



## INSIGHT

### INSTRUMENTALIZATION OF MIGRANTS, SANCTIONS TACKLING HYBRID ATTACKS AND SCHENGEN REFORM IN THE SHADOWS OF THE PACT

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#### THE EUROPEAN COMMISSION'S INSTRUMENTALIZATION STRATEGY: NORMALISING BORDER PROCEDURES AND *DE FACTO* DETENTION

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**ABSTRACT:** The global reform of the EU migration policy envisaged in the New Pact on Migration and Asylum is stalling. The increased number of arrivals from Belarus gave the European Commission the opportunity to change its approach in attempting to reform the European migration management. The Belarus crisis, influenced by the active involvement of the Belarus regime in facilitating third country nationals' passage towards the EU external border, has been labelled an "instrumentalisation situation" posing a threat to the security of the Union. This *Insight* claims that the Commission is exploiting the instrumentalisation narrative to push forward its agenda on migration policy, normalising the use of detention and border procedures as standard migration management tools. Such policy objectives, already introduced in 2015 with the hotspot approach, already play a key role in the overall structure of the New Pact on Migration and Asylum. The *Insight* argues that the Commission's fight against the instrumentalisation of migrants is in itself an instrumentalisation exercise: migrants are instrumentalised to strengthen the securitarian approach to migration; migration crises are instrumentalised to push forward sectorial elements of the New Pact; EU law is instrumentalised to introduce derogatory regimes as permanent components of the EU migration policy.

**KEYWORDS:** instrumentalisation – border procedures – detention – migration crisis – derogatory regime – Belarus.

#### I. INTRODUCTION

The Ukrainian war showed a new and unexpected side of the EU migration policy: the swift and unanimous decision to let millions of displaced persons cross the EU external

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border and to offer them immediate protection.<sup>1</sup> For the first time since the 2015 “migration crisis”, EU leaders did not adopt *ad hoc* derogatory measures to face the emergency.<sup>2</sup> Instead, the tools provided by the Common European Asylum System (CEAS) were used, most notably the Temporary Protection Directive.<sup>3</sup>

Both the solidarity and the *modus operandi* deployed in the Ukrainian case are in stark contrast with the approach adopted in previous migration crises. Just a couple of months before the war, the increased influx of third country nationals crossing the Belarus border was approached not as a humanitarian crisis, but as a “hybrid attack” on the security of the Union.<sup>4</sup> Persons crossing the border were labelled “instruments” exploited by the Belarus regime to destabilise the Union and therefore considered a dangerous menace to tackle, instead of welcome.

This *Insight* claims that the instrumentalisation narrative has monopolised the EU reaction to the Belarus crisis. The European Commission (Commission) is exploiting the peculiarity of the migration flow at the Eastern European land border to push forward its migration policy objectives: the institutionalisation of *de facto* detention and border procedures as standard migration management tools. Such measures, already introduced in 2015 with the hotspot approach, are undergoing an (insofar unsuccessful) process of institutionalisation under the New Pact on Migration and Asylum.<sup>5</sup> The instrumentalisation toolbox presented by the Commission cherry-picks some elements of the New Pact, intending to speed up their entry into force. The Belarus crisis unveiled the determination of the Commission to push forward its migration policy agenda, aimed at the transformation of the EU external border into a non-territory where “irregular” migrants can be confined for as long as possible before either being expelled from or granted access to the EU territory.

## II. THE HOTSPOT APPROACH: FROM EMERGENCY MEASURE TO STANDARD MIGRATION MANAGEMENT

The use of external borders as confinement areas emerged as part of the EU migration policy with the hotspot approach. The hotspot approach was introduced at EU level in 2015 to support frontline Member States facing an increased influx of migrants during the “migration

<sup>1</sup> Almost six million people fled Ukraine and entered the EU since 24 February 2022. See United Nations High Commissioner for Refugees, *Ukraine Refugee Situation* [www.unhcr.org](http://www.unhcr.org).

