

THE CRISIS AND FORCE MAJEURE REGULATION: TOWARDS FUTURE-PROOF CRISIS MANAGEMENT AND RESPONSES?

Alberto-Horst Neidhardt

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EXECUTIVE SUMMARY

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In recent years, the EU has been confronted with emergencies that have severely impacted the asylum and reception systems of member states. Following the adoption of the New Pact reforms, the Union now has a dedicated instrument for dealing with such situations. The newly adopted Crisis and Force Majeure Regulation (the 'Regulation') sets in place a procedure for determining if a member state faces an emergency and defines which response should be set into motion, including enhanced solidarity and derogations from the Asylum Procedures Regulation (APR). Against this background, the policy study examines the added value and the challenges relating to the implementation of these measures. To this end, it explores key aspects of the crisis cycle, including the potential impact of the derogations, the authorising procedure as well as the monitoring and coordination mechanisms to be used in an emergency.

The study's overarching question is whether the EU will be better prepared for future crises after

the adoption of the New Pact reforms. It highlights that the EU is potentially better off with a common framework, also considering the likelihood of volatile migration flows in the future. Nevertheless, this study points to the ambiguities and grey areas in the Regulation, underlining that the flexibility for facilitating EU responses could come at the cost of legal certainty. At the same time, the benefit of using the derogations remains unclear, while solutions to address the root causes of an emergency may lie outside the New Pact instruments or even migration policy. Considering this, the newly adopted rules do not suffice to future-proof EU crisis management. To address possible challenges, this study includes forward-looking reflections which underline the need to make exit strategies part of the crisis response from the start. It also recommends using all foreseen measures – not just derogations – that can lead to an effective response on the ground while minimising the risks of rights violations and negative spillover effects for the EU.

INTRODUCTION

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While most New Pact reforms seek to improve pre-existing frameworks, one novelty is a dedicated instrument to deal with crisis and force majeure situations in the field of migration and asylum. Especially after the disastrous political and humanitarian consequences following increased irregular arrivals in 2015-2016, the EU's lack of preparedness and capacity to respond to such situations could no longer be ignored. The Pact tries to fill this gap with a new crisis management system, mostly governed by the Crisis and Force Majeure Regulation (the 'Regulation').¹ The Regulation provides for enhanced solidarity based on the provisions laid out in the Asylum and Migration Management Regulation (AMMR)² and derogations from the Asylum Procedures Regulation (APR).³ Further derogations are foreseen in other instruments, such as the temporary closure of border crossings under the amended Schengen Borders Code (SBC).⁴

Derogations have attracted a great deal of attention from commentators and civil society organisations (CSOs).⁵ However, the Regulation is more comprehensive. Together with other tools, it seeks to strengthen the Union's preparedness and resilience, thus trying to prevent crises from arising in the first place. Under the new framework, the derogations are meant to be a measure of last resort: they should only apply when strictly necessary, if capacity-building and preventive measures failed, and for a limited time. Their stated aim is to ensure that national asylum and reception systems can overcome exceptional circumstances and return to a situation of normalcy as soon as possible. And yet, the exceptional measures foreseen are also to a degree discretionary, and, despite the stated goal, some member states may more readily call for their use. More broadly, the Regulation – alongside other reformed legislation – remains a legal tool. As such, its adequate operationalisation will be contingent on a variety of factors, including capacities as well as financial support.

Nevertheless, the importance of the Regulation in the reformed Common European Asylum System (CEAS) should not be overlooked, even if many may hope that it will never be used. Only with effective tools in place will the EU be able to devise and swiftly execute a collective response in the event of future crises, avoiding the uncertainty and humanitarian emergencies of the past, while also preserving mutual trust between member states and public confidence. Against this background, this policy study examines the new rules against the overarching question of whether the EU will be better prepared for future crises, including those engineered by foreign actors, thanks to this new crisis management system.

The policy study begins with an analysis of key definitions and the procedure for activating emergency rules, before turning to the foreseen solidarity measures and derogations linked to other New Pact reforms. The study then moves to monitoring provisions and fundamental rights protections in the new system, followed by an exploration of crisis coordination mechanisms. It concludes with forward-looking reflections. Overall, the study builds on key takeaways from past crisis situations, such as the increased arrivals in 2015-2016, the engineered rise in border crossings from Belarus in 2021, and the large-scale displacement following Russia's invasion of Ukraine in 2022. The study points to three weaknesses revealed by past emergencies, which the Regulation only partly addresses: the need for better preparedness and rapid responses, enhanced crisis coordination, and jointly agreed exit strategies.

1. CRISIS, INSTRUMENTALISATION AND FORCE MAJEURE SITUATIONS: WHAT'S IN A NAME?

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In recent years, the EU has more than once been confronted with extraordinary situations, be that due to a surge in irregular arrivals, the use of migration as a hybrid tool by malicious foreign actors or because of unprecedented situations with major impacts on mobility, like the COVID-19 pandemic. Considering growing geo-political instability, but also the possibility of severe health or natural disasters becoming more frequent, the EU will need to deal with more volatile migration flows in the future.⁶

Past crises can be useful in evaluating whether the EU will be better off with the newly adopted Pact instruments.⁷ And the first lesson is that, while member states and EU institutions have generally agreed about the existence of emergencies in the past at a general level, they differed as to their exact starting point and duration as well as their determining factors. In addition, each emergency raised unique challenges for national asylum and reception systems. Reflecting this, the situations covered by the Regulation should be seen on a continuum with, but also as distinct from those covered by the AMMR, such as "migratory pressure" or "significant migratory situations".⁸ They are all considered exceptional, either because of the scale of irregular arrivals, or because of their causes, as in the case of instrumentalisation and force majeure respectively. And yet, they also differ from one another.

Due to the highly variable characteristics of the situations that the newly adopted rules cover, the Regulation embeds flexibility in the new system, starting with the inclusion of broad definitions.⁹ While these could facilitate EU responses in wide-ranging emergencies, they also increase uncertainty.

Crisis is defined as a situation of mass arrivals, which, considering the population, GDP, and geographical specificities of the concerned state, renders its asylum, reception, or return systems "non-functional" due to its "scale and nature", with serious consequences for the CEAS.¹⁰

Instrumentalisation involves a situation where a third country or hostile non-state actor facilitates the movement of non-EU nationals to the EU's external borders or to a member state with the intended aim of destabilising the Union or undermining a member state's capacity to perform essential functions.¹¹ The Regulation's recitals specify that neither smuggling nor humanitarian assistance should be considered forms of instrumentalisation, provided they do not aim at destabilising the EU or a member state.

Force majeure refers instead to unforeseeable circumstances outside a member state's control, also defined as "abnormal", which could not have been avoided and thus prevent a member state from fulfilling its obligations under the AMMR and APR.¹² Some clarity on what qualifies as force majeure is provided in one of the Regulation's recitals, which cites pandemics and natural disasters as examples.¹³

Compared to previous versions under negotiation, the final text of the Regulation somewhat improves legal certainty. For example, unlike the Commission's original proposal from 2020, an "imminent risk" does not suffice for crisis situations to arise.¹⁴ Yet, ambiguities remain. Illustrating this, asylum and reception systems must be 'non-functional' for a situation of crisis to arise.

However, nowhere does the Regulation specify what this means. It also remains unclear how it could be proven, or contended, that a humanitarian mission has the goal of destabilising the EU or a member state, because the term 'destabilising' is itself undefined.

Therefore, the definitions remain broadly framed. Embedding some flexibility in the system is understandable. That said, broad definitions could contribute to conflicting interpretations and a lack of predictability. This is especially problematic considering the derogations foreseen in such scenarios and their impact, both on the functioning of the CEAS and on the activities of actors such as humanitarian organisations.

