



Jean Monnet Network on EU Law Enforcement

Working Paper Series

**Asymmetries and ambiguities in the EU emergency law in prejudice of effective access to asylum at EU borders**

**implications of Commission's proposal for a decision ex 78 (3) TFUE**

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Abstract

This contribution examines the issue of asymmetries and ambiguities in terms of effective judicial protection of third country nationals and migrants at EU borders by analysing the impact that EU emergency law has on the EU legal order. It offers an overview on the possible implications of the Commission's proposal for a decision ex 78 (3) TFUE to adopt derogatory measures in the management of migrants with regard to asylum applications, which would allow Poland, Latvia and Lithuania to derogate from a number of EU legislative instruments in order to help them 'manage the emergency situation caused by the actions of Belarus'. It highlights light and shades in terms of the effectiveness of such a proposal, which would allow the concerned Member State to process asylum applications within a period of 16 weeks, offering a protection of rights that risks being below the required standard. In the light of these considerations, it reflects on the actual scope of these derogatory measures which, if they were to be applied to a Member State, such as Poland, with a weak protection of human rights and a tendency to violate the rule of law, could also affect procedural guarantees for asylum seekers at borders and their right to benefit from the right to an effective remedy, as enshrined in the European Convention on Human Rights and recognised as a principle of EU law. Even though there is a clear tendency to condemn a systemic practice of ignoring asylum claims brought by applicants at the EU borders and to take positive provisional measures, the ECHR do not explicitly mention the need to admit these migrants to the territory to initiate an asylum procedure. Thus, it demonstrates a significant gap in judicial protection that leaves a particularly vulnerable group of people stuck in a border area in a ‘no man's land’ and exposed to human rights violations. This contribution concludes by reflecting on the current increasingly institutional preference for a securitarian approach that risks taking precedence over the protection of human rights.

Keywords:

Emergency law; instrumentalisation of migration; border procedures; migrants’ rights; judicial protection

1. **Introduction**

The situation at the EU-Belarus border is witnessing a serious humanitarian crisis which erupted in the summer of 2021, leading to an unprecedented increase in irregular border crossings from Belarus and involving several thousand migrants camped at the Belarusian-Polish border, mostly Kurdish-Iraqi refugees.

To understand the reasons for this crisis, a brief step back needs to be done. On 14 August 2020, during a meeting organised by the EU High Representative for Foreign Affairs, the foreign ministers of EU countries decided to impose economic and financial sanctions on the government of Belarus following the violence by security forces against demonstrators during protests against the outcome of the presidential elections held on 9 August[[2]](#footnote-2).

As a response to the sanctions imposed by the EU, the Lukashenko regime has lured migrants to the border with the cooperation of migrant smugglers and criminal networks. Therefore, the government in Minsk has implemented a policy of instrumentalisation[[3]](#footnote-3) of migrants or so-called 'weaponisation of migrants'[[4]](#footnote-4) and has thus, through various measures, stimulated the arrival of large and steady flows of migrants from various countries (such as primarily Iraq) on the territory, and then promptly directed them towards the border with the above-mentioned Member States. The Belarusian government has been accused of determine a new migration route to EU territory in order to create a real crisis. Thus, essentially to take advantage of vulnerable migrants to create a humanitarian emergency.[[5]](#footnote-5) Due to this instrumentalisation, as of 21 November 2021, 7 831 third-country nationals illegally entered the territories of Latvia, Lithuania and Poland from Belarus, compared to 257 entries in the whole of 2020.[[6]](#footnote-6) There were also 2 676 asylum applications in Lithuania, 579 applications in Latvia and 6 730 applications in Poland. The three Member States also prevented 42 741 attempted crossings. [[7]](#footnote-7)

1. **The response of Poland, Lithuania and Latvia to the migration crisis.**

As a result of these events and the ensuing strong pressures that saw large groups of migrants arriving at their borders and a continuous increase in the number of applications for international protection, Poland, Lithuania and Latvia declared a state of emergency and introduced changes to their national immigration and asylum legislation.[[8]](#footnote-8) Because of these changes, various concerns and criticisms were also raised regarding their compatibility with EU legal obligations, the EU Treaties, the Charter of Fundamental Rights and international law.[[9]](#footnote-9)

As a matter of fact, Lithuania, Latvia and Poland allegedly intensified border controls, minimised external border access points and militarised their borders to prevent unauthorised entry, justifying these acts in the light of the need to protect national security and territorial integrity. In light of these, the impression and concern, is that the Member States involved aim, in practice, at the consolidation of a policy of refoulement, risking giving legal status to a practice that is illegal and in serious violation of human rights. [[10]](#footnote-10). For instance, in the case of Poland, the government created a 3-kilometre emergency zone from the Belarusian border, allowing only the police and residents to have access to that area. This resulted in migrants being unable to apply for asylum. And the new legislation allows for the removal of people from the national territory, even after they have applied for international protection and without an individual examination to determine whether or not the removal involves a violation of their human rights. In addition, in Poland works began in January 2022 on the construction of a 186 km wall demarcating the territory to stop mass crossings. [[11]](#footnote-11)

1. **The European response to the emergency situation and the instrumentalisation of migrants**