<sup>2</sup> The simplistic use of the term “migration crisis” to describe the migratory events involving (not only) Europe in 2015 has been disputed in the literature. For this reason, it will appear in quotes in this insight. See: P Pallister-Wilkins, ‘Interrogating the Mediterranean “Migration Crisis”’ (2016) *Mediterranean Politics* 311.

<sup>3</sup> Council Directive 2001/55/EC of 20 July 2001 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.

<sup>4</sup> European Commission, *2021 State of the Union Address by President von der Leyen* [ec.europa.eu](http://ec.europa.eu).

<sup>5</sup> Communication COM(2020) 609 final from the Commission of 23 September 2020 on a New Pact on Migration and Asylum.

crisis”.<sup>6</sup> The European Agenda on Migration described the hotspots as areas where EU agencies could support Member States to identify, register and fingerprint incoming migrants.<sup>7</sup>

Hotspots facilities were established in two Member States: Italy and Greece. Despite the number of arrivals steadily decreasing after 2015-2016, these centres were never dismantled, becoming an integral part of their reception systems. In Italy, the hotspots still function as identification and redistribution facilities. However, according to many international organisations and NGOs, the centres are systematically overcrowded, and access to health care and legal advice is limited.<sup>8</sup> In Greece, the hotspots became the backbone of the reception system, especially after the entry into force of the EU-Turkey Statement,<sup>9</sup> shifting from spaces of identification and transit to spaces of containment and detention.<sup>10</sup>

The normalisation of the hotspot approach beyond its emergency purposes was unsustainable and fragile, especially during the outbreak of the Covid-19 pandemic, which led to more restricting policies and more prolonged stays in the centres.<sup>11</sup> On 8 September 2020, the biggest Greek hotspot, Moria, was destroyed by a fire.<sup>12</sup> The humanitarian catastrophe prompted the Commission to publish a reform plan for the EU migration policy: on 23 September 2020, the New Pact on Migration and Asylum was published, under the motto “no more Morias”.<sup>13</sup>

### III. THE NEW PACT ON MIGRATION AND ASYLUM: THE INSTITUTIONALISATION OF THE HOTSPOT APPROACH

The New Pact on Migration and Asylum was presented as a “fresh start”, a reform “mov[ing] away from *ad hoc* solutions and put[ting] in place a predictable and reliable

<sup>6</sup> The EU hotspot approach was inspired by the Italian experience of CAS (Centri di Accoglienza Straordinaria), introduced in 2014 to support the overloaded hosting system with the temporary repurposing of reception facilities on the Italian territory.

<sup>7</sup> Communication COM(2015) 240 final from the Commission of 13 May 2015 on A European Agenda on Migration.

<sup>8</sup> See: European Council on Refugees and Exiles, *The Implementation of the Hotspots in Italy and Greece. A Study* [www.ecre.org](http://www.ecre.org); Council of Europe, Report CPT/Inf (2020) 2 of 21 January 2020 to the Italian Government on the visit to Italy carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 12 to 22 March 2019.

<sup>9</sup> EU-Turkey Statement of 18 March 2016, in European Council Press Release 144/16 of 18 March 2016.

<sup>10</sup> N Kourachanis, ‘Asylum Seekers, Hotspot Approach and Anti-Social Policy Responses in Greece (2015–2017)’ (2018) *Journal of International Migration and Integration* 1153.

<sup>11</sup> Still I Rise, *Locked in and Neglected: More Human Rights Violations in the Samos Hotspot* [www.stillirisengo.org](http://www.stillirisengo.org).

<sup>12</sup> The hotspot on Lesbos Island housed around 13 000 people despite a hosting capacity of 3 000. European Council on Refugees and Exiles, *Greece: Moria Fire – Thousands Sleeping Rough, Chaos Prevails, Calls for Structural Solutions* [www.ecre.org](http://www.ecre.org).