Relatedly, it is also worth noting that 'instrumentalisation' is classified in the Regulation as a specific iteration of 'crisis'. By contrast, the Commission had originally proposed a separate instrument to cover such situations in December 2021, following a rise in unauthorised border crossings from Belarus orchestrated by the Lukashenko regime.¹⁵ To this day, some member states consider situations of instrumentalisation as a self-standing category deserving ad hoc responses.¹⁶ In the Regulation, mass arrivals are in fact not considered a key factor when a foreign actor engineers a migration management crisis, unlike in other crisis situations, somehow confirming their difference.

The legal and operational benefits of placing instrumentalisation into the crisis category can thus be questioned. In the long-term, it may not prevent national demands for a special treatment of such situations, and for further targeted measures. Illustrating this prospect, the letter from 15 member states addressed to the Commission in May 2024, just a few weeks after the European Parliament and Council had agreed to the Regulation, called for strengthening or even reforming the newly adopted tools "to address the threats posed by the instrumentalisation of migrants at the EU's external borders".¹⁷

As such, the definitions in the Regulation will likely continue to generate debate and disagreement,

even among institutional actors. Far from being an abstract issue, this uncertainty can have significant systemic consequences, depending on whether and which derogations and supporting measures will be authorised in an emergency.

2. EMBEDDING CRISIS PREPAREDNESS AND RESPONSES IN THE NEW MIGRATION MANAGEMENT CYCLE

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Questions and ambiguities regarding the scenarios covered by the Regulation and the conditions for applying the derogations are in part addressed by the authorising procedure established by the new law (see Table 1). This procedure does not happen in a vacuum, but as part of the annual migration management cycle foreseen by the AMMR, with further relevant provisions on preparedness.¹⁸

As part of this broader policy cycle, member states should develop national strategies, including preventive measures to reduce the risk of crisis and force majeure situations, and identifying actions to ensure a sufficient level of preparedness. To this end, states should consider contingency planning foreseen under the recast Reception Conditions Directive (RCD) and the Commission's reports issued within the framework of the Migration Preparedness and Crisis Blueprint.¹⁹ The latter amounts to an operational framework for monitoring, anticipating, and managing migration flows (see Box 1 below).²⁰

While embedding crisis and force majeure scenarios in the overarching policy cycle and seeking to strengthen resilience against emergencies, the Regulation establishes an ad hoc procedure for determining the necessary response, if an exceptional situation does arise. This procedure aims to define responsibilities and speed up the EU's reaction. In doing this, it seeks to address two shortcomings revealed by the EU's response to past crises, especially the one that took place in 2015-2016: the lack of clear roles and leadership, and the failure to react to the early signs of the emergency.²¹

Accordingly, under this new procedure, a member state that considers itself to be in a situation of crisis or force majeure should submit a "reasoned request" to the Commission.²² The request must include a description of the situation, and how it has rendered its asylum and reception systems non-functional, as well as the requested solidarity measures and derogation(s). In its request, the member state can indicate whether it wants to benefit from a longer period for registering asylum applications. This is the only derogation that is allowed from the start, and not requiring a corresponding authorisation.

The Commission must then "expeditiously" assess the request in consultation with the concerned state, EU agencies, the UN Asylum Agency (UNHCR), and the International Organization for Migration (IOM).²³ When assessing the situation, the Commission is to verify whether the conditions spelt out in the above-mentioned definitions are met based on the information provided by the member state and relevant qualitative and quantitative indicators listed in the AMMR.²⁴ These include the number of asylum applications, refused entries and irregular crossings, as well as the number of non-EU nationals subject to the border procedure and the reception capacity in the requesting state.

The use of a wide variety of qualitative and quantitative indicators – and the Commission's view that no indicator takes precedence over another²⁵ – should enable it to carry out an evidence-based and impartial assessment, without overlooking any of the relevant factors. Yet, inevitably, it widens the Commission's discretion in evaluating a given situation.

Table 1: The procedure and timeline of the 'Crisis Management Cycle'

ACTION	TIMELINE
A member state submits a reasoned request to the European Commission.	At the outset of the situation.
When submitting the request, the state may start applying a specific derogation to the APR: delays in registering an application for international protection.	Registration delays are immediately applicable for 10 days, unless later authorised for a longer period in the Council Implementing Decision.
The European Commission adopts an Implementing Decision determining if the requesting member state is in a situation of crisis or force majeure.	No later than two weeks after the member state's request.
The Commission submits a proposal for a Council Implementing Decision, including a draft Solidarity Response Plan.	Simultaneously with the adoption of the Commission Implementing Decision (no later than two weeks following the request).
The Council adopts an Implementing Decision authorising the derogations and establishing the Solidarity Response Plan.	Within two weeks following the Commission's proposal (four weeks after the request).
The Commission convenes the Technical Level Solidarity Forum to promote the application of the measures foreseen in the Plan.	Immediately following the Council Decision, and regularly during the measures' operationalisation.

Further conditions must be fulfilled for specific situations to be recognised. In determining whether a member state faces a situation of instrumentalisation, the Regulation specifies that the Commission must verify if an unexpected and significant increase in applications for international protection has occurred and indicate why the situation cannot be addressed through the EU Migration Support Toolbox, which includes operational support by agencies, Union Funds, and the Union Civil Protection Mechanism, next to enhanced diplomatic and political outreach.²⁶

In all scenarios, if the necessary conditions are met, concurrently with adopting its own Implementing Decision, the Commission should also make a proposal for a Council Implementing Decision. The proposal should outline the derogations that the requesting member state would be authorised to apply and include a draft Solidarity Response Plan, to be developed in consultation with the concerned state.

Based on the Commission's proposal, the Council should then adopt an Implementing Decision authorising the derogations and the period for their application and establishing the Solidarity Response Plan.²⁷ The Plan should include the total relocations needed to address the crisis, financial, and alternative solidarity contributions as well as the total amount of contributions to be taken from the annual Solidarity Pool. While recognising the equal value of the different solidarity contributions and respecting national discretion in choosing them, the Council should also define the specific contributions that member states other than the one facing the exceptional situation should fulfil.

The procedure also establishes temporal limits.²⁸ By default, the duration of the derogations and solidarity measures should be three months. If the situation persists, the derogations and solidarity measures may be extended for another three months. If, at the end of this period, the concerned

state requests it, the Commission may submit a proposal for a new Council Implementing Decision to amend or prolong the specific derogations or the Solidarity Response Plan, for a period of no longer than three months, extendable only once (amounting to one year in total). The Regulation also establishes that the emergency measures should be withdrawn, if the situation no longer persists. These limits reflect another lesson learnt from past crises: the need to ensure that exceptional measures in response to an emergency do not apply indefinitely.²⁹

This procedure, which complements the migration management cycle laid down by the AMMR but also seeks to improve preparedness and responsiveness, appears to have been designed to strengthen the overall governance of the CEAS. Although all these goals are widely considered essential for more effective crisis management, blind spots as well as some possible sources of tension and uncertainty remain.

To begin with, if not supported by further actions, initiatives to strengthen the EU's resilience to future crises may prove seminal but insufficient. Ambiguities also remain: for example, neither the use of measures comprised in the EU Migration Support Toolbox nor, presumably, those of the Blueprint are regarded in the legislation as a precondition to benefit from the measures under the Regulation.³⁰ At the same time, the Commission has emphasised that, to benefit from support measures foreseen under the new system, including solidarity contributions, a member state must fulfil its responsibilities, and have resilient asylum, migration and reception systems.³¹ In this respect, the EU-level Common Implementation Plan, released by the Commission in June 2025 reiterates that contingency planning under the RCD and national strategies under the AMMR are a prerequisite for a member state to be considered well-prepared. Yet, ambiguities in the Regulation will remain, and key will be to monitor and regularly assess follow-up actions by member states in this context.³²

Broader questions also arise on how to ensure adequate preparedness for situations that may, by definition, be unpredictable and outside states'

control, as in the case of force majeure and, arguably, instrumentalisation.³³

The annual review that the Regulation includes as part of the crisis cycle could also be potentially helpful to incentivise better preparedness and responses, and preserve the experience acquired: no later than one year from the date when the emergency ended, member states must revise, *where necessary*, their national strategy, as required by the AMMR.³⁴ The goal is to implement the asylum and migration management system of member states more effectively in the future. Despite its potential benefits, the review too has limits, particularly the risk of discretionary or limited use by member states. A lack of commitment to the exercise would be problematic, considering the benefits such a collective re-assessment would provide, especially but not only if the emergency has a pan-European dimension.

