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Proposal for a

**COUNCIL DECISION**

**on provisional emergency measures for the benefit of Latvia, Lithuania and Poland**

## EXPLANATORY MEMORANDUM

### 1. CONTEXT OF THE PROPOSAL

- **Reasons for and objectives of the proposal**

#### **Triggering Article 78(3) TFEU in response to instrumentalisation of migrants at external borders**

The European Council Conclusions of 21 and 22 October 2021 underlined the EU's non-acceptance of any attempt by third countries to instrumentalise migrants for political purposes. Leaders committed to continue countering the ongoing hybrid attack launched by the Belarusian regime. They also recalled the need to ensure effective returns and full implementation of readmission agreements and arrangements, using the necessary leverage. They stated that the European Union remained determined to ensure effective control of its external borders. In this context, the European Council invited the Commission to propose any necessary changes to the EU's legal framework and concrete measures underpinned by adequate financial support to ensure an immediate and appropriate response in line with EU law and international obligations, including the respect for fundamental rights.

In view of Latvia, Lithuania and Poland being confronted with an emergency situation characterised by a sudden inflow of nationals of third countries which have been instrumentalised by Belarus for political purposes, among the concrete measures being envisaged, the Commission is bringing forward a proposal for provisional emergency measures based on Article 78(3) of the Treaty on the Functioning of the European Union (TFEU). It also responds to a request by the impacted Member States to be able to rely on provisional measures to address the emergency migratory situation at the EU's external borders effectively. This is thus a response to the hybrid attack on the EU as a whole.

Belarus has been challenging the Union, especially Latvia, Lithuania and Poland, by action resulting in an unprecedented increase in irregular border crossings from Belarus. While recent years saw almost no attempts to cross the external borders illegally from Belarus into the EU, since the summer of 2021, the number of illegal crossing has been steadily increasing. These actions constitute a hybrid attack that show a determined attempt to create a continuing and protracted crisis as part of a broader concerted effort to destabilise the European Union and undermining society and key institutions. These actions represent a real threat and present danger to the Union's security.

The objective of the proposal is to support Latvia, Lithuania and Poland by providing for the measures and operational support necessary to manage in a humane, orderly and dignified manner, fully respectful of fundamental rights, the arrival of persons being instrumentalised by Belarus. The proposal complements diplomatic efforts and other measures adopted by the Union to respond to this hybrid attack.

This instrumentalisation of migrants by Belarus has resulted in a grave situation for these people in the European Union-Belarus border region. Belarus' actions have created a humanitarian crisis, with a number of fatalities already confirmed. The primary responsibility for addressing this crisis lies with Belarus. It is bound by the Geneva Convention, including the principle of *non-refoulement*, and it joined the Global Compact. Therefore, while the EU will continue to contribute to humanitarian aid for those in need on Belarus territory, Belarus must provide for adequate protection of the refugees on its territory and cooperate with the United Nations High Commissioner for Refugees (UNHCR) and the International

Organization for Migration (IOM) to this end. The Commission and the European External Action Service have been working very closely with the United Nations and its specialised agencies and with relevant human rights organisations in order to prevent a humanitarian crisis from further unfolding, also in view of deteriorating weather conditions.

Because of this instrumentalisation, in 2021 as of 21 November, 7 831 third country nationals have entered the territories of Latvia, Lithuania and Poland from Belarus in an unauthorised manner, compared to 257 in the entire 2020. In addition, there have been 2 676 asylum applications in Lithuania, 579 applications in Latvia and 6 730 applications in Poland. In addition, 42 741 attempts to cross have been prevented by the three Member States. While an exact estimate would be difficult to give, up to 10 000 more migrants may be currently stranded in Belarus with further arrivals on a daily basis.

As a result, Latvia, Lithuania and Poland have declared a state of emergency. Despite all Union and Member States' efforts, the situation has continued to deteriorate. Third-country nationals continue to seek to enter into the territories of Latvia, Lithuania and Poland from Belarus and despite current improvements, the situation remains very volatile.

Following the notification in June by Lithuania, the Commission established a regular monitoring mechanism through the Migration Preparedness and Crisis Management Network (the "Migration Blueprint Network") in accordance with Commission Recommendation (EU) 2020/1366 of 23 September 2020 on an EU mechanism for preparedness and management of crises related to migration<sup>1</sup>. Within this framework, the affected Member States, the European External Action Service, relevant EU Agencies and Commission services have shared data, information and insight, which are reported regularly.

The European Union is supporting the Member States that are being targeted by the Belarusian regime. Since the start of the crisis, the Commission has worked to operationalise the Union's solidarity with Latvia, Lithuania and Poland and granted emergency financial assistance of EUR 36 million to Lithuania in July. In addition to the EUR 360 million foreseen for these Member States under the Border Management and Visa Instrument (BMVI) for this financial period, the Commission has also made available a further top-up of around EUR 200 million for 2021 and 2022.

In addition, Lithuania activated the EU Civil Protection Mechanism on 15 July 2021, and the Commission has been coordinating assistance from 19 Member States. Through the Mechanism, Lithuania has received tents, beds, heating systems and other items crucial to attend to the needs of the migrants present in the territory of Lithuania. This option remains open to Latvia and Poland.

Another important aspect has been the operational support from EU agencies. Upon request by Lithuania, from the start of this crisis, the EU deployed assistance immediately. Operational support by the European Asylum Support Office (EASO) has been provided to Latvia and Lithuania to help them cope with the situation of instrumentalisation. EASO has notably assisted with the handling of asylum applications, reception management and interpretation. The European Border and Coast Guard Agency (Frontex) and Europol have also been providing support to the Member States who requested their assistance. In particular, EU agencies have deployed experts to carry out border control and intelligence measures and have been working to reinforce return capacity and carry out return operations.

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<sup>1</sup> OJ L 317, 1.10.2020, p. 26–38.

This support has already resulted in substantial numbers of return operations. Today, the support includes over 111 border guards, over 82 asylum experts, and two Europol guest officers. The agencies can now continue to step up operational support and it is important for the three Member States to make full use of that support.