The conduct of the Belarusian government constitutes a concrete danger to the fundamental rights of the individuals involved, to the Member State and to the EU as a whole. The geopolitical backdrop to this humanitarian crisis has not only destabilised and undermined the foundations of the European Union's society and fundamental institutions, threatening the security of the Union as well as to the three Member States involved, but has also brought to the surface a very hot topic: that of European management of migration policies.[[12]](#footnote-12)

As a matter of fact, there was unanimous condemnation by European leaders of the attempt by the Belarusian President, Aleksandr Lukashenko, to destabilise neighbouring democratic countries in retaliation against European sanctions. And the Council of Europe's Commissioner for Human Rights, Dunja Mijatovic, said that ''the humanitarian and human rights situation along the border between Poland and Belarus is alarming: urgent action must be taken to protect the lives of people stranded in this area''. [[13]](#footnote-13)

The Polish, Latvian, and the Lithuanian government had signed an appeal requesting the help of the other Member States 'to jointly use all available diplomatic and practical means to cut off the new irregular migration routes at the earliest possible stage'[[14]](#footnote-14). And they also called for EU funding 'for the protection of the external borders', referring not only to the duties of individual Member States, but also to the general responsibility of the EU to defend the borders of the Schengen area.

The institutional response saw substantial economic support from the European Commission on 11 August 2021. Indeed, it granted Lithuania EUR 36.7 million from the Asylum, Migration and Integration Fund to support it in the implementation of reception measures. In addition to the 360 million foreseen for these Member States under the Borders and Visa Instrument (BMVI) for the current financial period, the Commission also made available a further supplement of around EUR 200 million for 2021 and 2022. [[15]](#footnote-15)

Another important aspect of EU intervention is the operational support provided by the EU agencies and provided for in the Proposal for a Decision, ex art. 78, par. 3, TFEU itself. The Proposal for a Council Decision requires, among others, the agencies to give priority to requests for operational support from Latvia, Lithuania and Poland. So, finally. Significant practical support has also been envisaged, through the intervention of agencies. This support includes the operational intervention of European Border Coast Guard (commonly referred as FRONTEX) , to support border control activities, including screening and return operations, European Union Agency for Asylum EUAA) to register and process applications, and Europol for intelligence activities. [[16]](#footnote-16)

* 1. *The Proposal for a Council Decision, ex art. 78, par. 3, TFEU.*

The European institutional response to the emergency situation as described above, followed with the proposal for a Council decision, pursuant to Art. 78(3) TFEU, presented by the Commission in December 2021, 'on temporary emergency measures for the benefit of Latvia, Lithuania and Poland', COM (2021) 752. [[17]](#footnote-17) According to Article 78(3) TFEU, in the event of one or more Member States being confronted with an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, acting on a proposal from the Commission and after consulting the European Parliament, may adopt temporary measures for the benefit of the Member State(s) concerned, and may therefore propose provisional measures in emergency migratory situations at the EU's external borders. [[18]](#footnote-18)

The Proposal thus aims to respond to the request of the affected Member States for temporary measures to effectively address the emergency migratory situation at the EU's external borders. It represents a response to the hybrid attack[[19]](#footnote-19) on the EU as a whole and the objective of the proposal is to support the three affected Member States by providing not only the measures but also the operational support necessary to manage the migration crisis in full respect of fundamental rights.

The Council's proposal for temporary emergency measures for Latvia, Lithuania and Poland is followed by the proposal for a regulation of the European Parliament and of the Council to address situations of exploitation in the area of migration and asylum of 14 December 2021.[[20]](#footnote-20) The measures contained therein complement and strengthen the proposals made in the framework of the new Pact on Migration and Asylum.

*3.2 Critical and elusive aspects of the Proposal for a Decision under Article 78(3) TFEU*

Although the adoption of such a proposal is part an EU emergency framework in the interest of the EU and is intended for the benefit of the Member States, it nevertheless presents critical and problematic elements for the protection of human rights that deserve to be noted. [[21]](#footnote-21) Primarily, the Proposal for a Decision seems to derogate from specific provisions of the Asylum Procedures Directive since the provisions of the Procedures Directive are not designed to deal with situations in which the integrity and security of the Union are under attack such as a result of the instrumentalisation of migrants. Therefore, the Proposal aims to establish a temporary emergency procedure for migration and asylum management tailored to the needs of the three Member States concerned and proposes to implement measures that are temporary, extraordinary and exceptional in nature.

Specifically, the Proposal recognises the possibility to examine any application for international protection at the border without authorising entry into the territory and to apply the accelerated procedure to decide on the admissibility and merits of all applications made there. Indeed, whether subjected to the accelerated procedure, applicants would be detained in transit-boundary zones until the procedure for granting international protection is concluded. Detention entails a worrying restriction on the freedom of movement of applicants who find themselves isolated, for an indefinite period of time, from the rest of the population and being guarded by members of the security services permanently present in areas where their freedom of movement is restricted.