<sup>13</sup> European Commission, *Intervention in the European Parliament Plenary Session Debate on “The Need for an Immediate and Humanitarian EU Response to the Current Situation in the Refugee Camp in Moria”* [ec.europa.eu](http://ec.europa.eu).

migration management system".<sup>14</sup> Looking at the measures presented, such a statement contains one truth and two lies: while the Pact does substitute *ad hoc* measures with standard and permanent policies, it does not introduce substantial novelties, neither it increases migration management's predictability and reliability. The discrepancy between rhetoric and reality is evident in the field of border management.<sup>15</sup> The hotspot approach instead of being revoked is institutionalised with the Screening Regulation<sup>16</sup> and Asylum Procedures Regulation (APR) proposals.<sup>17</sup>

The Screening Regulation, explicitly inspired by the hotspot approach,<sup>18</sup> introduces a generalised screening procedure (identity, security and health checks) through which every person irregularly crossing the external border must undergo in a location nearby the external border.<sup>19</sup> Differently from the hotspot approach, designed to respond to a mass influx of arrivals, the screening is conceptualised as a "new effective process allowing for better management of mixed migration flows".<sup>20</sup> The confinement of third country nationals at the border is therefore no longer an emergency tool, but a standard feature of the EU migration policy aimed at filtering persons immediately upon their arrival.

Following the Screening, the APR proposal provides for the standardisation and prolongation of asylum border procedures,<sup>21</sup> automatically followed by a return procedure in case of refusal of an international protection application.<sup>22</sup> Throughout the procedures, asylum seekers, which are not allowed to leave the proximities of the border, are not juridically granted entry into the EU.<sup>23</sup> The Screening and APR proposals, therefore,

<sup>14</sup> European Commission, *Press Statement by President von der Leyen on the New Pact on Migration and Asylum* ec.europa.eu.

<sup>15</sup> L Marin, 'The 2020 Proposals for Pre-Entry Screening and Amended Border Procedures: A System of Revolving Doors to Enter (and Leave) Europe?' (30 November 2020) ADiM Blog [www.adimblog.com](http://www.adimblog.com).

<sup>16</sup> Communication COM(2020) 612 final from the Commission of 23 September 2020 on a proposal for a Regulation of the European Parliament and of the Council introducing a screening of third country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817.

<sup>17</sup> Communication COM(2020) 611 final from the Commission of 23 September 2020 on an amended proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU.

<sup>18</sup> Communication COM(2020) 612 final cit., *Explanatory Memorandum*, 1.4.3. - *Lessons Learned from Similar Experiences in the Past*, p. 39.

<sup>19</sup> The screening procedure will apply to all third country nationals who crossed the external border irregularly (arts 3 and 4 of Communication COM(2020) 612 final cit.). Furthermore, the screening will apply also to third-country nationals found within EU territory when authorities suspect they have crossed an external border irregularly (art. 5 of Communication COM(2020) 612 final cit.).

<sup>20</sup> Communication COM(2020) 612 final cit., *Explanatory Memorandum - Context of the proposal - Reasons and objectives of the proposal* 1.

<sup>21</sup> Communication COM(2020) 611 final cit. provides for a mandatory 12-week border procedure for most of the asylum seekers irregularly crossing the external border (amended arts 40 and 41).

<sup>22</sup> New art. 41(a), Communication COM(2020) 611 final cit.

<sup>23</sup> Art. 4 Communication COM(2020) 612 final cit. and art. 41 Communication COM(2020) 611 final cit.

introduce a *fiction of non-entry* in the EU legal framework, placing border facilities outside of full EU and national jurisdiction.

If implemented, the fiction of non-entry will most likely facilitate the *de facto* detention of third country nationals and increase legal uncertainty: many aspects of the procedures are informal and therefore not subjected to legal scrutiny,<sup>24</sup> while asylum seekers' rights and guarantees are only partially granted.<sup>25</sup>

With the New Pact, the Commission institutionalised the use of border facilities, like hotspots, as areas of confinement for persons irregularly entering the EU. The need-for-change rhetoric was instrumental to embellish the design of such exclusionary policies, resulting in the restriction of third country nationals' fundamental rights and access to EU and national jurisdiction.

