Flexible Responsibility or the End of Asylum Law as We Know It?

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On March 21 2023, the Council released a revised draft proposal for an Asylum and Migration Management Regulation (AMMR). The draft regulation forms part of the ongoing overhaul of the EU asylum *acquis* through the New Pact on Migration and Asylum, which aims to enhance solidarity and responsibility sharing across Member States. One of the AMMR's central contributions to this goal is its proposed adoption of the concept of 'flexible responsibility' — or 'adaptable responsibility' — into the EU's migration management. Already included in the controversial Instrumentalisation Regulation of 14 December 2021, flexible responsibility is the idea that Member States should be allowed to derogate from normally applicable asylum standards when faced with sudden migratory pressures. While the Instrumentalisation Regulation was rejected in December 2022, this post will detail how the new AMMR draft threatens to reintroduce the idea of flexible/adaptable derogations — including, potentially, those originally foreseen in the Instrumentalisation Regulation — into the EU's asylum framework and why we should reject it.

The Push for Flexibility/Adaptability in EU Migration Management

One of the core issues of the EU asylum *acquis* is the absence of an effective solidarity and responsibility mechanism. The (in)famous 'first entry-criterion' of the Dublin III Regulation has long resulted in an overburdening of the Member States of first arrival. The Commission tried to solve this by introducing a solidarity scheme in its 2016 Dublin IV proposal — containing a mandatory relocation mechanism that would kick-in when protection applications exceeded 150% of a Member State's pre-determined capacity level. Strong domestic opposition to mandatory relocation, however, resulted in the proposal's withdrawal.

The initial, 2020 AMMR proposal was the Commission's renewed attempt at a solution. Considering the opposition to the 2016 proposal, it replaced the idea of mandatory relocation with the concept of 'flexible solidarity': while Member States should assist each other when faced with large inflows, they should have flexibility in choosing how to, e.g., by lending operational/financial support, cooperating with third countries, or offering return-sponsorships. However, where such non-relocation contributions would not suffice, Member States could be forced to cover 50% of their pre-determined contributions through relocation or return-sponsorships. It remains to be seen whether any potential

implementation of flexible solidarity will actually alleviate the pressure on Member States of first arrival. Given that the AMMR retains the problematic 'first entry-criterion', the proposal is not expected to solve the solidarity problems of the current framework.

While the discussions on the implementation of 'flexible solidarity' were ongoing, in July 2022 the Czech Council Presidency was installed. Drawing inspiration from the idea of 'flexible solidarity', as well as from several 'crisis-management' proposals of the preceding two years — including the then not yet rejected Instrumentalisation Regulation — which, without using the flexible terminology, already contained the idea of allowing derogations in case of large inflows, in November 2022 the Czech Presidency inserted this concept of 'flexible/adaptable responsibility' into the discussions on the AMMR.

Flexible/Adaptable Derogations in an Instrumentalisation Context

Even prior to the concept's explicit articulation and introduction into the AMMR in late 2022, the idea of more flexibility regarding the adherence to the EU's asylum standards was already being pushed for in older legislative proposals. The concept was, for example, reflected in the EU's responses to the 2021 Belarussian migration 'crisis'. In an effort to coerce the EU into dropping its sanctions, Belarus became the latest third country to be accused of the deliberate creation of an inflow of migrants into the Union — a phenomenon that has become known as 'migration instrumentalisation'. The rejected Instrumentalisation Regulation sought to make an 'emergency asylum and migration management procedure' available to Member States faced with instrumentalised migration, in the form of derogations from normally applicable standards. These included: extensions in registration deadlines, expanded use of border procedures, and deviations from normal material reception conditions.

Proponents of the derogations gave practical reasons for their necessity, *i.e.* they would help Member States process a potential sudden surge in protection applications resulting from an inflow of instrumentalised migrants. The proposal itself for example claims that: "[t]his flexibility may be needed to help the Member State respond effectively to the hostile actions whilst enabling it to manage the unexpected caseload, given the nature and sudden character of the third country interference".

Opponents, on the other hand, criticised the emergency procedure for its potential detrimental effects on the fundamental rights of 'instrumentalised' migrants. The provided delays of registration deadlines, for example, would increase the precarity of arriving migrants, given that they remain unprotected while unregistered. Additionally, the application of border procedures to all arrivals risks an increase in illegal prolonged detention by prohibiting applicants from leaving the border area in which they find themselves. While the Instrumentalisation Regulation claimed in recital 8 that the procedure would comply with all protections against unnecessary detention provided for in the EU's Reception Conditions Directive, in practice most applicants subject to the border procedure are placed in either *de facto* or *de jure* detention. Thirdly, as clarified in recital 9, an appeal against a negative decision in the emergency procedure would not have suspensive effect. This means that an applicant would not have the right to remain

on the territory of the relevant Member State whilst awaiting the outcome of their appeal. The removal of suspensive effect risks violations of the right to asylum, and potentially instances of *refoulement*, as an appeal might show that a person, who has since been expelled to a third country, should have been granted protection status in the EU.

At its most basic, however, to permit flexible/adaptable derogations would create a situation in which individuals are subjected to different rules, merely based on the context of their arrival. Despite the political currency this idea appears to possess, it has no basis in international or EU asylum or human rights law. All arrivals have the right to asylum and are entitled to a rigorous and individual assessment of their protection needs — irrespective of whether they arrive as part of a sudden (instrumentalised) inflow.