This financial and operational support has been underpinned by foreign policy actions aimed at addressing the instrumentalisation of migrants and curtailing arrivals and taken in the context of the on-going standoff with Belarus after the fraudulent presidential elections in August 2020, followed by wide spread and increasing repressions of the Lukashenko regime against their own people and the forced landing of the Ryanair flight. In addition to the comprehensive package of economic and financial sanctions and the ban on flights through EU airspace and on access to EU airports by Belarusians carriers as a reaction to the fraudulent elections and the Ryanair flights diversion, the Union has taken additional measures as a specific response to the instrumentalisation of migrants by Belarus. On 9 November 2021, the Council adopted the Commission proposal on the partial suspension of the EU-Belarus Visa Facilitation Agreement. On 15 November 2021, the Council amended the EU sanctions regime regarding Belarus and the Union is now also able to target both individuals and entities organising or contributing to activities that facilitate illegal crossing of the EU's borders. The Council has also reached political agreement on a fifth package of listings. On 23 November 2021, the Commission tabled a proposal to prevent and restrict the activities of transport operators that engage in or facilitate smuggling or trafficking of people into the EU.

The Commission, High Representative for Foreign and Security Policy and the Member States have also undertaken intense diplomatic efforts towards the main countries of origin and of transit to prevent further arrivals of nationals of these countries through Belarus. This has included outreach to third countries to counter Belarusian disinformation, and to get support for the return and readmission of their own nationals. The outreach has also included direct contacts with airlines and civil aviation authorities to explore ways to help limit non bona fide travel to Belarus.

These measures have brought rapid results, but the situation at the border remains very fragile with Belarus continuing to instrumentalise migrants who continue to arrive at the Union's external borders. Vigilance and preparedness to react quickly to new developments are key.

As well as continuing to assist the Member States concerned both operationally and financially, the Union should equip the Member States concerned with the legal tools needed to react swiftly in defence of their national security and that of the Union. These measures should complement those taken by the Union and Member States concerned. Under Article 78(3) TFEU, the Council has a broad discretion in the choice of the measures it takes if these respond rapidly and efficiently to a particular emergency. These measures can evolve and adapt if they retain their provisional nature.

The measures included in this proposal allow the Member States concerned to manage the situation in a controlled and effective way with full respect for fundamental rights and international obligations as highlighted in the European Council call to the Commission.

The provisions go further than those foreseen in the Asylum Procedures Directive 2013/32/EU in the event of arrivals involving a large number of third country nationals or stateless persons and aim to cater for the specific situation of instrumentalisation of migrants, without undermining the right to asylum or the principle of *non-refoulement*.

The provisions of the Asylum Procedures Directive are not designed to deal with situations where the Union's integrity and security is under attack as a result of the instrumentalisation of migrants. For this reason, this proposal sets a temporary emergency migration and asylum management procedure tailored to the needs of the Member States concerned in the current situation. The emergency migration and asylum management procedure and the other measures in this Decision aim to help the Member States concerned to take the steps necessary to respond effectively to the hostile actions of the third country in line with the Union's fundamental values.

Lithuania, Latvia and Poland have intensified border surveillance and other border control measures to protect the Union's integrity and security. They must in addition manage the third-country nationals arriving at their borders. As part of these measures, these Member States have been forced by the current circumstances to limit the number of border crossing points open and have deployed a significant number of border guards along the green border.

The measures included in this Decision are of a temporary, extraordinary and exceptional nature, and will complement border control measures with specific measures in the area of asylum and return. Given the current situation and taking into account the fact that the Union's concerted actions have started to bring results in reducing arrivals, these measures should be applicable for a period of six months. This period is considered sufficient to allow the Member States concerned to effectively manage the exceptional situation. Before the expiry of this six-month period, the Commission will regularly reassess the situation and may propose to the Council to prolong or repeal the application of the measures in this proposal.

The emergency migration and asylum management procedure established in this proposal foresees specific procedural provisions for the registration and lodging of applications of international protection, longer registration deadlines and the possibility to decide at the border or at transit zone on the admissibility or substance of all applications, except where specific vulnerabilities cannot be catered for. It also foresees specific provisions for return and material reception conditions. These measures are accompanied by a series of safeguards. In all other aspects, the Asylum Procedures Directive, and in particular the guarantees foreseen in Chapter II of the Directive, apply.

The proposal also includes an operational support Chapter in view of a possible stepping up of the support by the EU agencies upon request of the three Member States concerned.

- **Consistency with existing policy provisions in the policy area**

This proposal is fully consistent with the New Pact on Migration and Asylum adopted in September 2020 and the accompanying legislative proposals.

- **Consistency with other Union policies**

This proposal is consistent with the need to sustain a reduced pressure from irregular arrivals and maintain strong external borders in line with the comprehensive approach set out in the New Pact on Migration and Asylum. It complements the Schengen Borders Code and the upcoming Schengen reform, in which the Commission intends to propose a permanent framework for addressing possible situations of instrumentalisation that may still confront the Union in the future. It also aims to reduce onward movements of irregular migrants and stress on the Schengen area. Swift and effective return and readmission are effectively addressed in a situation of instrumentalisation, in line with the comprehensive approach to migration management set out in the New Pact on Migration and Asylum. It is also consistent with, and

should be used in parallel to, the Union's external action, such as EU restrictive measures. This proposal is part of a comprehensive set of EU actions to counter the hybrid attack and artificially created migratory pressure at the EU borders.

## 2. LEGAL ELEMENTS OF THE PROPOSAL

### Summary of the measures

#### (1) Emergency migration and asylum management procedure at the external borders

Faced with a hybrid attack, Latvia, Lithuania and Poland have been forced to restrict to the minimum the border traffic by limiting the number of border crossing points open with a view to preventing unauthorised entry and protecting their national security and territorial integrity.

However, many migrants are still stranded in the territory of the three Member States concerned and the situation remains volatile on the Belarusian side of the border with irregular arrivals still continuing to come. To ensure a coherent approach with the border control measures in the current emergency situation and allow Latvia, Lithuania and Poland to manage the current flows but also the people already present in their territories, this proposal sets up an emergency migration and asylum management procedure in relation to third-country nationals apprehended or found in the vicinity of the border with Belarus after an unlawful entry or after having presented themselves at border crossing points.

##### (a) Asylum procedure at the external borders

The main features of this procedure are:

- **Possibility for the Member States concerned to register an asylum application and offer the possibility for its effective lodging only at specific registration points located at the vicinity of the border including the border crossing points designated for that purpose**

Under this procedure, it should be possible for the Member States concerned to require that the registration and lodging of applications for international protection take place at specific registration points located at the vicinity of the border, which may also include the border crossing points designated for that purpose. This would allow a more orderly management of the flows and is also in accordance with the possibilities already offered by the Asylum Procedures Directive.