#### IV. THE BELARUS MIGRATION CRISIS: INSTRUMENTALISING THE INSTRUMENTALISATION NARRATIVE

The New Pact on Migration and Asylum, while not questioning the use of external borders as confinement areas, is the most significant attempt made by the Commission to shift from the post-2015 emergency-based decision-making to a more stable and predictable policy reform. However, the institutionalisation of the hotspot approach via global reforms did not meet Member States' expectations and support. Over one year after the publication of the New Pact, negotiations are indeed stalling: none of the major legislative proposals has been approved.<sup>26</sup>

With the failure of the reformist approach of the New Pact, the emergence of a new migration route on the Eastern European land border prompted the return of the "migration crisis" logic in EU headquarters. Determined to fulfil its policy agenda on migration management, the Commission adopted a (not so) new approach, grounded again on the emergency-response rhetoric.

The emergency at stake was the increase of arrivals from Belarus started at the end of the summer of 2021. Such a phenomenon was influenced by the Belarus regime, which facilitated the passage of third country nationals through its territory as a retaliation to the packages of sanctions imposed by the EU after the fraudulent August 2020 presidential

<sup>24</sup> The de-briefing concluding the screening procedure (art. 13 Communication COM(2020) 612 final cit.), which will be used by authorities to define the type of procedure following the screening, is not a formal document. Despite its substantial effect, such document cannot be challenged with a legal remedy.

<sup>25</sup> During the screening, the right to have access to a lawyer is not prescribed, and the monitoring mechanism (art. 7 Communication COM(2020) 612 final cit.) leaves great discretion to Member States. Under the APR proposal, the guarantees granted during border procedures (Chapter II Amended proposal COM(2020) 611 final cit.) and return procedures (art. 54(3) read together with arts 54(4) and 54(5) Communication COM(2020) 611 final cit.), are far more limited if compared to ordinary procedures.

<sup>26</sup> N Nielsen, 'Commission's New Migration Pact Still Seeking 'Landing Zone' (22 October 2021) EU Observer euobserver.com.

elections.<sup>27</sup> The inflow of third-country nationals to the EU, mainly Iraqis, Afghans and Syrians, totalled almost 9 000 arrivals in 2021.<sup>28</sup> The year before, arrivals were 667.<sup>29</sup>

Despite the more than tenfold increase, the absolute numbers cannot be described as critical, especially if compared to the migration flows targeting Mediterranean Member States. However, the affected Member States, Latvia, Lithuania and Poland, adopted extreme emergency measures. They declared the state of emergency,<sup>30</sup> militarised the border<sup>31</sup> and implemented national legislation legitimising detention at the border and pushbacks.<sup>32</sup> The EU-Belarus border zone became a very hostile area for migrants and asylum seekers.<sup>33</sup> During the winter, 21 fatalities were confirmed.<sup>34</sup> Many NGOs and international organisations accused the actions of Latvia, Lithuania and Poland to breach core provisions of EU and International law.<sup>35</sup>

Confronted with this situation, the Commission did not condemn the Member States' behaviour. Seizing the momentum, it abandoned the systemic and global approach of the New Pact, addressing the increased arrivals as a crisis caused by Belarus via the "instrumentalisation of migrants".<sup>36</sup>

<sup>27</sup> Belarus strategy consisted in attracting third country nationals mostly from the Middle East by easing its visa policy, increasing flight connections especially with Iraq and arrange the transfer from Minsk to the Western border. For more information, check: A Fakhry, R Parkes and A Rác, 'Migration Instrumentalization: A Taxonomy for an Efficient Response' (Hybrid CoE Working Paper 14 -2022).

<sup>28</sup> Frontex, *Migratory Situation in October: Persisting Pressure on Eastern Border* frontex.europa.eu.

<sup>29</sup> Frontex, *Migration Routes, Eastern Borders Route* frontex.europa.eu.

<sup>30</sup> On 30<sup>th</sup> September in Poland; on 9<sup>th</sup> November in Lithuania; on 11<sup>th</sup> of August in Latvia.

<sup>31</sup> Poland passed a law authorising the construction of a border-wall on 3 November, while Lithuania started building a fence along the border on September 2021. Both States sent the army at the border. Poland increased the military presence in the area to 20 000 soldiers in October 2021.