A critical element for the procedure's functioning relates to the deadlines for issuing the implementing decisions. The deadlines are undoubtedly tight, also considering the manifold scenarios covered and the slow responses in some past emergencies. In this context, it will be essential that states, the Commission, and the Council develop the human resources that enable them to fulfil their respective obligations while also facilitating information exchange. Meeting the deadlines will also be contingent on close coordination between all relevant actors from the outset, without necessarily waiting for the procedure to have formally reached a certain stage. Connected to this, mutual trust between all the actors involved will be key.

But arguably even more important than the procedure itself will be to have a broad political consensus from the start to ensure a prompt and unified response. Illustrating this, it only took a few days for member states to activate the Temporary Protection Directive (TPD), which had remained unused for over two decades, after Russia's full-scale invasion of Ukraine in February 2022 provoked the largest displacement in Europe since the Second World War.³⁵ Only time will tell if member states will be able to come together and show the same

unity again, if confronted with an emergency of a similar magnitude, or less, in the future.

Other than these broader considerations, there appears to be an inconsistency in the timeline. The Regulation highlights that the Commission should expeditiously assess a state's request to limit the time gap between the application of the registration delays – the only derogation permitted immediately and without authorisation – and the Council Implementing Decision. Yet, this derogation is applicable for 10 days, while the Decision may only come two weeks from the Commission's proposal.

A third problematic aspect, and possible source of tensions, could stem from simultaneous or prolonged crises, which the procedure does not altogether preclude, and, consequently, the risk of fragmentation of the CEAS. Although the Regulation limits the application of derogations and solidarity measures for the same situation to 12 months, a member state may request and be authorised to apply further measures concomitantly when it faces several of the situations covered "at the same time".³⁶ In addition, the Regulation does not clarify what further elements would be necessary for a new exceptional situation to arise, and no provision appears to prevent multiple requests. This raises the prospect of member states expediently demanding a new assessment every time some (self-determined) new elements arise or the circumstances change, potentially extending the use of the derogations beyond the time limits.

While admittedly underpinned by different rules, an instructive parallel can be drawn from the functioning of the Schengen system.³⁷ Schengen has for years been undermined by the controversial reintroduction of what should otherwise be 'temporary' internal border controls.³⁸ The criticism relates to the state practice of shifting legal basis, once the temporal limits have been exhausted, and the limited justifications provided.³⁹ Strong scrutiny by the Commission should prevent the use of 'weak' justifications in relation to crisis and force majeure situations. Member states would also not be able to simply claim that an existing threat persists.⁴⁰ However, also considering

that what counts as a new threat is unclear, it cannot be excluded that member states may similarly claim that a new situation has arisen and alternate the grounds to go beyond the time limits.

Other than this, while the 12-month overall limit to the application of emergency measures under the Regulation should prevent permanent 'states of exception', this limit may not correspond to the actual duration of a crisis or force majeure situation. Against this background, there is a risk that member states will try to use the Regulation's ambiguities and weaker points to surpass the time limit. Alternatively, if not possible under the Regulation, they may demand additional measures: states may request further derogations and support through Article 78(3) of the Treaty on the Functioning of the European Union (TFEU).⁴¹ This Article, first used in the 2015-2016 crisis, allows for the adoption by qualified majority of provisional measures to support a member state experiencing "a sudden inflow of nationals of third countries", also making use of further discretion regarding their duration.⁴²

To put this risk into perspective, it is worth noting that many of the past emergency situations often lasted longer than one year, as was the case with irregular arrivals in 2015-2016, but also the COVID-19 pandemic. Most recently, states neighbouring Belarus and Russia, facing what they consider a persistent risk of instrumentalisation have not hesitated to prolong emergency measures and a corresponding state of exception under national law, going well beyond the 12 months now permitted by the Regulation.⁴³

Even though permanent states of exception could ultimately be avoided if the Commission enforces a strict interpretation of the new rules, procedural ambiguities but also the strong support that states may expect amplifies the risk that the CEAS may end up fragmented, especially in scenarios where member states claim to face extended crises. Considering the comprehensive derogations foreseen, and the degree of flexibility in establishing which derogations apply, there is a danger that this fragmentation and the unpredictability connected to the rules' functioning could undermine rather than protect the CEAS.

3. THE CORE OF FUTURE EU CRISIS RESPONSES: DEROGATIONS AND SOLIDARITY 2.0

3. THE CORE OF FUTURE EU CRISIS RESPONSES: DEROGATIONS AND SOLIDARITY 2.0

Each emergency requires tailor-made and targeted responses. The Pact reforms accordingly provide for a variety of measures to respond to situations of crisis or force majeure. Some are protection-oriented: the Commission could, for example, recommend using an 'expedited procedure' to speed up the granting of protection where objective circumstances suggest that applications by specific groups of asylum seekers are well-founded.⁴⁴ Other than this, the TPD could be activated to complement other emergency measures. The TPD – which the Commission had originally proposed to repeal – will thus offer a distinct form of immediate and temporary protection in the event of a mass influx of displaced persons.

At the same time, the Pact reforms foresee wide derogations from ordinary rules that could potentially impact protection standards or even hinder access to asylum. Temporary closures of border crossing points, for example, will be possible under the amended Schengen Borders Code in cases of instrumentalisation, although effective access to procedures for international protection should in principle be guaranteed.⁴⁵ But what lies at the heart of the Regulation and the new crisis management system are derogations from the APR and enhanced solidarity measures beyond those foreseen by the AMMR. To a certain extent, these derogations are discretionary: a state will be able to select from the various possible derogations foreseen to devise its response and, subject to the authorisation of the Commission and Council, apply them. That said, the Regulation establishes overarching limits, with derogations from the APR being possible in all scenarios, while enhanced solidarity measures are only available in crisis situations.

Looking at each in turn, the justification for the derogations from the APR rules is that while member states should remain bound by their obligations under the new border procedure⁴⁶, a country facing a situation of crisis or force majeure may require additional time to organise its response or re-allocate its resources.

In such situations, a member state may be able to derogate from deadlines for registrations and the duration of the border procedure. As to the former, a member state facing a crisis or situation of force majeure may be authorised to extend the period for the registration of applications for international protection for up to four weeks instead of the standard five days, but only during the first period set out in the Implementing Decision, i.e., no more than three months, nor during any subsequent extensions.⁴⁷ As to the latter, member states in all situations of crisis or force majeure may extend the duration of the border procedure by a further six weeks (bringing the total duration to 18 weeks).⁴⁸ Further time extensions are possible under the Return Border Procedure Regulation.⁴⁹

At the same time, via the derogations, the personal scope of border procedures under the APR can be adjusted to reflect the composition of the flows in the situation at hand.⁵⁰ This can result in significantly different responses to each situation. It can reduce pressure on responsible authorities but also, paradoxically, in heavier workloads for them.

For example, in a crisis situation "characterised by mass arrivals" – thus excluding instrumentalisation – or force majeure, member states may be exempt from processing applicants from countries

with an EU-wide average recognition rate below 20% in border procedures, potentially reducing the volume of border procedures. On the other hand, a member state facing a crisis – neither instrumentalisation nor force majeure – could be authorised to expand the use of the border procedures by making decisions on the applications' merits for non-EU nationals from countries with a recognition rate of 50% or lower.