Under Article 6(3) of the Asylum Procedures Directive, a Member State may require that applications for international protection be lodged at a designated place. However, the Directive does not specify where the registration shall take place. Article 6(1) of the Directive only requires that when a person makes an application for international protection, the application must be registered. Member States can therefore designate specific registration points, which may include border crossing points, as the place for registering and lodging an application for international protection. Under Article 6(2) Member States shall ensure that applicants have an effective opportunity to lodge an application made as soon as possible. For this reason, and to ensure a genuine and effective access to the asylum procedure, Latvia, Lithuania and Poland must ensure that a sufficient number of registration points, including border crossing points, are designated and open for such purpose and that the applicants receive information about the location of the nearest points where their application can be lodged.

- **Registration deadline extended to up to four weeks**

The specific asylum procedure at the external borders provides that the registration deadline for applications for international protection would be up to four weeks (as opposed to the Asylum Procedures Directive which sets three or six days and in case of mass influx up to 10 days).

Latvia, Lithuania and Poland may need this flexibility to respond effectively to the hostile actions by Belarus whilst enabling them to managing the sudden inflow given the instrumentalisation situation and hybrid attack by Belarus.

Given the sudden and unforeseeable interference/intervention by Belarus, the Member States concerned need to deviate resources to protect their territorial integrity in addition to managing the third-country nationals arriving at their borders. As a result, the Member States concerned may need time to reorganise their resources and increase their capacity, including with the support of the EU agencies.

If Member States make use of the longer registration deadline, they shall prioritise the registration and the examination of applications that are likely to be well-founded or lodged by minors and their family members.

- **Possibility to apply the accelerated procedure at the border for all applications**

In the current situation, the measures should support the Member States concerned in protecting their territorial integrity and preventing the entry of those who do not fulfil entry conditions, while protecting the fundamental rights. The possibility to examine an application at the border without authorising entry to the territory in accordance with Article 43 of the Asylum Procedures Directive offers this kind of protection but under the current rules, the merits of applications may be examined in a border procedure only in a limited set of circumstances. Although this could be the case, under certain conditions, for applicants who entered the territory unlawfully, this Decision extends this possibility to all applicants by not excluding any category of applicants.

The proposal allows, under the specific asylum procedure, Latvia, Lithuania and Poland to apply the accelerated border procedure to decide on the admissibility and substance of all applications, except where adequate support for applicants with particular health issues cannot be provided. This measure will limit the possibility for Belarus to target for instrumentalisation third-country nationals to whom the border procedure cannot be applied. As provided for in the Asylum Procedures Directive and explicitly stated in this proposal, during the border procedure the basic principles and guarantees of Chapter II of the Asylum Procedures Directive apply to ensure that the rights of those who seek international protection are protected, while maintaining the right to asylum and respect of the *non-refoulement* principle. Furthermore, the proposal includes the mandatory prioritisation of well-founded claims and those of families and children.

In addition, Latvia, Lithuania and Poland may extend the duration of the border procedure for sixteen weeks. A decision on the application including on a possible appeal against an administrative decision should be taken within those sixteen weeks. Similar to the extension of the registration deadline above, a longer duration for the border procedure can be considered to help the Member States in relation to instrumentalisation of migrants, given the nature and sudden character of Belarus' action. The Member States concerned may need time to reorganise their resources and increase their capacity, including with the support of the EU agencies. In addition, the number of cases to be processed in the border procedure will be larger (as in principle all applicants can be subject to it) than under normal circumstances.

Therefore, the extension will help the Member State to apply the fiction of non-entry for a longer period of time providing for more flexibility to deal with the increased workload.

Latvia, Lithuania and Poland may also extend the application of the rules set out in Article 46(6) of the Asylum Procedures Directive, which allows Member States to limit the automatic suspensive effect of an appeal, to all border procedures and instead confer on a court or tribunal the power to rule whether or not the applicant may remain on the territory provided that the guarantees under Article 46(7) and (8) are respected.

Given the safeguards provided in the Asylum Procedures Directive and the Reception Conditions Directive, also in the context of the asylum procedure at the border, detention of applicants should be a measure of last resort, where other sufficient but less coercive measures cannot be applied in a specific case. Therefore, the asylum procedure will not imply a systematic detention of applicants. In order to allow vulnerable applicants to benefit from their rights, where the state of the health of the applicant does not ensure the examination of the application at the border or transit zones with the necessary support, Latvia, Lithuania and Poland shall not apply the border procedure.

(b) Material reception conditions – Possibility to cover only basic needs

In a situation of instrumentalisation, where there is a sudden arrival of third country nationals, it might be difficult for the Member State to ensure the material reception conditions standards are met. However, Latvia, Lithuania and Poland need to ensure that any actions respect basic humanitarian guarantees, such as providing third-country nationals on their territory with food, water, clothing, adequate medical care, assistance to vulnerable persons and temporary shelter, as also set out by the European Court of Human Rights in recent orders for interim measures in relation to these Member States.

Article 18(9) of the Reception Conditions Directive allows the Member State, in duly justified cases and under certain conditions, to set modalities for material reception conditions different from those provided in the Reception Conditions Directive, if in any event basic needs are covered. This proposal extends the possibility to set different material reception conditions in the current situation of instrumentalisation of migrants provided that basic needs are covered, including temporary shelter, food, water, clothing, adequate medical care, assistance to vulnerable persons, in full respect of the right to human dignity.

(c) Return procedure at the external borders

In order to help Latvia, Lithuania and Poland cope with the current inflow of third country nationals, the proposal includes a possibility to derogate from the application of Directive 2008/115/EC for third country nationals and stateless persons whose application for international protection has been rejected in accordance with the procedure set out in Article 2 of this proposal. In relation to third country nationals who did not apply for international protection, the provision of Article 2(2)(a) of the Return Directive can be applied by Latvia, Lithuania and Poland. The derogation set out in Article 3 of this proposal aims at establishing a mechanism that is similar to the derogation as set out in Article 2(2)(a) of the Return Directive specifically for those third country nationals and stateless persons whose application for international protection has been rejected in accordance with the procedure as set out in Article 2 of this proposal.

(d) Additional safeguards



The proposal ensures that arrangements exist securing the right to request protection in a genuine and effective manner by ensuring sufficient locations where applicants can formally lodge the application for asylum are available. In order to guarantee access to the asylum procedure, Latvia, Lithuania and Poland shall duly inform third-country nationals or stateless persons in a language which the third-country national understands or is reasonably supposed to understand about the measures applied, the points accessible for registering and lodging an application for international protection, in particular the location of the nearest point where they can lodge an application for international protection, the possibility to challenge the decision taken on the application, and the duration of the measures.