<sup>32</sup> OHCHR, *Belarus and Poland: Stop Sacrificing Migrant Lives to Political Dispute—UN Special Rapporteurs* www.ohchr.org; Amnesty International, *Belarus/EU: New Evidence of Brutal Violence from Belarusian Forces Against Asylum-Seekers and Migrants Facing Pushbacks from the EU* www.amnesty.org.

<sup>33</sup> Due to the dire situation, the European Court of Human Rights issued an interim measure ordering Poland to provide food, shelter and water to people stranded at the border. The Court indicates interim measures in respect of Iraqi and Afghan nationals at Belarusian border with Latvia and Poland, in European Court of Human Rights press release 244 (2021) of 25 August 2021 hudoc.echr.coe.int.

<sup>34</sup> Médecins Sans Frontières, *Poland-Belarus Border Crisis: "We Don't Want People to Die in the Forest"* www.msf.org.

<sup>35</sup> European Council on Refugees and Exiles, *EU Eastern Borders: States Deploy Troops, Dehumanise Migrants and Decry Belarus as Border Tensions Escalate – Locals Offer Humanitarian Aid* http://www.ecre.org. Council of Europe, *Commissioner Calls for Immediate Access of International and National Human Rights Actors and Media* www.coe.int.

<sup>36</sup> "Instrumentalisation" is defined at art. 2(2) Communication COM(2021) 891 final from the Commission of 14 December 2021 on a proposal for amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders (check below footnote 42) as "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 [...] 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

The presence of migrants at the European Eastern land border was defined as a “hybrid attack” on the security of the Union.<sup>37</sup> Coupling the logic of emergency with the instrumentalisation narrative, the Commission published a set of proposals composing a “more permanent toolbox to address future attempts” of instrumentalisation.<sup>38</sup> The first element of the toolbox is the Proposal for a Council Decision on Provisional Emergency Measures for the Benefit of Latvia, Lithuania and Poland (Emergency Measures Proposal).<sup>39</sup> The measures are designed as an emergency and temporary reaction to the increased number of arrivals. However, the Commission decided to immediately institutionalise the emergency measures beyond the specific case of Belarus, introducing two new legal texts: the Proposal for a Regulation addressing situations of instrumentalisation in the field of migration and asylum (Instrumentalisation Regulation)<sup>40</sup> and the proposal of a reform of the Schengen Borders Code (SBC Reform).<sup>41</sup> The two texts mirror the provisions of the Emergency Measures Proposal, centred on three main actions: The intensification of border controls;<sup>42</sup> the widespread application of border procedures<sup>43</sup> and the (*de facto*) detention of asylum seekers.<sup>44</sup>

With the extension of the time period for registering and assessing international protection applications,<sup>45</sup> asylum seekers are prevented to leave the border zone for at least 20 weeks. Moreover, asylum and return procedures are substantially assimilated.<sup>46</sup> As a

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”.

<sup>37</sup> European Commission, 2021 *State of the Union Address by President von der Leyen*, cit.

<sup>38</sup> Joint Communication JOIN(2021) 32 final from the Commission of 23 November 2021 responding to state-sponsored instrumentalisation of migrants at the EU external border 1.

<sup>39</sup> Communication COM(2021) 752 final from the Commission of 1 December 2021 on a proposal for a Council Decision on provisional emergency measures for the benefit of Latvia, Lithuania and Poland.

<sup>40</sup> Communication COM(2021) 890 final from the Commission of 14 December 2021 on a proposal for a Regulation of the European Parliament and of the Council addressing situations of instrumentalisation in the field of migration and asylum.

<sup>41</sup> Communication COM(2021) 891 final cit..

<sup>42</sup> The rules on border controls in a situation of instrumentalisation are regulated by arts 5 and 13 of Communication COM(2021) 891 final cit.

<sup>43</sup> Border procedures are regulated at art. 2 Communication COM(2021) 752 final cit. and at art. 2(1) Communication COM(2021) 890 final cit.

<sup>44</sup> The use of detention to keep asylum seekers in border areas is provided for in Recital 23 Communication COM(2021) 752 final cit. However, the derogation allowing Member States to decide at their border or transit zones on the admissibility and the substance of all applications (art. 2(2)) implicitly implies the detention of applicants throughout the procedure. Such format is mirrored in Recital 8 and art. 2(1)(b) Communication COM(2021) 890 final cit.

