


Rising tensions at the EU's External Borders with Russia: The Unwanted Return of Instrumentalised Migration and Problematic Responses

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On November 22nd 2023, the Finnish government announced its decision to close all but one of its border crossings with Russia — having closed four crossings one week earlier. That decision was taken in response to a spike in arrivals of undocumented migrants. Though the EU and its Member States have been confronted with several migratory inflows over the last decade, the situation at the Finnish-Russian border is unlike most previous cases; rather than migrants crossing the border of their own volition, in this case the Finnish authorities claim that Russia has facilitated the arrival of migrants.



The Russian Federation is accused of encouraging border crossings, reportedly as a retaliation to Finland joining NATO earlier this year. The Finnish border closures have obtained EU support — with Frontex sending staff and materials to help Finnish border guards, and Commission President Von Der Leyen accusing Russia of a “shameful” instrumentalisation of migrants. Reports indicate that a similar situation may currently also be unfolding along the Estonian-Russian border. The Russian government has denied any involvement in the events.

For the EU, the reports coming out of Finland and Estonia bring back memories of the summer of 2021. During this time, as discussed by Agata Kleczkowska, the Union accused Belarus of using practices similar to those now reportedly employed by Russia.

As part of the ongoing revisions of its asylum *acquis*, through the so-called ‘New Pact on Migration and Asylum’, the EU has sought to adopt legislation to deal with instrumentalised migration. Although the Commission’s initial responses to the Belarus incident were rejected in December 2022, we still find ourselves on the verge of ‘instrumentalisation’ becoming a permanent feature of EU law. This post will explain how we got here and how the unfolding tensions along the EU’s external borders with Russia could be the final push over this verge — risking a reality in which problematic derogations from normally applicable asylum standards are further normalised.

The theory of instrumentalised migration

The ‘instrumentalisation’ of migrants, sometimes referred to as ‘weaponised’ or ‘strategic engineered migration’, has a long history. While in recent years, reports of its occurrence may have mainly come from Europe, it would be incorrect to assume that its use has been confined to this part of the world.

The concept’s leading scholar, Kelly Greenhill, defines the phenomenon as “... those cross-border population movements that are deliberately created or manipulated in order to induce political, military and/or economic concessions from a target state or states.” Greenhill has conducted numerous studies into the phenomenon, having identified (at least) 81 instances of its global occurrence since the entry into force of the 1951 Refugee Convention — on average one per year.

Aside from those developed by academics like Greenhill, for now, instrumentalised migration lacks a commonly accepted definition, let alone a legally binding one. Despite the conceptual ambiguity surrounding the concept, through several waves of proposals, the EU has attempted to address ‘instrumentalisation’ through the adoption of new legislation.

A first wave of failed proposals

In response to the 2021 Belarus incident, as discussed by Mirko Forti, the Commission put forward several legislative proposals. Initially the EU’s response consisted of an *ad hoc* emergency measure for the benefit of Latvia, Lithuania, and Poland — these being the Member States sharing a border with Belarus. Simply put, the proposal would have allowed these Member States to derogate in several ways from normally applicable asylum standards — including extensions in registration deadlines, only having to provide for ‘basic needs’ in reception, more widespread application of border procedures, and limiting the suspensive effect of a rejection of an application for international protection.

Just two weeks after its release, the Commission abandoned the *ad hoc* emergency proposal declaring that “... it cannot be excluded that others [than Belarus] may attempt to conduct hybrid attacks on the Union that include the instrumentalisation of migrants.” In the eyes of the Commission, it was necessary to replace its original emergency measure with a more permanent and wide-reaching mechanism dealing with instrumentalisation. On 14 December 2021, it thus released its proposal for an Instrumentalisation Regulation. This measure sought to make the derogations originally meant for Latvia, Lithuania and Poland, permanently available for any Member State confronted with ‘instrumentalisation’.