(2) Operational support by EU agencies

As the effects of the Belarus' actions might easily spill over (or even have as their objective) to impact more broadly neighbouring Member States and the European Union, it is necessary to foresee the means for providing support at EU-level. If Latvia, Lithuania and Poland request support from EU agencies, the agencies should prioritise their operational support. This would particularly be the case for the European Asylum Support Office (EASO) which can help register and process the applications, to ensure screening of vulnerable migrants, support the management, design and putting in place of adequate standards of reception facilities; or from Frontex to support border control activities, including screening and return operations, or from Europol to provide intelligence.

(3) Other provisions

The proposal also includes provisions on cooperation, between the Commission, Member States and EU agencies, as well as on the obligation of Member States to continue reporting relevant data and statistics via the EU Migration Preparedness and Crisis Management Network, and for the Commission to regularly assess the situation. It also includes provision on the personal scope, making sure that persons who arrived prior to this Decision, but still in the context of instrumentalisation, and whose applications for international protection have not yet been registered or for whom the return procedure has not started, are covered and benefit from the provisions of the Decision. This will ensure legal certainty and predictability for these third country nationals about the procedural rules applicable. Several recitals address variable geometry, with regard to the matter of participation of Ireland and Denmark in this Decision. The Member States concerned are obliged to discontinue any measure if the emergency situation no longer exists.

• **Legal basis**

This proposal includes provisional measures for the benefit of three Member States (Latvia, Lithuania and Poland) which are confronted by an emergency situation characterised by a sudden inflow of nationals of third countries, created by an instrumentalisation of migrants. The necessary provisional support measures may go beyond the Common European Asylum System. Therefore, the appropriate legal basis for the Council to adopt these provisional measures is Article 78(3) TFEU, after consulting the European Parliament.

According to CJEU jurisprudence<sup>2</sup>, the concept of 'provisional measures' within the meaning of Article 78(3) TFEU is sufficiently broad to adopt all the provisional measures necessary to respond effectively and swiftly to an emergency situation characterised by a sudden inflow of

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<sup>2</sup> Judgement of 6 September 2017, *Slovak Republic and Hungary v Council*, Joined Cases C-643/15 and C-647/15, paragraphs 77, 78

nationals of third countries, in this case created by an instrumentalisation of migrants for political purposes. These measures may in principle also derogate from provisions of legislative acts. Generally, the Commission and the Council have a broad discretion in the choice of the measures they take if these respond rapidly and efficiently to a particular emergency. These measures can evolve and adapt if they retain their provisional nature<sup>3</sup>.

Therefore, in line with this jurisprudence, the proposal includes specific provisional measures in the areas regulated by the Asylum Procedures Directive (on registration, formal lodging and the border procedure), the Reception Conditions Directive and the Return Directive, accompanied by the necessary safeguards to respect fundamental rights, and operational support measures by European Union agencies for the benefit and on request of the Member States concerned.

- **Subsidiarity**

Title V of the TFEU on the Area of Freedom, Security and Justice confers certain powers on these matters to the European Union. These powers must be exercised in accordance with Article 5 of the Treaty on the European Union, i.e., if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can, therefore, by reason of the scale or effects of the proposed action, be better achieved by the European Union.

A situation where the territorial integrity and security of Member States are at risk because of the sudden arrival of third-country nationals due to a third country actively engaging in facilitating the arrival of those third-country nationals should be considered as impacting the EU as a whole and therefore requiring EU solutions and EU support. There is a need for all Member States to quickly react and rally support to the Member State concerned.

Achievement of these objectives requires action at the EU level since they are cross-border by nature. It is clear that actions taken by individual Member States cannot satisfactorily reply to the need for a common EU approach to a common problem.

Such a common approach cannot be sufficiently achieved by the Member States individually and can, by reason of the scale and effects of this proposed Decision, be better achieved at Union level. The Union must therefore act and may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5(3) of the Treaty on European Union.

- **Proportionality**

In accordance with the principle of proportionality, as set out in Article 5(4) of the Treaty on the European Union, this proposed Decision sets out the exact conditions when specific asylum procedural rules can be applied as well as provide for the scope and time limit of applying such rules, and necessary safeguards.

All the elements of the measures proposed to deal with the specific situation of instrumentalisation of migrants are limited to what is necessary to ensure Member States can manage the situation in an orderly and effective way while ensuring the equality of treatment in terms of rights and guarantees for applicants. The duration of these measures is also limited in time to what is strictly necessary to enable the Member States concerned to address the situation that endangers their security or territorial integrity.

The proposal establishes safeguards for applying the derogations. These measures are proposed together with other measures and when foreign policy measures are starting to yield

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<sup>3</sup> Joined Cases C-643/15 and C-647/15, paragraph 133, 134

results to help the Member States concerned to manage the situation, particularly given the significant number of third country nationals still arriving into these three Member States from Belarus and as there is still a significant number of migrants stranded in the EU-Belarus border. The Commission proposes them as a matter of urgency and as measures of an extraordinary and exceptional nature, limited in time.

The specific measures in those aspects regulated by the Asylum Procedures Directive and the Return Directive are proportionate, with a number of safeguards put in place that strike a balance between the immediate needs of the Member States concerned in order to manage the situation of instrumentalisation and the necessary protection of the third country nationals being instrumentalised.

- **Choice of the instrument**

The legal basis of Article 78(3) TFEU for this proposal requires a Council Decision, after consulting the European Parliament.

- **Fundamental rights**

This proposal respects fundamental rights and observes the principles recognised, in particular, by the Charter of Fundamental Rights of the European Union, as well as the obligations stemming from international law.

The framework provided for in this Decision shall be applied in full respect of fundamental rights as enshrined in the Charter, including the right to human dignity (Article 1), prohibition of torture and inhuman or degrading treatment or punishment (Article 4), the right to liberty and security (Article 6), the right to asylum (Article 18), the prohibition of collective expulsions and protection from *refoulement* (Article 19(1) and (2)), the right to non-discrimination (Article 21), the principle of equality between men and women (Article 23), the rights of the child (Article 24) and the right to an effective remedy (Article 47). This proposal fully takes into account the special needs of vulnerable persons. The safeguards provided for children and vulnerable persons in the Reception Conditions Directive 2013/33/EU shall be of primary consideration for competent authorities.