<sup>45</sup> The registration period is extended to four weeks in art. 2(1) Communication COM(2021) 752 final cit. and art. 2(1)(a) Communication COM(2021) 890 final cit. The time limit for assessing (both on admissibility and on merit) the asylum applications is set to sixteen weeks in art. 2(5) Communication COM(2021) 752 final cit. and art. 2(1)(c) Communication COM(2021) 890 final cit.

<sup>46</sup> Art. 4 Communication COM(2021) 752 final cit. and art. 4 Communication COM(2021) 890 final cit. provide for the derogation from almost all provisions of the Return Directive when performing returns procedures.

result, all procedures governing the stay and expulsion of third country nationals during an instrumentalisation situation are grouped in one place: the external border and its facilities, which would become semi-formal detention centres. The instrumentalisation toolbox reinforces the conceptualisation of external borders as a non-territory, already envisaged in the New Pact.<sup>47</sup> The jurisdiction of this area would be externalised, while territorially remaining on the EU territory, to allow Member States not to comply with their obligations towards the protection of third country nationals' rights.<sup>48</sup>

The instrumentalisation narrative has substituted the global reforms of the New Pact as a rhetorical tool deployed by the Commission to institutionalise the hotspot approach, which is now rebranded and upscaled. Such operation follows an instrumentalisation logic: migrants are instrumentalised to strengthen the securitarian approach of the EU migration policy; migration crises are instrumentalised to pursue sectorial migration policy objectives; finally, EU law is instrumentalised to pursue a model of legislation by derogation to speed up the legislative process and limit the role of the European Parliament.

#### IV.1. INSTRUMENTALISATION OF MIGRANTS

The instrumentalisation narrative reinforces the securitarian approach to migration adopted by the EU in the past twenty years, framing "irregular" migrants as a security threat.<sup>49</sup> Through the lenses of instrumentalisation, migrants are further de-humanised, becoming pawns on the European geopolitical chessboard. Such generalisation is simplistic and flawed, as it voids migrants of any agency: migration is no longer the result of an individual choice, but a weapon at disposal of countries along migration routes. Framing migration flows as instrumental, the EU feels entitled to no longer set up a support and solidarity policy to face arrivals, but rather to adopt a strategy of closure and defence.

The broad and vague definition of instrumentalisation contributes to the de-humanisation of migrants. By arbitrarily and subjectively defining the criteria triggering an "instrumentalisation situation", Member States could perpetually rely on instrumentalisation as a justification to limit access to their territory and third country nationals' rights and guarantees.<sup>50</sup>

<sup>47</sup> L Marin, 'The 2020 Proposals for Pre-Entry Screening and Amended Border Procedures: A System of Revolving Doors to Enter (and Leave) Europe?' cit.

<sup>48</sup> The Explanatory Memorandums of both Communication COM(2021) 752 final cit. and Communication COM(2021) 890 final cit. explicitly refer to the application of a fiction of non-entry as the objective of the extended border procedure. In Communication COM(2020) 612 final cit. instead, such fiction is only theorised but never explicitly mentioned.

<sup>49</sup> On the EU securitarian approach, see: A Geddes, L Hadj-Abdou and L Brumat, *Migration and Mobility in the European Union* (Bloomsbury Publishing Plc 2020); S Léonard and C Kaunert, *Refugees, Security and the European Union* (Routledge 2019).

<sup>50</sup> Art. 2(2) Communication COM(2020) 612 final cit. identifies as activation criteria third countries' "intention [...] to destabilise the Union or a Member State". No indication on how to assess such intention is provided.

In an instrumentalisation situation, third country nationals are homologated under a single category: threat. No distinction is made among different typologies of incoming migrants and no exclusion is provided for vulnerable persons and minors, which are only granted limited guarantees.<sup>51</sup> The message is clear: once instrumentalised, migrants cease to be individuals with specific needs, becoming threatening weapons that must be defused as quickly and far as possible from the EU territory.