According to Art. 2, the Proposal provides that the three Member States will first be able to extend the registration of applications for international protection to four weeks, while giving priority to applications from families and minors. This is in lieu of the maximum period of 10 days currently provided for in Article 6(1) of Directive 2013/32 (the Procedures Directive). Although, this would be intended to give more time to reorganise the resources of these Member States and increase their capacity to act, also with the support of EU agencies, at the same time it is not convincing. As a matter of fact, it seems rather to jeopardise the rights of applicants who would see this extended time for registering their application up to one month. In this regard, it should be borne in mind that the delay of registration makes it more difficult for applicants to prove their status and thus, could violate their right to reception and protection from refoulement, along with other rights deriving from their status as asylum seekers under EU law.

According to Article 5 of the Proposal, Latvia, Lithuania and Poland may introduce 'designated accessible points for registering and forwarding an application for international protection'. The registration and forwarding of applications for international protection would take place at specific registration points close to the border, which may include border crossing points designated for this purpose. This would be designed to allow for a more orderly management of migratory flows. However, although it is already foreseen in Article 6 (3) of the Asylum Procedures Directive that Member States shall identify designated places for applications for international protection, it is not convincing how Latvia, Lithuania and Poland, especially in an emergency situation, would be able to ensure that a sufficient number of registration points are designated and opened. Likewise, what do not persuade is that applicants would receive information on the location of the nearest points where they can make an application. Ultimately, questions may arise on the way these Member States can ensure that applicants are able to reach these points safely and legally. Certainly, if the latter criterion cannot be fulfilled, it is hard to see how effective access to asylum procedures can be guaranteed. On the contrary, in light of the border situation described above, this seems to jeopardise rather than guarantee the right to effective and efficient access to the asylum procedure.

Again, as an exception to the Asylum Procedures Directive, Member States concerned would also be entitled to apply the border procedure to all applicants, including minors, even at the appeal stage, in order to assess the admissibility of their application for international protection. A single exception to the application of the border procedure is provided for vulnerable applicants, such as those with health problems, that cannot be treated at the border or in transit zones.

Furthermore, the countries to which the Proposal is addressed could extend the duration of the border procedure to a full sixteen weeks.[[22]](#footnote-22) Within these sixteen weeks, a decision would have to be made on the application, including on a possible appeal against an administrative decision. Although a little further on it is already stated in the text of the Proposal, that the three Member States may limit the automatic suspensive effect of an appeal pending decisions to all border procedures, and instead give a judge the power to decide whether or not the applicant may remain in the territory. Which, again, raises quite a few concerns with respect to the guarantee that the right to suspensive effect guarantees, such as respect for the principle of non-refoulement.[[23]](#footnote-23) The exclusion of automatic suspensive effect has even more serious repercussions with regard to the right of access to effective judicial remedies as well as with regard to the principle of non-refoulement. Moreover, this would place an additional burden on the applicant who would have to file a separate application to remain on the territory.

With regard to return procedures, the proposal provides for a derogation from the Return Directive 2008/115/EC, on the basis of the sole existence of instrumentalisation. According to the provisions of the Proposal, the Member State concerned must be provided with the necessary legal instruments to ensure the swift return of those who are not eligible for international protection. However, the proprtionality of the measure and in particular the link between a detriment of guarantees during return and the situation of instrumentalisation does not appear clear.

Finally, the Proposal raises dubious limitations on reception conditions. Article 3 provides that the states concerned may temporarily establish modalities for material reception conditions that cover ''only the basic needs of applicants''. Given the very long timeframes introduced by the text of the Proposal, and outlined above, such as the 16-week timeframe for processing the application, the provisions of Article 3 raise clear doubts in relation to the protection of the right to human dignity.

* 1. *The risks for the protection of the rights third country nationals, the fiction of non-entry and the limitation of procedural guarantees.*

Although it is not disputed that these measures are designed and justified by the need to give organisational time to the Member States concerned, at the same time, this creates a legal fiction of non-entry that is detrimental to the asylum seeker present at the border and places him or her in a condition of detention. It therefore speaks of a fiction of non-entry that consists of a disjunction between physical and legal entry into the territory of the applicant. [[24]](#footnote-24) According to this, the foreigner, although physically present, would not be considered authorised to enter the territory until a decision on the matter is taken by the competent authorities.[[25]](#footnote-25)

The need to protect territorial integrity and to prevent illegal entry is repeatedly written into the text of the draft decision and seems to be the main justification for procedural solutions that are unconvincing with respect to the protection of migrants who find themselves stranded at the border, for even longer periods of time and in dire humanitarian conditions. Around four thousand people, stranded in the woods on the Belarus-Polish border, with very little food and basic necessities, forced outdoors in difficult conditions and exposed to cold temperatures.[[26]](#footnote-26)

Nor is it convincing to which extent the possibility of examining an application at the border without authorising entry into the territory can protect fundamental rights. Although this too is explicitly stated in the text of the Proposal, it seems as if the writer is doing so by mocking the conditions of those living at the borders. It is repeated in the text of the Proposal that all applicants are entitled to it without distinguishing between the possible categories, except for minors and vulnerable applicants due to health conditions. Article 3 of the proposal for a decision, for instance, provides that the Member States in question may derogate from Directive 2013/33 (Reception Directive) and provide different material reception conditions than those provided for in its Articles 17 and 18, on the understanding that the basic needs of applicants for protection must in any case be met. However, neither the modalities of provision nor the nature of such 'different' material conditions are specified in the text of the proposal.