The right to liberty and freedom of movement is protected given that, if detention is used in the context of the asylum border procedure or in the area of return, such rules can only be applied in a strictly regulated framework and for a limited time. Under Article 26(1) of the Asylum Procedures Directive, Member States shall not hold a person in detention for the sole reason that he or she is an applicant. The same provision references Article 8 of the Reception Conditions Directive for the grounds and conditions of detention. In accordance with Article 8(3)(c) of the Reception Conditions Directive, an applicant may be detained in order to decide, in the context of a procedure, on the applicant's right to enter the territory. Article 8(2) also provides that Member States may detain an applicant only, if other less coercive alternative measures – like restrictions to freedom of movement under its Article 7 – cannot be applied effectively.

The principle of *non-refoulement* enshrined in Article 33 of the 1951 Refugee Convention and Article 19 of the Charter of Fundamental Rights of the European Union is also respected when derogations from the Return Directive are applied. The proposal explicitly recalls the duty of Member States to always observe this principle in the fulfilment of their obligation to control borders. Respecting the principle of *non-refoulement* includes an assessment of whether there is neither a risk of persecution, torture or inhumane or degrading treatment, nor a risk of chain *refoulement*.

As regards the application of the asylum border procedure and the derogation from the Return Directive, the basic principles and guarantees provided by the Asylum Procedures Directive, the Reception Conditions Directive and the Return Directive remain applicable to applicants subject to the border procedure. Furthermore, the proposal includes the mandatory prioritisation of well-founded claims and those of families and children. It is to the benefit of these applicants to have their asylum applications decided upon as quickly as possible. The proposal guarantees the right to an effective remedy, ensuring that Courts have power to rule whether or not the applicant may remain on the territory of the Member State pending a decision on an appeal and with the right guarantees applicable to enable an applicant to make such requests to the Courts.

### **3. CONSULTATIONS OF INTERESTED PARTIES**

#### **• Evidence-based policy-making**

The proposal was prepared as a matter of urgency. It can rely on the work conducted in preparation of the crisis and *force majeure* proposal in the context of the New Pact on Migration and Asylum and on information provided by stakeholders during the consultation process since the beginning of the hybrid threat in the summer of 2021.

#### **• Stakeholder consultations and Collection and use of expertise**

Since the beginning of the situation of a hybrid threat emerged in the summer of 2021, the Commission has been consulting all relevant stakeholders on how to cope with the situation. The Member States concerned by the current instrumentalisation, in particular Lithuania, suggested concrete legislative initiatives, which in their view would adequately address the situation. This proposal takes on board a number of these suggestions. The Commission met and exchanged letters with international and non-governmental organisations, which have been assessing the situation and proposed adequate reaction. The Commission visited Poland and Lithuania several times, both at a political and at a technical level. During these visits, the Commission, other than meeting the national authorities, gathered information from the national branches of UNHCR and IOM, and from national non-governmental human rights organisations supporting migrants in the border regions.

### **4. BUDGETARY IMPLICATIONS**

Due to the nature of this proposal linked to a case of instrumentalisation of migrants, it is not possible to estimate a priori the possible budgetary impact. It will be accommodated within the budget of the existing EU funding instruments under the period 2014-2020 and 2021-2027 in the field of migration, asylum and border management. Where exceptionally necessary, if the situation aggravates further, the flexibility mechanisms within the MFF 2021-2027 could be used. The European Commission and the Member States have been discussing the financial needs arising from the situation at the external borders with Belarus on a regular basis. As a result, the European Commission provided emergency assistance support to Lithuania this autumn, while Lithuania, Latvia and Poland have taken measures to shift (unspent) resources under their 2014-2020 national programmes of these funding instruments. In this context, in addition to the €360 million foreseen for these Member States under the BMVI for this financial period, a further top-up of around €200 million will be available for 2021 and 2022, from within existing resources, mainly the BMVI Thematic Facility envelope. Continued regular dialogue will enable the optimal use of the available resources under these instruments.

For the reason mentioned above, it is not possible to estimate a priori the possible budgetary impact on the decentralised agencies concerned. They have some flexibility within their existing budgets but, depending on future developments and reflecting the fact that the agencies' resources are limited, it is not excluded that a redeployment of resources might be needed.

The financial needs in this proposal are compatible with the current multiannual financial framework and might entail the use of special instruments.

In terms of the asylum procedural aspects, this proposal does not impose any additional financial or administrative burden on the Union. On those parts, therefore, it has no impact on the Union budget.

Proposal for a

## COUNCIL DECISION

### on provisional emergency measures for the benefit of Latvia, Lithuania and Poland

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 78(3) thereof,

Having regard to the proposal from the European Commission,

Having regard to the opinion of the European Parliament<sup>4</sup>,

Whereas:

- (1) According to Article 78(3) of the Treaty on the Functioning of the European Union (TFEU), in the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission and after consulting the European Parliament, may adopt provisional measures for the benefit of the Member State(s) concerned.
- (2) Since the summer of 2021, the Union as a whole, and Latvia, Lithuania and Poland in particular have experienced a hybrid threat, in the form of instrumentalisation of people. This has resulted in an unprecedented increase in irregular border crossings from Belarus. While recent years saw almost no attempts to cross the external borders irregularly from Belarus into the EU, this is now a daily reality. This has been initiated and organised by the Lukashenko regime, luring migrants at the border with the cooperation of migrant smugglers and criminal networks.
- (3) This instrumentalisation has resulted in a grave situation for these migrants at external borders of the European Union with Belarus. Belarus' actions have created a humanitarian crisis, with a number of fatalities already confirmed. The primary responsibility for addressing this crisis lies with Belarus. It is bound by the Geneva Convention, including the principle of *non-refoulement*. Therefore, Belarus must provide for adequate protection of the migrants on its territory and cooperate with the United Nations High Commissioner for Refugees (UNHCR) and the International Organization for Migration (IOM) to this end. While limited access has hindered the task of assessing needs on the Belarusian side of the border, the Commission has been working very closely with the United Nations and its specialised agencies and with relevant human rights and humanitarian partner organisations in order to prevent a humanitarian crisis from further unfolding, also in view of deteriorating weather conditions. Recent decisions have mobilised EUR 700 000 in humanitarian funding in order to support partners in providing assistance to vulnerable people stranded at the border and inside Belarus.

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<sup>4</sup> OJ C , , p. .