The derogations put forward in this first wave of legislative proposals were heavily criticised by human rights experts. Critics argued that these would have a seriously detrimental effect on the fundamental rights of ‘instrumentalised’ migrants. Among others, three main concerns were put forward: (i) the proposed extensions in registration deadlines would place migrants in a prolonged precarious position (being unprotected whilst unregistered); (ii) the wider

application of border procedures would result in increased instances of their arbitrary detention, and; (iii) limitations of suspensive effect would increase the risk of violations of the prohibition of non-*refoulement*.

Given these concerns, civil society rejoiced at the news that in December 2022 the Council failed to reach agreement on the Instrumentalisation Regulation — as mentioned, the *ad hoc* emergency proposal having already been abandoned by the Commission previously. The Council's rejection should not, however, be taken to mean that the Member States object to the idea of making derogations available in cases of instrumentalised migration. To the contrary, responding to the rejection of the Instrumentalisation Regulation, the European Council on Refugees and Exiles (ECRE) warned of the Council's continued appetite for such derogations stating that:

“... the dangerous idea of allowing wide-ranging derogations from the standards in the Common European Asylum System (CEAS) might return by the backdoor – through integration into other reform proposals.”

Developments over the last year reveal that this warning has since become a reality.

Return of the derogations

Events in Brussels following the rejection of the Instrumentalisation Regulation show that within the Council there is still enthusiasm for instrumentalisation derogations. Having let the Commission's instrumentalisation plans fail, the Council has since engaged in a cherry-picking exercise. Due to its important role in the EU's ordinary legislative procedure — used for the adoption of the New Pact proposals — it has been possible for the Council to reject those elements of the Commission proposals that it did not like and to move the elements of the plans that it *did* into other New Pact measures.

Over the last year, the Council has made several attempts to incorporate those elements of the Commission's plans that it viewed favourably (*i.e.* the derogations) into other New Pact proposals. During the early months — first in January, and again in March — the Council tried moving the derogations into the proposal for a Regulation on Asylum and Migration Management (AMMR). This being the proposed replacement of the current Dublin III Regulation, containing the rules to determine the Member State responsible for an application for international protection. These attempts were, however, quickly abandoned — most likely, because finding agreement on the AMMR was deemed too politically important for the negotiations on the proposal to be derailed by the introduction of the controversial topic of instrumentalisation.

The Council thus decided to change tracks, moving the derogations into yet another New Pact proposal. On June 14th 2023, the Council released its compromised text of the proposal for a Regulation addressing situations of Crisis, *Instrumentalisation* (emphasis added) and

Force Majeure (the Crisis Regulation) — an update in content and name to a proposal previously known merely as the Crisis and Force Majeure Regulation.

What happens next?

The Council's attempts to move 'instrumentalisation' derogations into other New Pact proposals has been subject to further criticism, as the previously-raised human rights concerns remain equally applicable. Despite this, on October 4th 2023, the Council announced that it had found agreement on the Crisis Regulation, including the freshly incorporated derogations. As such, the Union is closer than ever before to instrumentalisation, and the derogations that come with it, becoming a permanent feature of EU asylum law.

Whether this will actually happen is now in the hands of the European Parliament (EP). As the Union's other co-legislator, the EP will need to consent to the adoption of all New Pact proposals — including the Crisis Regulation. For the moment, the EP's position on the idea of introducing instrumentalisation derogations into the EU's future asylum *acquis* remains unclear.

The EP, however, faces enormous political pressure to agree to the Council's position, after committing itself to finding an agreement on all New Pact proposals before the 2024 European elections. As such, the clock is ticking.

There is an additional risk that the Member States may try to use the current tensions along the Union's borders with Russia as further evidence of the need for instrumentalisation derogations, putting further political pressure on the EP to fall in line. Despite the human rights concerns, the reported Russian use of 'instrumentalisation' practices against Finland and Estonia may turn out to be the final push necessary for the Member States to have their long-desired derogations adopted.