#### IV.2. INSTRUMENTALISATION OF MIGRATION CRISES

The instrumentalisation toolbox is built on the questionable premise of the existence of a migration crisis in Belarus. As admitted by Commissioner Johannsson, the situation at the Belarus border was problematic not for the scale of arrivals, but for the instrumentalisation actions carried out by the Belarus regime.<sup>52</sup> According to the Commission, the EU legal framework was not flexible enough to allow Member States to respond appropriately to such instrumentalisation. Hence, the adoption of emergency measures was justified.<sup>53</sup>

However, the legal basis of the Emergency Measures Proposal, art. 78(3) TFEU, is specifically purposed to assist Member States to respond to sudden inflows of third country nationals which constitute an emergency. The Court of Justice of the European Union specified that to be an emergency, a migration inflow must render the functioning of the asylum system impossible.<sup>54</sup> Neither the Treaties nor the Court refer to external actors influencing a migratory phenomenon as a trigger for art. 78(3) TFEU. Consequently, the existence of an instrumentalisation situation alone is not sufficient to activate art. 78(3) TFEU. Nonetheless, the Commission is continuing to rely on this legal basis for the provision of emergency measures.

The situation at the Belarus border is also instrumentalised to introduce long-lasting changes in the EU migration policy. The measures foreseen by art. 78(3) TFEU are meant to address the exceptional situation at the Belarus border. The Belarus crisis, however, has been only the starting point for a broader reform attempt of the EU legal framework: the Instrumentalisation Regulation and the SBC Reform indeed aim at making the emergency measures a permanent element of the EU legal framework. Such a shift happened in record time, less than two weeks: in comparison, it took seven years for the Commission to englobe the hotspot approach within the EU migration policy as part of the New

<sup>51</sup> Communication COM(2021) 752 final cit. and Communication COM(2021) 890 final cit. do not have a specific provision offering vulnerable migrants a preferential treatment. Concerning minors, Member States are only required to prioritise the registration and examination of their application.

<sup>52</sup> G Barigazzi, 'EU Grants Emergency Asylum Measures for Belarus Border — but Insists No Crisis Yet' (1 December 2021) Politico [www.politico.eu](http://www.politico.eu).

<sup>53</sup> European Commission, *Asylum and Return: Commission Proposes Temporary Legal and Practical Measures to Address the Emergency at the EU's External Border with Belarus* [ec.europa.eu](http://ec.europa.eu).

<sup>54</sup> Joined cases C-643/15 and C-647/15 *Slovak Republic, Hungary v Council of the European Union* ECLI:EU:C:2017:631.

Pact on Migration and Asylum. Despite the delicate content of the provisions, proposing substantial derogations from core protective EU migration law provisions, the Commission did not wait for the emergency measures to be approved and implemented and did not run any impact assessment before proposing their institutionalisation.

#### IV.3. INSTRUMENTALISATION OF DEROGATORY REGIMES

The New Pact on Migration and Asylum aimed at introducing “a new, durable European framework” providing “certainty, clarity and decent conditions for [persons] arriving in the EU”.<sup>55</sup> Only one year later, this goal is off the table.

The instrumentalisation toolbox is composed of a patchwork of derogatory provisions grouped in short legal texts. To make the texts understandable, long explanatory memorandums are added, which however have no legal value. The toolbox lacks clarity and accessibility, and its compliance with the principles of necessity, proportionality and efficiency is hard to assess.<sup>56</sup> The instrumentalisation narrative weakens the effectiveness of CEAS and hinders its compliance with fundamental rights, as many of its core provisions could be disapplied in arbitrarily defined “instrumentalisation situations”. Using the instrumentalisation narrative, the Commission is normalising the introduction of derogatory regimes in the EU migration policy. Such regimes however seriously hinder the homogeneous application of EU law, weakening legal certainty and the harmonisation of national norms.