Finally, although it is clearly stated that ''the detention of applicants should be a measure of last resort, to be applied in specific cases where other sufficient but less coercive measures cannot be applied'',[[27]](#footnote-27) this seems, in practice, to clash with the standards just analysed where the non-entry fiction seems the preferable approach. And it is not clear how the guarantees provided by the Asylum Procedures Directive and the Reception Conditions Directive can be respected.

Conclusively, issues also arise as to whether the asylum procedure as proposed does not lead to the systematic detention of applicants at borders, which is very reminiscent of a situation where border procedures take peace in detention. And to what extent the proposed emergency measures are not only necessary but above all proportionate to the objective.

1. **The Operational Support of European Agencies at the External Borders: the Proposal in its Implementation Phase.**

Article 7 of the Proposal for a Council Decision, as seen above, provides, among others, for operational support of the EU agencies. Specifically, it requires FRONTEX, EUAA and Europol to give priority to requests for operational support from Latvia, Lithuania and Poland.

The operational support provided by EU agencies was primarily at the request of Lithuania. In fact, since the beginning of the migration crisis, the European Asylum Support Office EASO (now EUAA) has provided Latvia and Lithuania with operational support to help them cope with the exploitation of migrants on the borders with Belarus. EUAA assistance focused on activities related to the asylum procedure and reception system, as the two *macro* objectives of the agency's intervention are to improve effectiveness and efficiency in relation to access to the procedure and the processing of applications for international protection. And finally, these activities are aimed at improving the effectiveness and efficiency of the reception system. [[28]](#footnote-28)

In addition, there is also support from the FRONTEX Agency and Europol. In particular, the three agencies sent experts to implement border control and intelligence measures and worked to strengthen the return capacity and carry out a considerable number of return operations.[[29]](#footnote-29) In particular, the EUAA is expected to provide support both in the on-site management of reception facilities and in the strengthening of workflows and procedures, including the improvement of operational tools. In addition, Agency officials are requested to support the Border Guard Service in registering applications for international protection and the Immigration Department in conducting interviews and drafting decisions on applications for international protection.[[30]](#footnote-30)

It is a concern with specific reference to the intervention of EUAA and FRONTEX officials who may find themselves, also given the limited margin of discretion they enjoy in relation to possible directives from the national authorities of the Member States concerned, implementing provisions of national law that are contrary to EU law. In this regard, it is stipulated in the Agency Regulation that ''the Executive Director, after consulting the Fundamental Rights Officer and informing the Member State concerned, shall withdraw support for any of the Agency's activities, or suspend or terminate, in whole or in part, any of the Agency's activities, if he/she considers that there are serious or persistent breaches of fundamental rights or international protection obligations which are linked to the activity in question''. [[31]](#footnote-31)

*4.1 The role of Frontex and the allegations of serious incidents in Lithuania.*

Although several complaints have been lodged, as far as FRONTEX is concerned, under Article 46 (6) of the 2019 Regulation concerning serious incidents in Lithuania[[32]](#footnote-32) relating to the questionable human conditions of asylum seekers in the asylum camps - only recently it appears that a withdrawal of the agencies from the territory is being considered. This was never considered at the time when F. Leggeri was Executive Director of the Agency. There have been numerous complaints from civil society and activists of how, in the Baltic state, refugees and migrants are arbitrarily detained for months in squalid, prison-like centres. There are reports of how applicants at the border in Lithuania are denied access to a fair asylum procedure and how they are subjected to further human rights violations in the hope that they will 'voluntarily' return to the places from which they have fled.[[33]](#footnote-33) A situation that is very reminiscent of the events in Hungary, which then led to the activation for the first time of the mechanism referred to in Article 46 of the Frontex regulation and the suspension of operations, as well as the withdrawal of agents from the territory. [[34]](#footnote-34)

However, despite many complaints under Article 46 were made, no consideration had been given to a withdrawal of FRONTEX support. It was only on 12 July 2022 that the agency's new acting executive director, Aija Kalnāja, declared that the it would have reduced the number of FRONTEX agents deployed at the borders but that it would maintain an operational footprint in Lithuania. Despite her statements, she strongly denied a link between the agency's involvement and the human rights violations of which FRONTEX is accused.[[35]](#footnote-35) It is not surprising, however, that this decision only followed a recent ruling by the Court of Justice of the European Union, which ruled on 30 June 2022 that the Lithuanian law, which denies the right to asylum and provides for the automatic detention of third country nationals entering the country illegally, is incompatible with EU law. [[36]](#footnote-36) With this ruling, the Court rejected the argument of the Lithuanian authorities, who had justified the modus operandi on the basis of the 'emergency' conditions created to deal precisely with the crisis of migrants arriving from Belarus in the summer of 2021.

In the light of what has been said, it has been pointed out that the operational support of the agencies falls within the emergency measures applicable in exceptional situations envisaged by the European Union. However, it is not convincing how, despite the Proposal for a Decision ex art. 78, par. 3, TFEU, as well as the package of reforms presented with the New Pact on Migration and Asylum[[37]](#footnote-37) remain, at least for now on paper, in a certain way, it is evident how their content is already being implemented thanks to the work of the agencies, FRONTEX and EUAA.