- (4) Because of this instrumentalisation, in 2021, as of 21 November, 7 831 third country nationals have entered the territories of Latvia, Lithuania and Poland from Belarus in an unauthorised manner, compared to 257 in the entire 2020. There have been 2 676 asylum applications in Lithuania, 579 applications in Latvia and 6 730 applications in Poland. In addition, 42 741 attempts to cross were prevented by the three Member States. While an exact estimate would be difficult to give, up to 10 000 more migrants may be currently stranded in Belarus with further arrivals on a daily basis.
- (5) The Union has strongly condemned this instrumentalisation of vulnerable migrants and refugees, at the highest level. The European Council addressed this threat at its meetings of June and October 2021<sup>5</sup>. In the State of the Union address, President von der Leyen identified the Belarus actions as a hybrid attack to destabilise Europe<sup>6</sup>. These actions show a determined attempt to create a continuing and protracted crisis as part of a broader concerted effort to destabilise the European Union and undermining society and key institutions. They represent a real threat and present danger to the Union's security.
- (6) The current proposal follows the invitation of the European Council to the Commission in its conclusions of 22 October to propose any necessary changes to the Union's legal framework and concrete measures to ensure an immediate and appropriate response to the hybrid threat in line with Union law and international obligations. It also responds to a request by the impacted Member States to be able to rely on provisional measures to address the emergency migratory situation at the Union's external borders effectively. Those measures would aim to further support Latvia, Lithuania and Poland in managing the current situation in a controlled and swift manner, while fully respecting fundamental rights and international obligations.
- (7) To respond to the current emergency situation, Lithuania, Latvia and Poland have declared the state of emergency and have intensified border surveillance and other border control measures to protect the Union's integrity and security. As part of these measures, these Member States have been forced to limit the number of border crossing points open and deployed a significant number of border guards along the land border with Belarus. They must, in addition, manage the third-country nationals arriving at their borders many of whom are seeking or intend to seek international protection in the European Union and those already present in their territories.
- (8) The Union has shown its resolute support to these Member States that are being targeted by the Belarusian regime and who are managing the external border on behalf of the EU.
- (9) The Commission has granted emergency financial assistance to Lithuania. It has also provided, in addition to the €360 million foreseen for these Member States under the Border Management and Visa Instrument (BMVI) for this financial period, a further top-up of around €200 million that will be available for 2021 and 2022. Furthermore, Lithuania activated the EU Civil Protection Mechanism and the Commission has been coordinating assistance from 19 Member States. Through the Mechanism, Lithuania has received tents, beds, heating systems and other items crucial to attend the needs of the migrants present in the territory of Lithuania. This option remains open to Latvia and Poland.

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<sup>5</sup> EUCO conclusions 24-25 June 2021 and 20-21 October 2021.

<sup>6</sup> State of the Union 2021 Address, 15 September 2021.

- (10) In addition, the European Border and Coast Guard Agency (Frontex), the European Asylum Support Office (EASO) and Europol have been providing operational support to the Member States who requested their assistance to help them cope with the current crisis situation. In particular, the agencies have deployed experts to process asylum applications, carry out border control and intelligence measures and have been working to reinforce return capacity and carry out return operations. This operational support has already resulted in substantial numbers of return operations. The agencies can now provide a further step forward in operational support and it is important for the three Member States concerned to make full use of that support.
- (11) This financial and operational support has been underpinned by actions in the foreign policy domain aimed at addressing the instrumentalisation situation and curtailing arrivals. In addition to the comprehensive package of economic and financial sanctions and the ban of Union airspace and on access to Union airports by Belarusians carriers as a reaction to the fraudulent elections and the Ryanair flight diversion, the Union has taken additional measures as a specific response to the instrumentalisation of migrants by Belarus. On 9 November 2021, the Council adopted the Commission proposal on the partial suspension of the EU-Belarus Visa Facilitation Agreement. On 15 November 2021, the Council amended the EU sanctions regime regarding Belarus and the Union is now also able to target both individuals and entities organising or contributing to activities that facilitate illegal crossing of the EU's borders. On 23 November, the Commission tabled a proposal to prevent and restrict the activities of transport operators that engage in or facilitate smuggling or trafficking of people into the Union.
- (12) The Commission, the High Representative, assisted by the European External Action Service, and the Member States have undertaken intense diplomatic efforts towards the main countries of origin and of transit to prevent further arrivals of nationals of these countries through Belarus. These efforts have included outreach and stepped up visits to key partner countries of origin and transit to counter Belarusian disinformation, curtail departures and get support for receiving back their own nationals currently stranded in Belarus. The outreach has also included direct contacts with airlines and civil aviation authorities, to explore ways to help limit non bona fide travel to Belarus.
- (13) These diplomatic, humanitarian, operational and financial efforts undertaken by the Union or its Member States have led to rapid results. Transit routes being exploited by smugglers to bring migrants to the Belarusian border are being shut down one by one. However, the actions orchestrated by Belarus are still representing a real and present danger to the security of the Union and of the Member States concerned as well as to their territorial integrity. Indeed, the context remains very volatile with Belarus continuing instrumentalising migrants who are still arriving at the Union's external border, thereby constituting a hybrid attack on the EU.
- (14) As a result, the situation on the ground remains challenging for Latvia, Lithuania and Poland with thousands of migrants stranded in their territory and at the EU-Belarus border and with third country nationals who continue to arrive. Given the current volatile and difficult situation in the three Member States concerned, it is therefore necessary to adopt provisional measures for the benefit of these Member States.
- (15) The measures should equip the Member States concerned with the necessary legal tools to respond rapidly and efficiently to the emergency situation characterised by a sudden inflow of nationals of third countries with which Latvia, Lithuania and Poland



are confronted. These provisional measures may include all measures necessary to respond effectively and swiftly to the current attack. These measures may in principle also derogate from provisions of legislative acts.