Furthermore, the instrumentalisation toolbox derogates from regulations and directives already involved in a reform process under the New Pact. Regarding border procedures, many of the measures introduced are copy-pasted from the Screening and APR proposals: the introduction of a fiction of non-entry, the extension of the personal scope of the border procedures and their duration, the overlapping between the asylum and return procedures, to name a few. Many provisions also resemble the Crisis and Force Majeure Regulation.<sup>57</sup>

Looking at these similarities, it can be argued that the Commission is instrumentalising the derogations of the instrumentalisation toolbox to introduce selective elements of the New Pact in the EU legal framework. The Belarus crisis provided the justification to introduce extraordinary measures with extraordinary means, such as art. 78(3) TFEU, excluding the European Parliament from the negotiations. The exclusion of one co-legislator is also instrumental in speeding-up negotiations and silencing its criticisms. Furthermore, the Instrumentalisation Regulation and SBC proposal are going to permanently introduce derogatory provisions directly inspired by the New Pact in the EU legal framework.

<sup>55</sup> Communication COM(2021) 752 final cit. 1.

<sup>56</sup> M Forti, ‘Weaponisation of Migrants? Migrants as a (Political) Weapon and the EU Regulatory Response: What to Expect Now’ (10 March 2022) EJIL Talk [www.ejiltalk.org](http://www.ejiltalk.org).

<sup>57</sup> Communication COM(2020) 613 final from the Commission of 23 September 2020 on a 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.

In conclusion, the instrumentalisation toolbox works as a proxy to allow the Commission to make the widespread application of detention and fast procedures at the border the main tool of the EU border management.

## V. CONCLUSION

The instrumentalisation approach adopted by the Commission during the Belarus crisis is at odds with the solidarity shown during the Ukrainian humanitarian crisis. This contradictory behaviour unveils the fragile basis on which the instrumentalisation rhetoric is built. The emergency measures were aimed to better equip Eastern European Member States to face an increased number of arrivals. However, none of these measures has been introduced when the same Eastern border, and especially Poland, has been invested by a mass influx of persons fleeing Ukraine. On the contrary, incoming persons have been granted free access to the EU territory, intra-EU mobility and immediate and generalised protection, in order to avoid overloading frontline Member States' reception systems. Such a strategy is quite different from the model of prolonged and generalised detention at the external border envisaged by the instrumentalisation toolbox.

The welcoming policy to persons fleeing Ukraine and the determination to stop the inflow of migrants from Belarus have the same origin: political will. In the past years, the Commission has failed to group Member States' support on its reform proposal. Striving to remain relevant in the EU migration debate, the Von der Leyen Commission decided to adopt a *Realpolitik* approach, giving Member States what they want.<sup>58</sup> Such an approach is evident both in the New Pact on Migration and Asylum and in the instrumentalisation toolbox. Looking at past contrasts on solidarity measures, the Commission focused its effort on one element of its political agenda: the institutionalisation of widespread border procedures and border detention.

This strategy not only disregards third country nationals' needs and fundamental rights, but it appears not to be effective: the measures designed to appease Member States have been deemed by many EU leaders as insufficient and too weak. As a result, the negotiations on the New Pact are not progressing, and the instrumental toolbox received a lukewarm reaction. Especially the Member States directly involved in the Belarus crisis spoke against the measures proposed by the Commission, demanding for asylum procedures to be suspended, instead of prolonged.<sup>59</sup>

The Ukrainian humanitarian crisis is currently monopolising the European migration debate, and the EU is showing a more humane side of its migration policy. It is important,

<sup>58</sup> D Thym, 'European Realpolitik: Legislative Uncertainties and Operational Pitfalls of the "New" Pact on Migration and Asylum' (28 September 2020 ) EU Immigration and Asylum Law and Policy [eumigrationlawblog.eu](https://eumigrationlawblog.eu).

<sup>59</sup> Euractiv, 'Poland Frowns at EU-Proposed Longer Legal Limbo for Migrants from Belarus' (2 December 2021) Euractiv [www.euractiv.com](https://www.euractiv.com).

albeit unlikely, for the solidaristic and welcoming policy adopted by the EU not to remain a *unicum*. To do so, the Commission must abandon its *Realpolitik* strategy and fulfil its role of guardian of the Treaties, bringing forward proposals to “develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulment”.<sup>60</sup>

<sup>60</sup> Art. 78(1) TFEU.