1. **Concluding remarks.**

These temporary derogation measures as under Article 78(3) TFEU raise, as highlighted above, many doubts. Firstly, one would have to ask whether or not 'instrumentalisation' falls within the scope of Article 78(3); and secondly, whether, given the manageable number of arrivals at the border, the limitation of the rights of the migrants concerned is necessary and, above all, proportionate. All in all, the question is whether the situation actually justifies a derogation from the asylum acquis as laid down in Article 78(3) TFEU.

Conclusively, it raises doubts on whether these measures are the most appropriate and whether less burdensome and cheaper alternative measures are not instead envisaged. These are questions that remain largely unanswered in the Proposal for a Decision. Since this is a legislative proposal, control over the principle of subsidiarity and proportionality must be carried out by the national parliaments. And on this point, doubts arise precisely in relation to the principle of proportionality. It is not convincing that these measures are necessary and proportionate to the objective.

Moreover, as highlighted above, procedural issues, such as the length of time granted to states to process applications at the borders, i.e. 16 weeks, would seem to allow the Member States concerned to intervene in a way that could rather deteriorate the protection of human rights. Indeed, detaining asylum seekers for up to 16 weeks could lead to the risk of arbitrary detention of migrants seeking international protection.

Lastly, countries that benefit from this exemption, such as Poland, present problematic elements in terms of the protection of the rule of law and also in terms of fundamental rights to asylum. Concerns arise in relation to those governments that may abandon their obligations under international law to provide access to asylum. Poland, for instance, may seek to use the same vulnerable people to drive its own anti-migrant agenda. The recent ruling of the European Court of Justice in 2020 invites us to reflect on critical issues of rule of law. [[38]](#footnote-38) This is a well-known ruling, an infringement procedure initiated by the European Commission against Poland and also Hungary and Slovakia, which has to do with the relocation mechanisms adopted to meet the needs of Greece and Italy during the refugee crisis. [[39]](#footnote-39) These Member States had disregarded their obligations under certain provisions of Decisions 2015/1523 and 2015/1601, and adopted these national measures in breach of their obligations under EU law for reasons of public security.[[40]](#footnote-40) These decisions had been adopted by the Council on 14 and 22 September 2015, based precisely on Article 78(3) of the TFEU, in order to offer adequate support to Greece and Italy, which were disproportionately burdened by the huge migratory flows recorded in the summer of that year. On that occasion, the European Union had acknowledged the existence of an 'emergency situation characterised by a sudden influx of third-country nationals' and, therefore, of a situation that could no longer be sustained autonomously by the individual Member States concerned and necessitating the provision of measures to support them, in implementation of the principles of solidarity and loyal cooperation. It should be recalled in this regard that on the same occasion, Advocate General E. Sharpston had delivered his opinion at the outcome of that procedure, expressing a strongly critical position towards the conduct of the defendant Member States and representing the centrality of respect for the rule of law, as well as the principles of loyal cooperation and solidarity between Member States for the effective realisation of the objectives of the Treaties. [[41]](#footnote-41)Once again, reference can be made to the two most recent judgments on the conditional mechanism that emphasise the need for Member States to respect the protection of human rights and the rule of law as a fundamental value that must characterise the entire membership of the Union.[[42]](#footnote-42)

As a matter of fact, in such a context question may arise on which risks may come from implementing such a proposal. And it seems necessary to be concerned about how such emergency measures are already partly implemented, as seen above, through the work of the agencies, demonstrating a clear institutional preference for a securitarian approach that risks prevailing over the protection of human rights.

It is precisely the episodes of serious human rights violations caused by the inadequacy of the protection system for asylum seekers, as seen in countries such as Belarus, that are at the origin of a crisis that has backfired on the EU and put its system to the test, thus demonstrating a significant gap in judicial protection that leaves a particularly vulnerable group of people stranded in a 'no man's land' border area and exposed to human rights violations.

The interior ministers of Member States such as Lithuania, Poland, Latvia, Hungary, the Czech Republic, Austria, Bulgaria, Cyprus, Denmark, Greece, Estonia, and Slovakia wrote a letter to the European Commission demanding 'the adaptation of the EU legal framework to the new realities'. The focus of the letter is the revision of the Schengen border code, and the most concrete request is for the EU to fund border walls and fences as the current border surveillance 'does not prevent people from attempting to cross borders illegally and it would therefore be useful to supplement it with additional preventive measures'. Some commentators have interpreted this as a call for the legalisation of 'rejections', i.e. expulsions or rejections at the border that preclude individual assessment of asylum applications. However, rejections are still prohibited under EU and international law by the principle of non-refoulement.

Finally, it cannot be hide the concern that such legislative measures may satisfy long-standing demands of the countries on the external borders, which have found their legitimacy in the crisis caused by Belarus. And the concern that this is being done under the guise of defending the interests of the Union[[43]](#footnote-43)

The above issues invite the question as to what scenarios the European Union will face. In times of deep time of crisis, the European Union is committed to recompacting the common European front and its action plan is entirely aimed at mitigating the consequences of the ongoing Russian-Ukrainian conflict. One area of action of particular interest inevitably remains that of border management policy, which has already been severely scarred by the very shortcomings encountered during the 2021 migration crisis on the Belarus-Polish border.

