revision of the Schengen Borders Code. The proposal for a regulation on the rules governing the movement of persons across borders (COM-2021-891) and the proposal for a regulation on situations of instrumentalisation in the field of migration and asylum (COM-2021-890) were published on 14 December. The Commission proposes to amend Article 2(27) of the Schengen Borders Code as follows:

‘instrumentalisation of migrants’ refers to a situation where a third country instigates irregular migratory flows into the Union by actively encouraging or facilitating the movement of third country nationals to the external borders, onto or from within its territory and then onwards to those external borders, where such actions are indicative of an intention of a third country to destabilise the Union or a Member State; where the nature of such actions is liable to put at risk essential State functions, including its territorial integrity, the maintenance of law and order or the safeguard of its national security.

2 According to Article 16(3) of the Treaty on European Union (TEU): ‘The Council shall act by a qualified majority except where the Treaties provide otherwise’.

3 Bold added by the authors.


5 In particular, the Court reported statistics provided by the European Border and Coast Guard Agency (Frontex) and Eurostat, according to which in July and August 2015 only, the irregular crossing of the Italian and Greek external borders increased by 20% and 250% respectively, compared with May and June 2015. It also recalled statistics provided by the European Border and Coast Guard Agency (EASO) and Eurostat, according to which between January and July 2015 requests for international protection increased by 27% in Italy and by 30% in Greece.

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