In cases of instrumentalisation, the Regulation instead allows member states to take decisions on the merits in a border procedure for all applications made by non-EU nationals who, according to the Council Decision, have been subject to instrumentalisation, and either are found in the proximity of the external border following an unauthorised crossing or presented themselves at border crossing points.

Regarding solidarity measures, while a member state may ask for support from the EU Asylum Agency, the European Border and Coast Guard Agency or Europol in all exceptional scenarios foreseen by the Regulation, enhanced solidarity is only possible in crisis situations, not force majeure.

The solidarity measures provided by the Regulation are the same as those foreseen by the AMMR. However, financial and alternative contributions should be targeted at addressing the situation of crisis. Provisions on relocations are also tighter. While in a situation of migratory pressure covered by the AMMR, relocations – or responsibility offsets – should cover at least 60% of the solidarity needs, in a situation of crisis, all needs of the state(s) concerned should be met.⁵¹

To this end, the Regulation specifies that a requesting state should be able to use contributions available in the Solidarity Pool, including relocations. Furthermore, if the Solidarity Pool is not enough, the state should also be able to access further contributions, including relocations, following further pledges made in the context of the Council Implementing Decision and laid out in the Solidarity Response Plan. Considering that member states have discretion in choosing solidarity contributions,

it is however possible that the combined relocations available in the Pool and the Plan are insufficient to cover all the identified needs. If relocation pledges are below the relocation needs, further, more stringent rules kick in under the Regulation. First, "where necessary", contributing states should take responsibility "above their fair share".⁵² Second, where this is the case, "responsibility offsets" become mandatory to meet the needs set out in the Solidarity Response Plan.⁵³ Offsets involve a shift in responsibility for asylum applicants to a contributing member state following a secondary movement, as an alternative to relocations.⁵⁴

A solidarity contribution in all but name comes from a further derogation to take back procedures in the case of crises, not applicable to situations of instrumentalisation and force majeure. Where a member state faces "extraordinary mass arrivals" of "such extraordinary scale and intensity" that they lead to serious deficiencies in its asylum and reception systems, it may be relieved of its obligation to take back an applicant for whom it is responsible under the 'first country of entry' principle of the AMMR.⁵⁵

Together with mandatory offsets, this derogation constitutes a further way to reduce pressure on states facing a crisis. The Regulation also foresees measures 'compensating' a contributing state which has become responsible above its fair share.⁵⁶ The contributing state will be entitled to a proportionate reduction of its share in future solidarity contributions over a period of five years.

The Regulation therefore allows significant departures from ordinary rules, loosening responsibilities under the APR, while tightening solidarity provisions in the AMMR. Many experts consider stronger solidarity and flexibility as key for the EU crisis management system to work.⁵⁷ That said, the risk of negative spillover effects for other states and the Union as a whole is also manifest. Considering the interdependence between national asylum and reception systems, the derogations could potentially transform what is at first a national emergency into an EU-wide crisis if they do not strike the right balance. In this sense, the

Commission and the Council will have to ensure that the state(s) concerned benefit(s) from sufficient support while remaining able to fulfil broader obligations in the new system. From this perspective, only measures that can address the crisis or force majeure situations should be authorised.

Yet, challenges may still arise. First, member states may have differing views on what an appropriate response should consist of, and the types of measures needed. Connected to this, the Regulation does not explain the added value of specific derogations from the APR, alongside those from the AMMR, and how they enable the concerned state to better overcome the crisis or force majeure situation.

In fact, the solutions to address or mitigate an emergency may not be found in migration policy at all. For example, looking at past situations that may fall within the scope of instrumentalisation, what reduced unauthorised border crossings from Belarus in 2021 were diplomatic efforts targeting countries of origin and transit as well as sanctions against other actors, such as airlines.⁵⁸ From this viewpoint, it is not the Regulation or the foreseen derogations per se that member states may have to turn to, if the aim is to quickly and effectively end the emergency, but rather all available tools, including diplomatic ones, also relying on the EU Migration Support Toolbox.

Turning to solidarity measures, despite innovative approaches to satisfy possible needs, questions regarding their operationalisation remain. For example, where the Solidarity Pool does not suffice to meet all the needs, the Council should also receive further pledges when adopting its Implementing Decision. However, there is no guarantee that all the needs will be met. Relatedly, in the likely event that the Pool is fully used due to a prolonged crisis, it is not clear how it will be replenished to account for further or future needs.

Against this background, innovations such as the transformation of offsets into a first-order, mandatory solidarity measure could potentially support countries that are otherwise unable to benefit

from relocations in the Solidarity Pool or Solidarity Response Plan. However, offsets reduce the pool of contributing countries, as they are only applicable to asylum seekers already present on their territory, and not all member states are exposed to the same rates of secondary movements. Despite the benefits of having compensatory measures for countries contributing above their fair share, the reduced number of contributing states could negatively impact their ability to sustain the crisis, especially if this persists, with possible Union-wide consequences.

Moreover, questions remain about EU funding and its use. The first one is how to ensure that EU funds are strategically used to strengthen resilience and preparedness, while making sure that all states potentially facing emergency situations can benefit from the quick disbursement of extra funding. A second, connected question is what amounts of EU funding will be dedicated to strengthening the resilience of national asylum and reception systems, and what amounts will support the external dimensions of EU migration policy. The implementation plans by the Commission and by member states, but also the negotiations of the 2028-2034 Multiannual Financial Framework (MFF) and the pursuit of further strategic partnerships with third countries will be key to answering these questions.⁵⁹

Beyond the enhanced solidarity and derogations foreseen by the Regulation, it also remains to be seen how member states neighbouring Belarus and Russia will transition away from the national emergency measures currently in place, once the Regulation becomes applicable in 2026, should the alleged persistent risk of instrumentalisation that they face not cease before then. This is an especially consequential question, considering that some of the adopted measures at the national level effectively block asylum seekers at the border, while the Regulation and EU fundamental rights law should guarantee access to asylum.⁶⁰ But the question also arises as to whether these countries will not instead increase the pressure to demand further exceptions from the new EU acquis in the next policy cycle.⁶¹

4. FUNDAMENTAL RIGHTS CONSIDERATIONS AND MONITORING

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Since the Commission's original proposals, experts and advocacy organisations have expressed concerns about the potential impact of the foreseen emergency measures on human rights.⁶² Some of these concerns were addressed during the negotiations and resulted in the rejection of further derogations and discretion: neither the Regulation nor other reforms go so far as allowing the outright suspension of the right to asylum. That said, tensions remain.

For example, by allowing for delayed registrations and, with it, the reception of a document proving their status, and all the necessary information on their application and its processing, applicants may face practical obstacles in accessing their rights for a protracted period.

Considering the risks associated with the expanded use of border procedures, the Regulation highlights that the safeguards foreseen by the APR, including the right to an effective remedy, remain in place.⁶³ However, appeals against negative decisions in border procedures lack automatic suspensive effect under the APR, which could have a significant impact in emergency situations. In addition, the Regulation states that organisations and persons who provide advice and counselling must have access to applicants held in detention facilities or at border crossing points. And yet, states may impose limits to their activities for public order, security, or administrative reasons, provided that access is not severely restricted.⁶⁴

This latter provision could also prove to be a source of contention. In response to what they consider situations of instrumentalisation, some EU states have

for example, restricted access to border zones by journalists and CSOs. This made it harder to provide humanitarian assistance and monitor the situation, leading to concerns about possible violations of the rights of migrants and asylum seekers.⁶⁵

The broadening of the scenarios where persons may be subject to border procedures, and the foreseen derogations more in general, may also expose vulnerable persons to some risks, if complementary measures are not introduced. Notably, the Regulation includes several provisions dedicated to persons with special needs. For example, if authorised to lower the threshold for border procedures, states should prioritise registering minors and their family members and give priority to applications for international protection lodged by persons with special procedural or special reception needs.⁶⁶ And yet, save for instrumentalisation situations, no general exemptions to border procedures apply to vulnerable persons, including children and family members.