1. PhD Researcher at the University of Luxembourg, silvia.rizzutoferruzza@uni.lu [↑](#footnote-ref-1)
2. Council Implementing Regulation (EU) 2021/2124 of 2 December 2021 implementing Article 8a(1) of Regulation (EC) No 765/2006 concerning restrictive measures in respect of Belarus; Council Implementing Decision (CFSP) 2021/2125 of 2 December 2021 implementing Decision 2012/642/CFSP concerning restrictive measures in view of the situation in Belarus ; https://eeas.europa.eu/headquarters/headquarters-homepage/84103/video-conference-foreign-affairs-ministers-main- outcomes\_en [↑](#footnote-ref-2)
3. The definition is taken from the proposal to amend the Schengen Borders Code, according to which 'a situation of instrumentalisation of migrants may occur when a third country incites irregular migratory flows towards the Union [...] if such actions indicate the intention of the third country to destabilise the Union or a Member State and are of such a nature as to jeopardise essential functions of the State such as its territorial integrity, the maintenance of law and order or the safeguarding of national security'. Proposal for a 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 COM/2021/891 final [↑](#footnote-ref-3)
4. [https://www.politico.eu/article/eu-deploys-border-force-in-lithuania-as-belarus-opens-pathway-for- migrants-frontex/](https://www.politico.eu/article/eu-deploys-border-force-in-lithuania-as-belarus-opens-pathway-for-%20migrants-frontex/) [↑](#footnote-ref-4)
5. Carrera, S., Walling off Responsibility? – The Pushbacks at the EU's External Borders with Belarus, CEPS, November 2021; Przetacznik J. and Russell M., EU-Belarus relations: State of play – Human rights situation, EPRS, European Parliament, November 2021. [↑](#footnote-ref-5)
6. For a comprehensive account of the situation is available at https://www.dw.com/en/the-route-from-iraq-to-belarus-how-are-migrants-getting-to-europe/a-59636629 and at <https://theconversation.com/trouble-on-the-belarus-poland-border-what-you-need-to-know-about-the-migrant-crisis-manufactured-by-belarus-leader-172108> [↑](#footnote-ref-6)
7. UNHCR Refugee Data Finder https://www.unhcr.org/refugee-statistics/ [↑](#footnote-ref-7)
8. See the amendment to the Immigration Act N. IX-2206 (*Law on the Legal Status of Aliens* o *Aliens Law*) del 10 agosto 2021, adoption of lae N. XIV-515 “On the Law of the Republic of Lithuania on the Legal Status of Aliens No. IX-2206 Amendment to Article 67 TAR, 2021-08-11, N. 17359, available here: <https://bit.ly/3yIvIWS> ; In Poland, on 30 November 2020, President Andrzej Duda signed an amendment to the Law on the Protection of the State Border, which provides for the Minister of the Interior to introduce a ban on stopping at the border for a certain period, available here, <https://www.gov.pl/web/mswia/prezydent-podpisal-nowelizacje-ustawy-o-ochronie-granicy-panstwowej-i-niektorych-innych-ustaw>.: see Declaration of Emergency Situation (No 518) by the Latvian Cabinet of Ministers, https://likumi.lv/ta/en/en/id/325266 <https://www.unhcr.org/neu/69763-unhcr-law-observations-on-latvian-declaration-of-emergency-situation.html>, Emendaments on Latvia Law on Asylum Seekers and Refugees <https://likumi.lv/ta/en/en/id/278986-asylum-law>, [↑](#footnote-ref-8)
9. *inter alia*, art. 3 CEDU, art. 5 CEDU and also art 41 and 47 of the EU CFR [↑](#footnote-ref-9)
10. United Nations High Commissioner for Refugees, UNHCR Law Observations on Latvian Declaration of Emergency Situation [www.unhcr.org](http://www.unhcr.org);ECRE, Extraordinary responses: legislative changes in Lithuania, 2021, Legal Note #11, 2021, disponibile in: https://ecre.org/wp-content/uploads/2021/09/Legal-Note-11.pdf; : Human Rights Monitoring Institute, Global Detention Project, Lithuania oral submission to the UN Committee against torture, 72nd session November-December 2021 issues related to refugees, people seeking asylum, and immigration detention, consultabile in: https://www.globaldetentionproject.org/testimony-on-lithuanias- treatment-of-migrants-at-the-border-with-belarus-at-the-un-committee-against-tortures-72nd-session; Human Rights Watch, Die Here or Go to Poland”, Belarus’ and Poland’s Shared Responsibility for Border Abuses, report 24 November 2021,https://www.hrw.org/report/2021/11/24/die-here-or-go-poland/belarus-and-polands-shared-responsibility-border-abuses . ECRE, Poland: Parliament Approves ‘Legalisation’ of Pushbacks, Council of Ministers Adopt Bill to Construct Border Wall, Another Life is Lost at Border with Belarus 15th October 2021, <https://ecre.org/poland-parliament-approves-legalisation-of-pushbacks-council-of-ministers-adopt-bill-to-construct-border-wall-another-life-is-lost-at-border-with-belarus/> . [↑](#footnote-ref-10)
11. The Guardian, Poland starts building wall through protected forest at Belarus border, 27 Jan 2022, <https://www.theguardian.com/world/2022/jan/27/poland-starts-building-wall-through-protected-forest-at-belarus-border>; Shengen visa info, Poland to Build 186 Kilometers-Long Wall on Its Border With Belaru; Polish lawmakers give go-ahead to build Belarus border wall <https://www.trtworld.com/europe/polish-lawmakers-give-go-ahead-to-build-belarus-border-wall-51183>