- (16) The measures adopted in this Decision are of a temporary, extraordinary and exceptional nature, and need to be taken so as to allow an orderly and dignified management of the flows in full respect of fundamental rights, and to protect the territorial integrity and national security of the Member States concerned.
- (17) Based on the assessment of the current emergency situation, establishing an emergency migration and asylum management procedure at the external borders, derogating from some of the provisions of the Asylum Procedures Directive 2013/32/EU, the Reception Conditions Directive 2013/33/EU and the Return Directive 2008/115/EC, is considered the most suited to support the Member States concerned. The emergency migration and asylum management procedure and the operational support measures foreseen in this Decision should help the Member State concerned to manage the situation in a controlled and effective way while ensuring full respect for fundamental rights and international obligations as stressed in the European Council call to the Commission. In particular, the measures in this Decision respect the right to asylum by ensuring a genuine and effective access to the procedure and the principle of *non-refoulement*.
- (18) The emergency migration and asylum management procedure at the external borders set out in this Decision respects and is to be applied in full compliance with the Charter of Fundamental Rights of the European Union, in particular Articles 1, 4, 7, 24, 18 and 19(1) and (2) thereof. In order to reflect, in particular, the primary consideration that must be given to the best interests of the child, the need to respect family life, and to ensure the protection of the health of the persons concerned, this Decision should provide for specific rules and safeguards applying in respect of minors and their family members and of applicants whose state of health requires a specific and adequate support. The guarantees set out in Directive 2013/32 (the Asylum Procedures Directive) and Directive 2013/33 (the Reception Conditions Directive) in relation to applicants with special needs or vulnerabilities should continue to apply in respect of persons subject to the emergency migration and asylum management procedure. Directive 2013/33, including the rules and safeguards concerning the detention of applicants for international protection, should continue to be applied, from the moment an application for international protection is made. The possibility to derogate from certain provisions of this Directive should be without prejudice to the obligation for Member States to ensure at all times respect for human dignity and to cater, in particular, for the basic needs of third country nationals subject to the emergency migration and asylum management procedure.
- (19) Setting an emergency migration and asylum management procedure at the external borders, tailored to the specific needs of the Member States concerned, is necessary as the current provisions of the Asylum Procedures Directive do not provide with adequate tools to effectively respond to the current emergency situation characterised by the instrumentalisation of migrants by Belarus. While some of the provisions of the Asylum Procedures Directive 2013/32/EU can be applied to address the current situation in an orderly way, they are not specifically designed for a situation where the Union's integrity and security is under attack as a result of the instrumentalisation of migrants. Therefore, specific procedural provisions, in particular setting an emergency asylum and migration management procedure, are needed to cater for this particular

emergency situation. For the aspects not specifically regulated in this Decision, all the other rules and guarantees of the Asylum Procedures Directive should apply.

- (20) To assist the Member States concerned in the orderly management of the flows, under the emergency migration and asylum management procedure, Latvia, Lithuania and Poland may decide, in relation to third country nationals or stateless persons that have been apprehended or found in the vicinity of the border with Belarus after an unlawful entry or after having presented themselves at border crossing points, to register applications for international protection only at specific registration points designated for this purpose situated in the vicinity of the border, which may include specific border crossing points, and provide an effective possibility for lodging an application for international protection only at the specific points that have been designated for such purposes and which should be easily accessible. An effective and genuine access to the international protection procedure must nevertheless be ensured in accordance with Article 18 of the Union Charter of Fundamental Rights. To this end, Latvia, Lithuania and Poland should ensure that sufficient registration points, which may include border crossing points, are designated and open for such purpose. Applicants should be duly informed about the locations where their application will be registered and can be lodged.
- (21) In order to ensure that the Member States concerned have the necessary flexibility and avoid that Belarus targets specific categories of third-country nationals, it should be possible, under the emergency migration and asylum management procedure set out in this Decision, for the Member States concerned to take a decision in the framework of a border procedure under Article 43 of the Asylum Procedures Directive on admissibility and the merits of all applications for international protection by third country nationals or stateless persons apprehended or found in the vicinity of the border with Belarus after an unlawful entry or who presented themselves at border crossing points. The guarantees set in Chapter II of the Asylum Procedures Directive have to be respected.
- (22) In the emergency migration and asylum management procedure, the best interests of child and the safeguards for applicants with medical conditions should be a primary consideration for the competent authorities. For this reason, under the emergency migration and asylum management procedure, Latvia, Lithuania and Poland should prioritise the examination of applications from those persons with well-founded claims or of minors and their family members. Furthermore, where the state of the health of the applicant does not permit to conduct the examination of the application at the border or transit zones, Latvia, Lithuania and Poland should not apply the border procedure. This should also be the case if the health problems become apparent during the examination of the application. If during the examination of the application, it becomes apparent that an applicant is in need of special procedural guarantees, and adequate support cannot be provided in the context of the asylum procedure at the border, in accordance with Article 24(3) of the Asylum Procedures Directive, the Member State concerned should refer the applicant to the normal procedure within the territory.
- (23) In accordance with Article 26(1) of the Asylum Procedures Directive, Member States should not hold a person in detention for the sole reason that he or she is an applicant. In case of detention, the grounds and conditions of detention set out in Article 8 of the Reception Conditions Directive should apply. In accordance with Article 8(3)(c) of the Reception Conditions Directive, an applicant may be detained in order to decide, in the context of a procedure, on the applicant's right to enter the territory. Article 8(2)

also provides that Member States may detain an applicant only, if other less coercive alternative measures – like restrictions to freedom of movement under its Article 7 – cannot be applied effectively. The safeguards for detention as provided for in the Reception Conditions Directive are to apply, in particular for specific groups such as minors and their families. Alternatives to detention, such as restrictions in the freedom of movement, may be as effective as detention in the current circumstances and should therefore be considered by the authorities, particularly for minors.

- (24) The emergency migration and asylum management procedure under this Decision allows Member State to extend the registration deadline for applications for international protection to up to four weeks and the maximum duration for applying a border procedure to sixteen weeks, during which a decision on the application, including a decision on a possible appeal against a negative decision, should be taken. These procedural timelines, which are longer than those under the Asylum Procedures Directive, are conceived to help the Member States concerned in relation to dealing with the sudden inflow, in a situation of instrumentalisation of migrants. Confronted with the current situation, the Member States concerned need to divert resources to protect their territorial integrity in addition to managing the third country nationals arriving at their borders or that are already present in their territories. As a result, the Member States concerned may need time to reorganise their resources and increase their capacity, including with the support of the EU agencies. Furthermore, the number of applicants under the border procedure will be higher than under normal circumstances, and therefore the Member State concerned may need more time to be able to take decisions without allowing entry into the territory. However, Latvia, Lithuania and Poland should prioritise the registration of applications of minor children and their family members.
- (25) Any violent acts at the border must be avoided at all costs, not only to protect the territorial integrity and security of the Member State concerned but also to ensure the security and safety of the third country nationals, including families and children that are awaiting their opportunity to apply for asylum in the Union peacefully. Where the Member States concerned are confronted at their external border with violent actions, including in the context of attempts by third country nationals to force entry *en masse* and using disproportionate violent means, the Member States concerned should be able to take the necessary measures in accordance with their national law to preserve security, law and order, and ensure the effective application of this Decision.
- (26) Article 18(9) of Directive 2013/33/EU allows Member States to temporarily set modalities for material reception conditions different from those provided for in the Directive in duly justified cases under certain conditions. The current emergency situation is an exceptional situation that justifies providing for different material reception conditions, since there has been a sudden and unforeseeable flow of third country nationals that need to be processed and taken care of at the border. For this reason, in the current emergency situation, the Member State concerned should be able to derogate from the Reception Conditions Directive standards and provide third country nationals and stateless persons with temporary shelter, that should be adapted to seasonal weather conditions, and cover their basic needs, in particular by providing food, water, clothing, adequate medical care, and assistance to vulnerable persons, in full respect of the right to human dignity.
- (27) In order for Latvia, Lithuania and Poland to better cope with the emergency situation characterised by the current irregular flows of third-country nationals, and with a view to complementing and ensuring full coherence with border measures and with the