Because more applicants may be subject to border procedures in some emergency situations, national authorities may struggle to carry out their responsibilities efficiently while also ensuring the effective identification of persons with special needs.

Other than broadening the personal scope of border procedures, derogations also prolong their duration. Some experts and CSOs have flagged the increased dangers of being exposed to lower reception standards or even detention-like conditions in such procedures.⁶⁷ Notably, the Regulation highlights that rules and guarantees set out in the RCD continue to apply, and no derogations are allowed with respect to the required material reception conditions.⁶⁸

As such, safeguards should be in place for vulnerable individuals, including minors and families. However, while remaining applicable, the APR does contemplate that those undergoing border procedures may be deprived of their liberty during the processing. Considering the time extensions, and that reception systems may be especially overstretched in crisis situations, there is a risk that expediency ends up overriding EU standards in practice.⁶⁹

In this context, monitoring and reporting across all stages of situations of crisis and force majeure will be especially important. The Regulation establishes that the Commission and Council should "constantly monitor" whether a situation of crisis or force majeure persists, and promptly recall the measures, if appropriate.⁷⁰ The concerned member state, European Parliament, Commission, Council, and relevant EU agencies must also regularly inform each other on the implementation of the measures put in place.

As far as fundamental rights are concerned, no specific mandatory, independent monitoring is foreseen for situations of crisis and force majeure. However, the Commission may also ask the EUAA to initiate a specific monitoring exercise.⁷¹ In addition, the monitoring mechanisms foreseen by other instruments would remain relevant and play an important role in closing any oversight gap.

5. COOPERATION IN EMERGENCY SITUATIONS AND IN THE NEW MIGRATION GOVERNANCE SYSTEM

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One of the critical lessons learnt from past migration management crises is the need for effective and flexible coordination mechanisms. While each crisis is different and raises unique challenges, several factors render coordination in the EU generally complex. Among others, the existence of a variety of institutional actors, each with its own mandate, amplifies the need for sustained collaboration to reach widely agreed decisions in high-pressure circumstances. Crises also necessitate responses that span different policy areas, while siloes exist within and across EU institutions. The implementation of responses depends on political direction as well as on technical coordination, which raises additional challenges.

Overcoming these challenges is essential for ensuring effective and rights-compliant responses to emergencies, while also meeting the needs of institutional actors as well as those of migrants. Otherwise, there can be gaps in the response, or duplication of efforts, leading to confusion and to exacerbating instead of solving the emergency situation, as past crises have shown (see Box 1).

There is therefore a need for robust and agile coordination mechanisms, at different levels and involving different actors, in emergency situations. These mechanisms should allow for information exchange and the effective use of available resources, in line with identified existing and future needs. At the same time, past developments point to the risk of duplication among the institutional mechanisms that have in the meantime been set in place, and the need to avoid conflicting visions among those steering them.

Given this context, the Regulation establishes an additional layer of cooperation between EU

institutions, member states, and relevant agencies to be triggered in a situation of crisis or force majeure. To rapidly boost coordination, for example, the Commission is to convene a first meeting of the Technical Level Solidarity Forum immediately after the adoption of the Council Implementing Decision.

Still, the Regulation does not do away with tools set in place during past crises. Rather, it embeds them in the new governance framework, trying to streamline cooperation across the existing initiatives and platforms. For example, it emphasises that the Commission should ensure coordination and exchange of information with other networks, such as the IPCR and the Migration Preparedness and Crisis Management Network. A role is also foreseen for the Solidarity Coordinator who, according to the Regulation, should promote cooperation as well as a culture of preparedness among member states.⁷²

With the Regulation and the Pact's instruments, the EU will therefore have abundant tools to facilitate coordination. Each of them could potentially play an important role in coordinating different aspects of the response if a member state faces an emergency. This could strengthen ownership, and lead to more committed responses by all the actors involved. In addition, it could help to preserve the institutional knowledge and experience acquired in dealing with past crises.

At the same time, it is worth noting that several important details have been left vague in the Regulation, and may therefore only take shape when a crisis or force majeure situation occurs.

BOX 1. THE EMERGENCE OF COORDINATION TOOLS IN THE CONTEXT OF PAST EMERGENCIES

The EU faced significant challenges in past emergencies, with coordination only improving over time. Due to the lack of leadership and the absence of dedicated mechanisms, for example, coordination only slowly materialised following irregular arrivals in 2015-2016. The intricate distribution of power among EU institutions and member states hindered the Union's collective capacity to react, contributing to ineffective and disorderly responses and aggravating political tensions. EU agencies, together with international organisations and civil society had to step in to fill operational and reception gaps. While showing the importance of multistakeholder responses, their involvement raised further coordination challenges, also considering the fragmented landscape with different local needs and national dynamics. Several initiatives to improve coordination were eventually launched, including ARGUS, the Commission's general rapid alert system, and its regular high-level meetings chaired by the Secretariat General. However, it was the Integrated Political Crisis Response (IPCR), the Council's in-house political crisis mechanism, that facilitated the emergence of a more coherent response by enabling more effective information-sharing and strengthening the interface between the technical and political levels, among others. Since 2015-2016, further mechanisms have emerged, with the IPCR continuing to operate in the background. In 2020, for example, the Commission launched the Migration Preparedness and Crisis Blueprint and its Network. This is a complementary coordination mechanism managed by the Commission's Directorate-General for Migration and Home Affairs (DG HOME) which seeks to monitor, collect and disseminate information. It was first used in response to border crossings from Belarus, when the Commission brought together member states, EU agencies, and the European External Action Service in weekly meetings to provide situational awareness and improve coordination. Shared information included the number of border crossings and the country of origin, thus informing EU responses, including diplomatic efforts.⁷³ While the Network remained active, DG HOME also launched the Solidarity Platform shortly after Russia's invasion of Ukraine, facilitating information exchange and collaboration between the EU and member states. The Solidarity Platform, also included international organisations and foreign administrations, strengthening the response on the ground and scaling up coordination efforts to the global level.

To pick just one example, the role of the Solidarity Coordinator in crisis situations is anything but well-defined, not to mention that the Coordinator's official role is acknowledged in the Migration Support Toolbox, but not in the EU Migration Preparedness and Crisis Blueprint and its Network. Against this background, if and when a crisis or force majeure situation emerges, especially when large-scale, the leadership, personal network, and even proactiveness of key individuals will be instrumental to ensure cross-institutional collaboration and mobilise all available resources, also avoiding policy siloes.

Relatedly, it remains to be seen how in the new crisis system, international organisations and other stakeholders, including third countries, will be involved

in both the planning and the implementation of the responses to situations of crisis and force majeure. This could determine the success of a response to crises that have a strong foreign policy dimension or extend beyond the confines of the EU, as was the case with Russia's large-scale invasion of Ukraine and the displacement that followed it.

Beyond these more operational considerations, the new crisis management cycle suggests a reconfigured EU institutional architecture, as also indicated by the other New Pact reforms.⁷⁴ For example, the Commission will have to navigate multiple responsibilities: gatekeeper, with a degree of discretion, when it comes to the assessment of the exceptional situation and its proposal for a response,

and heading the operational response if a crisis situation is established. At the same time, it will have to ensure compliance with all obligations, including under the AMMR and the APR, also fulfilling its role of Guardian of the Treaties.

This raises capacity questions for the Commission, considering the additional resources that may be needed in an emergency. But it also calls for an assessment of the responsibilities of the EU's main executive body, and whether it will be able to fulfil its various roles effectively and impartially.

Meanwhile, while the European Parliament (EP) plays a marginal role in the new crisis management cycle, the Council will have a key function in the authorisation procedure, and on issues with a political dimension like the allocation of solidarity measures, as seen above. Against this background, a commitment to continuous dialogue, especially between the Commission and the Council, and the establishment of widely shared goals, other than inter-institutional trust will be as important as the presence of communication channels and coordination mechanisms. That said, considering the limited role of the EP, the accountability and democratic legitimacy of the process could be called into question.