January 5, 2022, https://www.schengenvisainfo.com/news/poland-to-build-186-kilometres-long-wall-on-its-border-with-belarus/ ; Euronews, Poland completes 186-kilometre border wall with Belarus after migration dispute, https://www.euronews.com/2022/06/30/poland-completes-186-kilometre-border-wall-with-belarus-after-migration-dispute; [↑](#footnote-ref-11)
12. the conduct of the Belarusian government constitutes a danger to the fundamental rights of the individuals involved; to the three Member States; and finally, it constitutes a danger to the EU as a whole. [↑](#footnote-ref-12)
13. See also the European Council conclusions of 24-25 June 2021 and 20-21 October 2021. And the State of the Union Address 2021 of 15 September 2021. [↑](#footnote-ref-13)
14. Statement of the Prime Ministers Ingrida Šimonytė (Lithuania), Arturs Krišjānis Kariņš (Latvia), Kaja Kallas (Estonia) and Mateusz Morawiecki (Poland) on the hybrissd attack on our borders by Belarus (published on 23 August)[https://ministraspirmininkas.lrv.lt/uploads/ministraspirmininkas/documents/files/LT%20PL%20EE%20LV%20Joint\_declaration\_%20Final(1).pdf](https://ministraspirmininkas.lrv.lt/uploads/ministraspirmininkas/documents/files/LT%20PL%20EE%20LV%20Joint_declaration_%20Final%281%29.pdf) [↑](#footnote-ref-14)
15. COMM Daily News 11 / 08 / 2021 <https://ec.europa.eu/commission/presscorner/detail/ro/mex_21_4181> ; si veda anche: COM (2021) 752, cit., p. 2. [↑](#footnote-ref-15)
16. Art 7. COM(2021) 752 , see also EASO Operating Plan , deployment of an immediate operational support to Lithuania, <https://euaa.europa.eu/news-events/lithuania-receive-immediate-operational-support-easo>; Frontex launches rapid intervention in Lithuania, https://frontex.europa.eu/media-centre/news/news-release/frontex-launches-rapid-intervention-in-lithuania-MwIEXJ ; [↑](#footnote-ref-16)
17. The Commission, noting that Latvia, Lithuania and Poland "are confronted with an emergency situation characterised by a sudden influx of third-country nationals instrumentalised by Belarus for political purposes" presents a proposal for a Council decision on temporary emergency measures under Article 78(3) of the Treaty on the Functioning of the European Union (TFEU). Proposal for a Council Decision on temporary emergency measures for Latvia, Lithuania and Poland, COM (2021) 752 final [↑](#footnote-ref-17)
18. Proposal for a Council Decision on provisional emergency measures for the benefit of Latvia, Lithuania and Poland, COM/2021/752 final [↑](#footnote-ref-18)
19. The term hybrid attack refers to a combination of coercive and subversive activities, conventional and unconventional (i.e. diplomatic, military, economic and technological) methods, which can be used in a coordinated manner by state or non-state entities to achieve certain objectives, while always remaining below the threshold of an officially declared war. Already in 2010, NATO in its Capstone Concept 'Military contribution to countering hybrid threats' - a document in which it identified such threats as 'those posed by adversaries with the ability to simultaneously employ conventional and unconventional means in an adaptive manner in pursuit of their objectives'; see the statements made by Ursula von der Leyen, NATO representatives, as well as from the Polish and Latvian authorities <https://www.trtworld.com/europe/nato-belarus-s-use-of-migrants-as-attack-tactic-unacceptable-51455>) : [↑](#footnote-ref-19)
20. COM(2021) 890 final cit [↑](#footnote-ref-20)
21. See also ECRE, Comments on the Commission Proposal for a Council Decision on provisional emergency measures for the benefit of Latvia, Lithuania and Poland [↑](#footnote-ref-21)
22. COM(2021) 752 final,cit. Art. 2(5): 'By way of derogation from Article 43(2) of the Asylum Procedures Directive, the time limit preceding the granting of access to the territory may be extended to 16 weeks, during which a decision on the application, including an appeal, shall be taken' [↑](#footnote-ref-22)
23. D. Vitiello, Le frontiere esterne dell’Unione europea, Cacucci editore, Bari, 2020. [↑](#footnote-ref-23)
24. Cornelisse, Galina, and Marcelle Reneman. 2022. Border Procedures in the European Union: How the Pact Ignored the Compacts. Laws11: 38. https://doi.org/ 10.3390/laws11030038; Caterina Molinari, The Borders of the Law: Legal Fictions, Elusive Borders, Migrants’ Rights, Politics and Governance (ISSN: 2183–2463) 2022, Volume 10, Issue 2, Pages 239–245 https://doi.org/10.17645/pag.v10i2.4968 [↑](#footnote-ref-24)
