

# DIRITTI COMPARATI

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## INSTRUMENTALISATION PACKAGE: DEROGATION AND CONFINEMENT AS THE BLUEPRINT FOR THE FUTURE EU MIGRATION POLICY

Posted on 7 Marzo 2023 by [Marco Gerbaudo](#)

### 1. Introduction

Despite the [political](#) and [academic](#) consensus over the necessity to change the EU migration policy after the 2015 “[migration crisis](#)”, it has been so far impossible to find an agreement on a common reform proposal. Even the last reform attempt of the Von der Leyen Commission, the [New Pact on Migration and Asylum](#), is [stalling](#) in spite of the [Realpolitik](#) approach adopted.

Before the Ukrainian war prompted the EU to surprisingly and quickly adopt an effective [solidarity scheme](#) to welcome people escaping from Ukraine, the migration debate gravitated around EU efforts to contrast a “new” phenomenon: the instrumentalisation of migration flows. It is arguable that such a phenomenon still constitutes the biggest concern of EU leaders in the field of migration. Even if the EU institutions are presenting the solidarity approach deployed in Ukraine as the [blueprint](#) for the future EU migration policy, the recent negotiating efforts of the Commission and the Council have been focused elsewhere: on the instrumentalisation package, whose content and legislative developments

are tackled in this blogpost.

The concept of migration instrumentalisation is not new in migration studies. While it lacks a universal definition, it generally refers to a [low-cost strategy](#) where countries with few other strategic advantages push people across borders to destabilise or coerce a target state. Many migratory phenomena targeting the EU external borders in the past years can be defined as migration instrumentalisation: from [Turkey's](#) unilateral (yet brief) suspension of the EU-Turkey Statement in March 2020 to [Morocco's](#) suspension of border checks at the Spanish exclaves of Ceuta and Melilla during the summer of 2021.

While these past events were tackled almost exclusively at the national level, with the external political support of the EU, one recent humanitarian crisis led to a different development: facing the increase of arrivals from Belarus during the winter of 2021, EU institutions took not only political but legal action as well. Consequently, for the first time, the concept of instrumentalisation was introduced in the EU legal framework.

## **2. The Instrumentalisation Package: context and content**

In the second half of 2021, irregular border crossings of the Eastern European land border started to increase: while in the years before arrivals rarely surpassed one thousand units, in a few months almost [9000](#) arrivals were detected. Such a sharp increase was [directly 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 elections.

The EU Member States bordering Belarus (Lithuania, Poland, and Latvia) individually adopted a set of harsh emergency measures focused on the [defence of their borders](#) and legitimizing [pushbacks](#) of people found in the proximity of the border areas. Despite the criticisms raised by [international organizations](#) and [NGOs](#), the Commission triggered the procedure of [article 78\(3\) TFEU](#) to propose a set of [emergency measures](#) allowing involved Member States to suspend many EU standards concerning asylum and hosting procedures to react to the so-called "[hybrid attack](#)" performed by the Belarus regime against the security of

the Union.

The proposed emergency measures were the first step towards the institutionalisation of the concept of instrumentalisation of migration in EU law. Only two weeks after the emergency measures proposal was published, the Commission presented the “[instrumentalisation package](#)”, where the most salient elements of the emergency measures were grouped into two legal texts: the Proposal for a Regulation addressing situations of instrumentalisation in the field of migration and asylum ([Instrumentalisation Regulation](#)) and the proposal of a reform of the Schengen Borders Code ([SBC Reform](#)).

The SBC Reform legally defines instrumentalisation as “a situation where a third country instigates irregular migratory flows into the Union where such actions are indicative of an intention of a third country to destabilise the Union or a Member State”. Building upon this definition, the Instrumentalisation Regulation outlines the activation procedure and measures to adopt when facing an “instrumentalisation situation”. The most noticeable element of the measures proposed is their derogatory nature: in its essence, the regulation contains a [list of derogations](#) from the Common European Asylum System (CEAS), allowing the intensification of border controls, the standard application of border procedures and the *de facto* detention of asylum seekers.

### **3. The instrumentalisation package: less harmonisation and protection standards**

If approved, the Instrumentalisation package would majorly impact the harmonisation of national rules under a common migration policy, which is the core objective of the EU [competence](#) on migration matters. The “derogation by law” envisaged would allow Member States not to comply with core provisions of the CEAS, leading to more disaggregation in the implementation of EU law. Moreover, the activation process enabling Member States to enforce such derogations is highly discretionary and vaguely defined. The definition of instrumentalisation provided by the SBC reform is excessively broad and vague, with many ambiguous terms: first, there is no reference to any quantitative indicator which could hint at what constitutes an “irregular migratory flow”. Second, no criterion on

how to evaluate the intention of a third country to “destabilise the Union or a Member State” is outlined: how can anyone assess the motives of the actions of a foreign country?