6. CONCLUSION AND FORWARD-LOOKING REFLECTIONS

6. CONCLUSION AND FORWARD-LOOKING REFLECTIONS

As migration flows will remain volatile in the future due to growing political instability and rising conflicts, the poor economic outlook in many regions, as well as climate change and possible new pandemics, the EU could benefit from the newly adopted common framework to address future crisis situations. And yet, this policy study also points to the ambiguities and grey areas in the Regulation that may determine the effectiveness of the crisis management system in the future, if activated. To begin with, striking the right balance between the necessary flexibility for effective responses to exceptional situations and the overall need for legal certainty and impartial assessments will be one of the key challenges in situations where a state is confronted with what it claims constitutes a crisis or force majeure.

Additionally, derogations under the crisis management cycle are vast, loosening responsibilities vis-à-vis border procedures, while enhancing solidarity to alleviate pressure from the affected state. This could enable the state to reallocate its resources and re-establish the status quo ante as soon as possible. And yet, the high degree of discretion and, simultaneously, the stronger interdependence between member states' asylum, migration, and reception systems could lead to negative spill-over effects for the Union in situations of crisis, especially prolonged ones affecting multiple member states. Instead of addressing the root causes of a crisis, derogations may only treat the symptoms, if not coupled with further concerted actions, such as diplomatic and policy initiatives which go beyond the means foreseen by the Regulation.

On this account, this study highlighted the importance of three aspects that will require operational investments and political attention in the next policymaking and implementation phases: the need for

preparedness and rapid responses as well as for coordination and clear leadership, but also the importance of a shared understanding about the overall goals of the crisis management system. If these and the remaining grey areas in the Regulation and other instruments are addressed, the EU will more likely be able to stand united in the face of future challenges. Mindful of ongoing and upcoming initiatives by the Commission and member states to stimulate ownership and pave the way for implementation, the study advances the following forward-looking reflections:

Improve legal certainty by providing guidance on definitions and ensuring quality of data: While preserving a degree of flexibility, definitional ambiguities should be clarified to the possible extent. This should not be done through exhaustive lists or simulation exercises that would not capture the complexity of potential future scenarios. Instead, non-exhaustive examples of what "destabilising intent", "non-functional" asylum and reception systems, and other vague terms in the Regulation could, for example, be provided in Commission guidelines. At the same time, the Commission should take all possible steps to guarantee the reliability of the data and the indicators used for assessing a state request, addressing inaccuracies and inconsistencies already during this preparatory phase. This would enhance legal certainty with respect to the triggering of derogations, minimising the risk of loose interpretations and abuse.

Avoid protracted emergency situations by making an exit strategy a key component of all Implementing Decisions and Solidarity Response Plans: This study suggests that the procedure for establishing a crisis or force majeure reflects a widely shared need to minimise to the possible extent the risk of arbitrariness and political interference, among others,

by making the Commission the gatekeeper in the activation of the crisis management system. At the same time, the procedure pays comparatively less attention to the conditions needed to successfully exit from an emergency situation. To avoid the negative political and humanitarian consequences of protracted emergencies, an exit strategy should be made a core component of Implementing Decisions and Solidarity Response Plans, also including objective indicators to help establish through real-time monitoring when exceptional measures should be recalled. Yet, the gradual phasing out of emergency measures should not be conditional on the end of the causes of the crisis, but on an assessment of whether states' needs have been met and the operational response has stabilised. For this reason as well, monitoring will be key and in emergency situations that may last for a prolonged period, the EUAA should also be systematically involved to boost capacity and verify the effects of derogations.

Strengthen preparedness and responsiveness by mobilising all resources and carrying out frequent revisions: Member states should be incentivised to strengthen their preparedness and resilience, constantly revising their plans to avoid the unnecessary triggering of the derogations and improve rapid responses where necessary. To achieve this, the tools included in the new annual asylum and migration cycle should focus on closing potential operational gaps in reception and asylum systems and overcoming weaknesses in border processing that could lead to possible situations of crisis. In this respect, the revision of contingency plans under the RCD, which the EU-level Common Implementation Plan only foresees every three years (at minimum), may be insufficient. More regular revisions, especially in the early years of implementation could prove essential to ensure the build-up and maintenance of resilient systems. EU funding should also be targeted to this end. The negotiations of the next MFF starting in 2025 will be key in this sense, as acknowledged by the Common Implementation Plan. Other than identifying and meeting all the funding needs for well-prepared and resilient asylum and reception systems, the Commission and member states should ensure that funds are sufficient to also cover for potential emergency

situations and that they will be promptly and effectively mobilised, if needed. Further tools should also be used to achieve these objectives. For example, prior to an emergency, early warning, risk analysis and monitoring systems at the EU level, including those of relevant agencies, the European External Action Service as well as those of the Schengen system, should be coherently and systematically leveraged to signal an emerging crisis. Following an emergency, all member states should revise their national strategies to draw the lessons learnt. This should be seized as an opportunity to re-assess and reconsider all member states' responses, facilitating mutual learning and strengthening resilience, at national and EU levels.

Ensure tailor-made responses, including derogations and enhanced solidarity, that can bring benefits on the ground and avoid negative repercussions: The use of derogations should be a measure of last resort, especially where they lead to negative spillover effects for the CEAS or have the potential to worsen the humanitarian situation affecting asylum seekers and migrants. When faced with a perceived crisis or force majeure situation, the requesting state should present clear, objective, and compelling reasons for their use, including comprehensive and reliable information to justify its request. Clarity on the added value of a requested derogation to respond to an emergency should be a pre-condition for their use. The Commission and Council, meanwhile, should base their respective implementation plans on an evidence-based assessment of the proportionality of the measures and all possible alternatives that could lead to equally positive outcomes. At the same time, they should consider on a case-by-case basis whether the application of derogations and solidarity measures should be made contingent on also receiving support from EU agencies, and the EUAA in particular. This could provide concrete benefits on the ground and strengthen real-time monitoring. Other than this, when it comes to funding, the quick and effective disbursement of emergency resources should be ensured, and a clear roadmap for their use should be devised in the relevant implementing decision in coordination with the member state(s) affected.

Ensure solidarity-ready systems at all times by tracking possible further contributions during prolonged or successive crises: while voluntary relocation contributions should be prioritised to the possible extent in an emergency situation to ease operational challenges and preserve wide support by member states, it will be essential that overall solidarity needs continue to be met. This will be as important for fulfilling on-the-ground operational needs as it is to preserve public confidence in frontline countries. Also considering the risk that both the Solidarity Pool and further pledges in the Solidarity Response Plan could be exhausted, especially in prolonged or successive crises, the EU should thus ensure solidarity-ready systems. To keep track of needs and availabilities, and replenish the overall contributions as a crisis situation unfolds, a register could be created where member states can update their possible additional pledges and further solidarity contributions.

Systematically consider the use of more protection-oriented elements, while also avoiding harmful practices in border processing: the expedited procedure, an important innovation introduced by the Regulation, should not remain a dead letter. Prioritising well-founded applications would reduce waiting times and minimise human suffering, while also unlocking useful resources and capacity which could be redeployed to address urgent needs. In this sense, the use of the expedited procedure should always be considered when the evidence-based assessment of the situation indicates that there are significant numbers of well-founded applications for international protection from specific groups of applicants. The Commission, in consultation with the EUAA and UNHCR, should use the open-end language of the Regulation to pro-actively promote the use of the procedure in such circumstances. On the other hand, this study points to the risks faced by vulnerable persons whose applications are received in situations of crises and force majeure when national systems may be overstretched. Already at the stage of the assessment and of the drafting of the implementation plans, measures should be identified to ensure that responsible authorities

can swiftly and effectively identify vulnerable persons and asylum seekers with special needs in instances where the border procedure is being used and can request assistance to this end.