25. And this has already been established in the past by the Grand Chamber in its ruling Saadi v. United Kingdom, (par 65) where the Court ‘’did not accept that as soon as an asylum-seeker has surrendered himself to the immigration authorities, he is seeking to effect an “authorised” entry, with the result that detention cannot be justified under the first limb of Article 5 (1). To interpret the first limb of Article 5 (1) as permitting detention only of a person who is shown to be trying to evade entry restrictions would be to place too narrow a construction on the terms of the provision and on the power of the State to exercise its undeniable right of control referred to above.’’ [↑](#footnote-ref-25)
26. See Human rights watch and Amnesty reports <https://www.hrw.org/news/2022/06/07/violence-and-pushbacks-poland-belarus-border>; <https://www.amnesty.org/en/location/europe-and-central-asia/belarus/report-belarus/> [↑](#footnote-ref-26)
27. For EU members States the obligation to consider alternatives to detention is established in: Directive 2013/33/EU, Recital (20) and Article 8 (2); Directive 2008/115/EC, Recital (16) and Article 15 (1); Regulation (EU) No 604/2013, Recital (20) and Article 28 (2). [↑](#footnote-ref-27)
28. Operating Plan agreed by EASO and the Ministry of the interior of the Republic of Lithuania and the Ministry of social security and labour of the Republic of Lithuania, 14 settembre 2021, cit., p. 15 ss. [↑](#footnote-ref-28)
29. Currently, the support includes more than 111 border guards, 82 asylum experts and two Europol detached officers. [↑](#footnote-ref-29)
30. Ibid. cit., p. p.14 -17 [↑](#footnote-ref-30)
31. See art 46 (6) Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624; e with regard to EASO, Regulation (UE) 2021/2303 del European Parliament and of the Council of 15 December 2021 on the European Union Asylum Agency and repealing Regulation (EU) No 439/2010. [↑](#footnote-ref-31)
32. ECRE Lithuania: Frontex Serious Incident Reports Multiply, Stranded People Suffer at the Border, Camps Improved with EU Funding, Twelve States Ask EU to Fund Fences, 15th October 2021 https://ecre.org/lithuania-frontex-serious-incident-reports-multiply-stranded-people-suffer-at-the-border-camps- improved-with-eu-funding-twelve-states-ask-eu-to-fund- fences/#:~:text=On%208%20October%2C%20a%20Frontex,such%20reports%20had%20been%20made e https://ecre.org/lithuania-frontex-serious-incident-reports-multiply-stranded-people-suffer-at-the-border-camps- improved-with-eu-funding-twelve-states-ask-eu-to-fund- fences/#:~:text=On%208%20October%2C%20a%20Frontex,such%20reports%20had%20been%20made. [↑](#footnote-ref-32)
33. See Amnesty International Report, Lithuania: Forced out or locked up – Refugees and migrants abused and abandoned, June 27, 2022Index Number: EUR 53/5735/2022, <https://www.amnesty.org/en/documents/eur53/5735/2022/en/> [↑](#footnote-ref-33)
34. Judgment of the Court , C-808/18 Commissione c. Ungheria, 17 Dicembre 2020. [↑](#footnote-ref-34)
35. Euobserver, Frontex ends Lithuania border surveillance operation, 14 luglio 2022, https://euobserver.com/migration/155523 [↑](#footnote-ref-35)
36. Judgment of the Court of Justice of European Union, 30 June 2022, C-72/22 PPU, M.A. v Valstybės sienos apsaugos tarnyba. [↑](#footnote-ref-36)
37. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A new pact on migration and asylum, 23 September 2020, COM(2020)609 final. [↑](#footnote-ref-37)
38. Judgment of 2 April 2020, Commission v. Poland, Hungary and the Czech Republic, Joined Cases C715, 718 and 719/17. [↑](#footnote-ref-38)
39. Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece; Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece [↑](#footnote-ref-39)
40. As is well known, Slovakia, Hungary and Poland brought an action for annulment of the Council Decisions that was later rejected by the Court of Justice, and Hungary held a national referendum against the relocation quotas, thus consolidating the discontent within the 'Visegrad Group' consisting of Poland, Hungary, the Czech Republic and Slovakia. [↑](#footnote-ref-40)
41. Opinion of Advocate General Sharpston delivered on 31 October 2019. European Commission v Republic of Poland and Others, Joined Cases C-715/17, C-718/17 and C-719/17. [↑](#footnote-ref-41)
42. Judgment of the Court (Full Court) of 16 February 2022 Hungary v European Parliament and Council of the European Union, C-156/21 and C-157/21 [↑](#footnote-ref-42)
43. Exemplary on this point is the position of the Polish government in the case of M.K. and others v. Poland, according to which, since the Polish-Belarusian border was also the external border of the European Union, the authorities had to act in accordance also with their obligations under European Union law (in particular the Schengen Borders Code), emphasising that their main responsibility was that of "border protection and control of border traffic, as well as the prevention of illegal immigration. (see M.K. and others v Poland n. 40503/17, 42902/17 e n. 43643/17 [23 july 2020] par. 158.). [↑](#footnote-ref-43)