The 2023 AMMR: Reintroducing Flexible Responsibility through the Back Door?

While many hoped that the rejection of the Instrumentalisation Regulation in December 2022 signalled the end of its flexible/adaptable responsibility regime — and perhaps even of the idea in general — the 2023 AMMR proposal demonstrates that this is a mistake.

Of particular concern, in this respect, is Article 6a of the 2023 AMMR proposal, which proposes a Permanent EU Migration Support Toolbox. This Toolbox consists of a non-exhaustive list of measures to be made available to Member States under 'migratory pressure' — upon Commission approval in accordance with Article 7a-c and 44c-d. Article 6a(1)(c) of the 2023 AMMR proposal explains that one of these measures would be "derogations foreseen in the Union acquis providing Member States with the necessary tools to react to specific migratory challenges", including those foreseen in the Instrumentalisation Regulation. Unlike previous formulations, Article 6a no longer contains the phrase 'flexible/adaptable responsibility.' However, the provision clearly continues to reflect the concept's central idea — *i.e.* allowing Member States to derogate from the ordinary requirements of asylum law in case of a sudden inflow of migrants, such as a situation of instrumentalised migration.

A related problem in this context is that, while the Instrumentalisation Regulation may have been rejected in December 2022, the revised Schengen Borders Code is still on the table. In it, the Commission is proposing an overly broad definition of 'instrumentalised migration' which requires merely that instrumentalisation practices are 'indicative of an intention to destabilise' the Union. Aside from the fact that the proposal remains silent on what destabilisation means and on who should assess this, instrumentalisation practices do not have to result in any real destabilisation; an indication of the intention to achieve that result suffices. Similarly, the practices must only be 'liable to put at risk essential state functions', thus not demanding that such functions are actually affected. The particular danger of this broad definition lies in the fact that it lowers the threshold for Member States to claim the occurrence of instrumentalised migration, thereby enabling the derogations of Article 6a(1)(c) AMMR — as these seek to enable Member States to respond to migratory challenges including those foreseen in the Instrumentalisation Regulation, *i.e*. an instance of instrumentalised migration.

Some of the early reactions to the proposed derogations of Article 6a show the provision could easily be misinterpreted. Lucas Rasche, for example, was quick to comment that it would allow Member States "to apply derogations from the Union acquis outlined in the Instrumentalisation Regulation". A close reading of Article 6a(1)(c), however, reveals that Rasche's understanding of the provision is not fully correct. The provision only makes derogations foreseen in the Union *acquis* available. Given that the Instrumentalisation Regulation was rejected in December 2022, it is not part of the Union *acquis*. As such, its suggested derogations are not (yet) made available to Member States — at least not as directly as suggested by Rasche.

This does not mean that civil society warnings of the potential re-emergence of flexible/adaptable derogations, including those proposed in the Instrumentalisation Regulation, should be dismissed. As mentioned, the Union's asylum *acquis* is currently being overhauled. If the new *acquis* includes the possibility of derogations, Article 6a AMMR would make these available to Member States. At the moment, negotiations on the New Pact are still ongoing. However, considering the political climate with its enduring worries about instrumentalised migration, it is possible that provisions allowing for derogations will be added to the New Pact — including those of the rejected Instrumentalisation Regulation. This is how that proposal's flexible/adaptable derogations may be re-introduced to the EU's asylum framework.

Flexible Responsibility as a Permanent Feature of EU Asylum Law?

It matters, in this regard, that the concept of flexible/adaptable responsibility appears to have gained traction also outside an instrumentalisation context. The idea can also be identified in the New Pact's 2020 proposal for a Crisis and Force Majeure Regulation — a proposal that is still on the table. Through this proposal the Commission seeks to create a separate legal framework that would apply in 'crisis situations', defined as: "an exceptional situation of mass influx of third-country nationals or stateless persons arriving irregularly …". Upon approval by the Commission, the proposal would allow a Member State for whom it has become impossible to comply with normally applicable asylum standards to derogate from them. Proposed derogations include: extensions in registration deadlines, wider use of the border procedure, prolonged detention possibilities, temporary suspension of Dublin/AMMR solidarity obligations, etc. Aside from raising questions as to why the Commission saw a need to propose a separate Instrumentalisation Regulation in December 2021 when it had already submitted this 'crisis' proposal, the Crisis and Force Majeure Regulation can be seen as further evidence of an acceptance of the ideas that underlie the concept of flexible/adaptable responsibility in EU migration management.

A further cause for concern in this regard is the fact that the 2023 AMMR proposal seems to entrench what was previously framed as an emergency procedure. While the derogations of the rejected Instrumentalisation Regulation — as well as those of the Crisis and Force Majeure proposal — were only meant to apply in "exceptional

circumstances", Article 6a AMMR speaks of a 'Permanent' Toolbox. Far from being a simple linguistic change, this threatens to normalise reliance on flexible/adaptable derogations in Member States' responses to migratory pressures. The discussed inclusion of flexible/adaptable derogations in other New Pact proposals demonstrates that this concern is far from misplaced.

While it remains to be seen whether any further flexible/adaptable derogations will be added to the measures of the New Pact, human rights experts must stay vigilant. While Article 6a AMMR would not directly make the derogations of the Instrumentalisation Regulation available, it might do so indirectly if these are embedded in other New Pact proposals. In order to prevent its problematic flexible/adaptable derogations from making an undesirable comeback, all future New Pact proposals must be scrutinised for their similarities with the rejected Instrumentalisation Regulation.

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