Strengthen coordination by identifying the added value of each platform used in past emergency situations and facilitating multi-stakeholder participation where needed: the Regulation reflects an awareness of the need to achieve strong coordination between all relevant actors and institutions. Nevertheless, further actions are needed to avoid duplication and ensure optimal coordination if an emergency arises. To this end, EU institutions and agencies, member states, and other actors involved should collectively engage in an assessment of the existing tools and platforms, including those used in response to displacement from Ukraine, to identify their added value and potential overlaps. While this should not necessarily lead to disposing of tools, greater awareness could facilitate coordination and avoid conflicting responsibilities. This exercise should consider the relevance and authority of different platforms for both crisis and regular coordination. Their value should also be assessed against the need to overcome siloed or sectoral thinking which can undermine effective crisis responses. In addition, the involvement in information-sharing, joint planning, and implementation of international organisations and other stakeholders, including like-minded third countries and civil society, should be systematically considered, in this assessment as well as in the activation of coordination mechanisms.

Turn the Regulation and its cycle into an opportunity to address the root causes of crisis and force majeure situations, including instrumentalisation and climate change: considering the growing political instability, and today's worsening economic and environmental outlook, the EU will likely be faced with sudden rises in cross-border mixed migration movements. Given that the exceptional measures foreseen by the Regulation could be triggered in this context, but also the high stakes involved in their possible use, the new crisis management system and its core goal of

strengthening resilience should be strategically mobilised to conduct objective assessments on the root causes of instrumentalisation and force majeure. Among others, this should include an evidence-based analysis of the unintended leverages created by prioritising short-term migration containment objectives through partnerships with autocratic or unstable foreign governments.⁷⁵ In a geopolitical context of greater rivalries, these may generate dependencies and expose the EU to greater risks of instrumentalisation. At the same time, ways to make instrumentalisation less attractive for third countries should be identified, encouraging sustainable cooperation instead.⁷⁶ As far as climate change is concerned, its impact on human mobility is not yet at the centre of EU's thinking and policymaking.⁷⁷ Given its ability to impact affected people's livelihoods through its extensive humanitarian and development aid resources, the EU should however take a leading position on climate-related mobility, using the newly adopted framework to stimulate coherent policy initiatives and leverage the necessary financial resources.

ENDNOTES

- 1 Regulation (EU) 2024/1359 of the European Parliament and of the Council of 14 May 2024 addressing situations of crisis and force majeure in the field of migration and asylum and amending Regulation (EU) 2021/1147 PE/19/2024/REV/1. OJ L, 2024/1359, 22.5.2024.
- 2 Regulation (EU) 2024/1351 of the European Parliament and of the Council of 14 May 2024 on asylum and migration management, amending Regulations (EU) 2021/1147 and (EU) 2021/1060 and repealing Regulation (EU) No 604/2013. PE/21/2024/REV/1. OJ L, 2024/1351, 22.5.2024.
- 3 Regulation (EU) 2024/1348 of the European Parliament and of the Council of 14 May 2024 establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU. PE/16/2024/REV/1. OJ L, 2024/1348, 22.5.2024.
- 4 Regulation of the European Parliament and of the Council amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders. 2021/0428(COD), PE-CONS 40/24. See, as part of the separate series on the New Pact reforms by the European Policy Centre (EPC) and the Odysseus Network on Asylum and Immigration, the EPC Discussion Paper by Daniel Thym.
- 5 See for example, European Council on Refugees and Exiles (2021) "Alleviating or exacerbating crises? The Regulation On Crisis And Force Majeure. ECRE's assessment of risks inherent in the crisis regulation and recommendations for a significant redrafting", available at: <https://ecre.org/wp-content/uploads/2021/03/ECRE-Policy-Note-32-Crisis-February-2021.pdf>, last accessed: 04 June 2024.
- 6 Zuleeg, F., Emmanouilidis, J. A., de Castro Borges, R. (2021) "Europe in the age of permacrisis". Commentary, European Policy Centre
- 7 This policy study draws on the valuable insights provided by published analyses of EU responses to past crises. These include, among others, Hahn, H. (2022) "Keeping a cool head: How to improve the EU migration crisis response". Discussion Paper, European Policy Centre; Collett, E. and Le Coz, C. (2018) "After the Storm: Learning from the EU Response to the Migration Crisis", Report, Migration Policy Institute; Rasche, L. (2022) "The instrumentalisation of migration. How should the EU respond?". Hertie School, Jaques Delors Centre.
- 8 Migratory pressure "means a situation brought about by arrivals by land, sea or air or applications of third-country nationals or stateless persons, that are of such a scale that they create disproportionate obligations on a Member State". Significant migratory situation "means a situation different from migratory pressure where the cumulative effect of current and previous annual arrivals of third-country nationals or stateless persons leads a well-prepared asylum, reception and migration system to reach the limits of its capacity." Article 2(24) and (25) of Regulation (EU) 2024/1351.
- 9 The Regulation includes relevant definitions in its articles, with further details available in the recitals.
- 10 Article 1(4)(a).
- 11 Article 1(4)(b).
- 12 Article 1(5).
- 13 Recital 20.
- 14 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. Article 5.
- 15 Proposal for a Regulation of the European Parliament and of the Council addressing situations of instrumentalisation in the field of migration and asylum, COM/2021/890 final.
- 16 Interview with member state representative. See also 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 - compilation of replies by Member States. CM 3754/23; 10463/2/23 REV 2, Brussels, 26 July 2023, available at: <https://www.statewatch.org/media/4004/eu-pact-council-force-majeure-reg-ms-replies-12032-23.pdf>, last accessed: 04 June 2024.
- 17 Stoyanov, K. Minister of Interior of the Republic of Bulgaria, et al. (2024) "Joint Letter from the undersigned Ministers on new solutions to address irregular migration to Europe", available at: <https://uim.dk/media/12635/joint-letter-to-the-european-commission-on-new-solutions-to-address-irregular-migration-to-europe.pdf>, last accessed: 04 June 2024.
- 18 See, as part of this series, the policy study by Philippe De Bruycker.
- 19 Commission Recommendation (EU) 2020/1366 of 23 September 2020 on an EU mechanism for preparedness and management of crises related to migration, C/2020/6469. OJ L 317, 1.10.2020.
- 20 The goal is to improve preparedness and facilitate a coordinated response to a crisis.
- 21 Collett, E. and Le Coz, C. (2018) "After the Storm: Learning from the EU Response to the Migration Crisis".
- 22 Article 2.
- 23 Article 3.
- 24 Article 3 referring to Article 9 of Regulation (EU) 2024/1351.
- 25 Interview with an official of the European Commission.
- 26 Article 3(4)(2). The Toolbox, which is further defined in the AMMR, was proposed during the New Pact negotiations with the aim of providing member states with the necessary tools to react to specific migratory challenges, including crisis and force majeure situations. Other than the derogations included in the Crisis and Force Majeure Regulation and enhanced diplomatic and political outreach, it includes measures such as the activation of the Union Civil Protection Mechanism and strengthened actions and cross-sectoral activities in the external dimension of migration. See Article 6 of Regulation (EU) 2024/1351.
- 27 Article 4.
- 28 Article 5.
- 29 Collett, E. and Le Coz, C. (2018) "After the Storm: Learning from the EU Response to the Migration Crisis".
- 30 Recital 22.
- 31 YouTube video, European Policy Centre "The New Pact on Migration and Asylum: Unpacking responsibility and solidarity", 21 March 2024.
- 32 Communication from the Commission, Common Implementation Plan for the Pact on Migration and Asylum, COM(2024) 251. This study only briefly elaborates on the contents of the Common Implementation Plan, as the latter was published shortly before its publication.
- 33 Fakhry, A., Parkes, R., Racz, A. (2022) "Migration instrumentalization: A taxonomy for an efficient Response" Hybrid CoE Working Paper.
- 34 Article 16(3).
- 35 De Somer, M. and Neidhardt, A. H. (2022) "EU responses to Ukrainian arrivals – not (yet) a blueprint", Discussion Paper, European Policy Centre.
- 36 Recital 25.
- 37 See, as part of the separate series on the New Pact reforms by the European Policy Centre (EPC) and the Odysseus Network on Asylum and Immigration, the EPC Discussion Paper by Daniel Thym.