Furthermore, the authorization procedure outlined in article 7 consists of a political decision where both Member States and the Commission enjoy great discretionary powers. Member States can ask for authorization to apply the regulation to the Commission, which assesses the situation “based on the information provided by the requesting Member State.” It is up to the Member State to select the information it deems necessary to corroborate its stance, while there is no indication of the criteria the Commission should follow for making the assessment. The final step of the procedure, the adoption of an Implementing Decision by the Council, reinforces the political nature of the procedure, from which the European Parliament is completely excluded.

Within this context, any migration flow targeting a Member State could be construed for the Instrumentalisation Regulation to apply. Therefore, the plausible frequent activation of the regulation could disrupt the already fragile common migration policy.

If approved, the regulation package would also negatively impact the standards of protection for asylum seekers crossing the border. Most of the derogations are aimed at preventing third-country nationals to leave the border area, starting with the four-week extension for countries to register applications for international protection (normally 3-10 days) to the extension of the scope of the [border procedure](#) (the analysis of an asylum claim at the border) to everyone crossing the border and its prolongation from 12 to 16 weeks. Throughout all these procedures, which could amount to up to 20 weeks and during which it is forbidden to leave the border area, asylum seekers are most likely going to be detained. The instrumentalisation Regulation does not specify the facility where the post-arrival procedures should take place. However, as asylum seekers are not allowed to leave the border premises, it is likely that Member States will standardly recur to *de facto* detention. To further worsen the hosting conditions, the Instrumentalisation Regulation allows Member States to set lower standards for the reception of asylum seekers

about their basic needs. Furthermore, no exception nor favourable treatment is envisaged for vulnerable groups and minors.

Against this background, the necessity and proportionality of the derogations provided by the Instrumentalisation Regulation are questionable. However, the Commission did not run any impact assessment of the proposals, despite their disruptive potential on the overall EU migration policy and their adverse effect on asylum seekers.

#### **4. Which future for the Instrumentalisation Package?**

Despite the generalised [criticisms](#) from NGOs and civil society and the change of approach witnessed during the Ukrainian crisis, EU leaders are keeping the instrumentalisation package at the top of the CEAS reform agenda.

Under the Czech Presidency (June-December 2022), the Council adopted a [general approach](#) to the SBC reform further broadening the definition of “instrumentalisation situation” by adding non-state actors as potential perpetrators of instrumentalisation. On the Instrumentalisation Package instead, the Council [did not reach a majority](#) on a draft [compromise proposal](#), which would have further increased Member States’ discretion in the authorisation procedure, obliging the Commission to initiate it in case the Member State brings “conclusive evidence demonstrating the existence of” an instrumentalisation situation.

Now, it is unclear what future the Instrumentalisation Regulation will have. However, the Council has shown its commitment to stick to the instrumentalisation narrative to push forward the reform of the common migration policy. A reform centred on the intensification of border controls and the confinement of arriving asylum seekers at the border. The Commission seems to agree: Ahead of the February European Council, President Von der Leyen sent a [letter](#) to the Member States urging them to agree on a set of immediate actions in the migration field mirroring the content of the instrumentalisation package: strengthening the external borders, standardising border procedures and improving migration and return management. Following the advice, the [European Council](#) restated the fight against instrumentalisation as a priority, calling the Commission to mobilise substantial EU funds and means to support

Member States in reinforcing border protection capabilities and infrastructure.

## **5. Conclusion**

Looking at the efforts from the Commission and the Council to push forward the derogatory measures outlined in the instrumentalisation package, it can be argued that the instrumentalisation narrative that monopolised the migration debate at the end of 2021 is being only temporarily shadowed by the Ukrainian solidarity approach.

Despite the welcoming protection scheme designed for those escaping from Ukraine (which is rightfully deserving praise), the reform of the common migration policy is following a different route. Such a route might have several names, “fight against smuggling”, “fight against instrumentalisation” or “reinforcement of migration management capabilities”, but it is built of the same material: the confinement of people crossing the border in the border area and the facilitation for Member States not to respect EU standards in poorly defined crisis situations.