- 38 See De Somer, M. "Schengen and internal border controls" in De Somer, M., De Brouwer, J. L., De Bruycker, P. (eds) (2019), *From Tampere 2.0 to Tampere 2.0: Towards a new European consensus on migration* (Brussels: European Policy Centre), pp. 119-130.
- 39 Cebulak, P. and Morvillo, M. (2021) "The Guardian is Absent Legality of Border Controls within Schengen before the European Court of Justice", *Verfassungsblog*, 25 June, available at: <https://verfassungsblog.de/the-guardian-is-absent/>, last accessed: 04 June 2024.
- 40 In the joined cases C-368/20 NW v Landespolizeidirektion Steiermark and C-369/20 NW v Bezirkshauptmannschaft Leibnitz, the Court of Justice of the EU (CJEU) held that member states can only re-introduce border controls within the Schengen Zone under strict conditions. The CJEU stated that the (now amended) Schengen Borders Code permits the temporary reintroduction of border controls if there is a serious threat to the public policy or internal security of a member state. However, such a measure cannot exceed a maximum duration of six months. A member state can only reintroduce such measures after the six-month period has ended, if it is faced with a new serious threat. The new threat affecting its public policy or internal security must be distinct from the previous one. Such strict conditions would apply by analogy in case of use of the derogations foreseen by the Crisis and Force Majeure Regulation.
- 41 Recital 11 of the Regulation specifically states that the "adoption of measures under this Regulation in respect of a particular Member State should be without prejudice to the possibility to apply Article 78(3) of the Treaty on the Functioning of the European Union (TFEU)."
- 42 See Radjenovic, A. (2020) "Emergency measures on migration: Article 78(3) TFEU", European Parliamentary Research Service, 649.325 available at: [https://www.europarl.europa.eu/RegData/etudes/ATAG/2020/649325/EPRS_ATA\(2020\)649325_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/ATAG/2020/649325/EPRS_ATA(2020)649325_EN.pdf), last accessed: 04 June 2024.
- 43 "The state of emergency at the Latvia–Belarus border is extended until 10 May 2023", *Republic of Latvia*, 31 January 2023; Tanner, J. (2024) "Finland extends Russia border closure until April 14 saying Moscow hasn't stopped sending migrants". *Associated Press*, 8 February. "EU Eastern Borders: Poland Publishes Data Showing 6000 Pushbacks in Past Six Months – Finland-Russia Border Closure Extended Again – Estonia Considers Closing Border Crossing Points". *European Council on Refugees and Exiles*, 16 February 2024.
- 44 Article 14.
- 45 Article 1(3) of Regulation of the European Parliament and of the Council amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders
- 46 See, as part of this series, the policy study by Evangelia (Lilian) Tsourdi.
- 47 Article 10.
- 48 Article 11
- 49 Article 6 of the Regulation (EU) 2024/1349 of the European Parliament and of the Council of 14 May 2024 establishing a return border procedure, and amending Regulation (EU) 2021/1148. PE/17/2024/REV/1. OJ L, 2024/1349, 22.5.2024.
- 50 Article 11.
- 51 Recital 30.
- 52 Article 9.
- 53 Ibid.
- 54 See, as part of this series, the policy study by Philippe De Bruycker.
- 55 Article 13.
- 56 Article 9.

- 57 See Hahn, H. (2022) "Keeping a cool head: How to improve the EU migration crisis response".
- 58 Eccles, M. and Barigazzi, J. (2021) "EU presses Iraq to halt migrant flights to Belarus". *Politico*, 5 August; Roth, A. and O'Carroll, L. (2021) "Turkey bans citizens from Syria, Yemen and Iraq from flying to Minsk". *The Guardian*, 12 November. See also Rasche, L. (2022) "The instrumentalisation of migration. How should the EU respond?".
- 59 On the definition of strategic goals to be pursued through cooperation with third countries see, as part of this series, the policy study by Andreina De Leo and Eleonora Milazzo.
- 60 See "Finland to present plan to push back migrants on Russian border". *Euractiv*, 20 May 2024; and "FINLAND: Proposed Legislation Could Breach International Human Rights Commitments – Frontex Extends Operation on Finland-Russia Border – UN Urges Finland to Introduce Safeguards for Accessing Asylum Procedures". *European Council on Refugees and Exiles*, 24th May 2024.
- 61 This could be as part of a revision of the Regulation, or through Article 78(3) of the TFEU examined above.
- 62 See for example, "Analysis of the New EU Pact on Migration and Asylum A "fresh start" for human rights violations". *EuroMed Rights*, October 2020; on instrumentalisation, see "CCBE position paper on the proposal addressing situations of instrumentalisation in the field of migration and asylum". Council of Bars and Law Societies of Europe, 16 February 2023
- 63 Article 11(10).
- 64 Article 11(10).
- 65 Sundberg Diez, O. (2023) "EU Crisis Regulation: Securing reforms or constructing a crisis?". Commentary, European Policy Centre.
- 66 Article 10; Recital 41.
- 67 European Council on Refugees and Exiles (2024) "ECRE comments on the Regulation of the European Parliament and of the Council addressing situations of crisis and force majeure in the field of migration and asylum and amending Regulation (EU) 2021/1147", available at: https://ecre.org/wp-content/uploads/2024/05/ECRE_Comments_Crisis-and-Force-Majeure-Regulation.pdf, last accessed: 04 June 2024..
- 68 Recital 9.
- 69 For a similar observation in normal circumstances, see, as part of this series, policy study by Evangelia (Lilian) Tsourdi.
- 70 Article 6(1).
- 71 Article 6(2).
- 72 See, as part of this series, the policy study by Philippe De Bruycker.
- 73 Hahn, H. (2022) "Keeping a cool head: How to improve the EU migration crisis response".
- 74 See, as part of this series, the policy study by Philippe De Bruycker and, as part of the separate series on the New Pact reforms by the European Policy Centre (EPC) and the Odysseus Network on Asylum and Immigration, the EPC Discussion Paper by Daniel Thym.
- 75 See, as part of this series, the policy study by Andreina De Leo and Eleonora Milazzo.
- 76 See Rasche, L. (2022) "The instrumentalisation of migration. How should the EU respond?".
- 77 Hahn H. and Fessler, M. (2023) "The EU's approach to climate mobility: Which way forward?". Discussion Paper, European Policy Centre.

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In recent years, the EU has more than once been confronted with emergencies that have severely impacted national asylum and reception systems. Especially after the mismanagement of the rise in irregular arrivals in 2015-2016, the EU's lack of preparedness and capacity to respond to such situations could no longer be ignored.

The reforms adopted in the context of the New Pact on Migration and Asylum seek to strengthen the EU's resilience in the face of possible future crises. The Crisis and Force Majeure Regulation establishes a procedure for determining whether a member state faces an emergency and defines which response should be initiated.

This policy study explores the strengths and blind spots in the authorising procedure, the potential impact of the measures foreseen in response to an emergency, as well as the coordination mechanisms to be used. The study's overarching question is whether the EU will be better prepared for future crises after the adoption of the New Pact reforms.

The policy study highlights that the EU is potentially better off with a common framework although the flexibility for facilitating crisis responses could come at the cost of legal certainty. The benefit of using the derogations foreseen by the Regulation also remains unclear. The study thus underlines the need for further operational, financial and policy measures to help strengthen the EU's resilience to possible future emergencies.

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