asylum procedure at the external border, the Member States concerned should be allowed to provisionally derogate from the application of Directive 2008/115/EC (the Return Directive) in relation to third country nationals and stateless persons whose application for international protection was rejected in the context of an asylum procedure as set out in this Decision. Where a subsequent application is made merely to delay or frustrate the return, Member States may consider that application as inadmissible in line with Article 33(2)(d) of the Asylum Procedures Directive. This Decision is without prejudice to the possibility for Latvia, Lithuania and Poland to derogate from the application of Directive 2008/115/EC by virtue of Article 2(2)(a) of that same Directive, in relation to illegally staying third-country nationals apprehended in connection with the irregular crossing by land, sea or air of the external border of a Member State and who have not subsequently obtained an authorisation or right to stay in that Member State.

- (28) When applying the derogation to the application of the Return Directive, Latvia, Lithuania and Poland need to ensure full respect of the principle of *non-refoulement* and take due account of the best interests of the child, family life and the state of health of the third country national concerned as otherwise set out for derogations in the Return Directive. They also need to ensure that the treatment and level of protection in relation to limitations on the use of coercive measures, postponement of removal, emergency health care and needs of vulnerable persons and detention conditions, is no less favourable than that set out in the Return Directive.
- (29) Latvia, Lithuania and Poland should inform third-country nationals of the measures applied in accordance with this Decision. In particular, Latvia, Lithuania and Poland should inform third-country nationals or stateless persons in a language which the third-country national understands or is reasonably supposed to understand about the measures applied, the points accessible for registering and lodging an application for international protection, in particular the location of the nearest points where their application can be lodged, the possibility to appeal the decision on the application, and the duration of the measures.
- (30) In order to support the Member State concerned in providing the necessary assistance to third country nationals falling under the scope of this Decision, including by promoting voluntary return activities or by carrying out their humanitarian duties, UN agencies and other relevant partner organisations, in particular the International Organization for Migration and the International Federation of Red Cross and Red Crescent Societies, should have effective access to the border under the conditions set out in the Reception Conditions Directive and the Asylum Procedures Directive. In accordance with Article 29 of the Asylum Procedures Directive, the United Nations High Commissioner for Refugees should be allowed access to applicants, including those at the border. To this end, Latvia, Lithuania and Poland should work in close cooperation with UN agencies and relevant partner organisations.
- (31) Latvia, Lithuania and Poland should apply any measures under this Decision only as long as strictly necessary to address the emergency situation and in any case no longer than six months. If the situation that led to the application of these specific measures were to cease to exist before this six-month period, the Member States concerned should immediately discontinue their application. The Commission, in cooperation with the Member States concerned and relevant EU agencies, should keep the situation under constant monitoring and review and propose as appropriate to the Council and the Member States concerned the cessation of the application of the measures in this

Decision or their eventual prolongation by means of a proposal under Article 78(3) of the TFEU.

- (32) Following a request for support by Latvia, Lithuania and Poland, the European Union Agencies should assess their needs in cooperation with them. To assist the three Member States facing specific challenges arising from the instrumentalisation of migrants by Belarus, the European Border and Coast Guard (Frontex), the European Asylum Support Office (EASO) and Europol as well as the Member States should provide Latvia, Lithuania and Poland with adequate support by prioritising the necessary resources, while continuing to meet the needs of other Member States facing migratory pressure.
- (33) To assist the three Member States facing specific challenges arising from the instrumentalisation of migrants, the European Border and Coast Guard (Frontex) should, upon request of the Member States concerned, prioritise its support to these three Member States. In this context, upon a request from one of these Member States, the Frontex Executive Director should launch a rapid border intervention or return intervention for a limited period of time on the territory of the host Member State concerned and deploy the necessary resources. In addition, upon request Frontex should prioritise the provision of any other type of assistance such as the EUROSUR Fusion Services or risk analysis products as well as the necessary equipment to enhance the border surveillance. A situation of instrumentalisation of migrants should in addition result in the European Border and Coast Guard Agency carrying out a dedicated vulnerability assessment, also to assess any further needs for support.
- (34) To support these Member States facing specific challenges arising from the instrumentalisation of migrants in implementing the derogations in these Decision, the European Asylum Support Office (EASO) should, upon request of the Member States concerned, prioritise its support by making available the necessary resources to Latvia, Lithuania and Poland, in particular through the deployment of asylum support teams to assist amongst others in the registering and processing applications, identification and assessment of vulnerabilities, ensuring adequate reception conditions or providing necessary translation services, expertise and training.
- (35) To assist the three Member States facing specific challenges arising from the instrumentalisation of migrants, Europol should, upon request of the Member States concerned, support them through deploying experts, giving priority treatment to their requests, providing tailored analysis products, such as threat assessments, strategic and operational analyses and situation reports, and keep supporting Member States in combating migrant smuggling and related crimes.
- (36) Where appropriate, the European Union agencies should launch calls for experts to respond to the request for support by Latvia, Lithuania or Poland. In this case, the Member States should be encouraged to provide the necessary experts with the adequate profiles as soon as possible. In the context of a rapid border intervention or a return intervention organised by the European Border and Coast Guard Agency, the Member States should be encouraged to provide their respective contributions for the deployment of teams from the standing corps, including from the Reserve for Rapid Reaction or all the necessary equipment, including under the Rapid Reaction Equipment Pool. Member States should also be encouraged to support Latvia, Lithuania and Poland in any return measures and in their outreach to third countries.
- (37) Since the objectives of this Decision cannot be sufficiently achieved by the Member States but can rather, by reason of the scale and effects of the action, be better

achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union (TEU). In accordance with the principle of proportionality, as set out in that Article, this Decision does not go beyond what is necessary in order to achieve those objectives.

- (38) This Decision respects the fundamental rights and observes the principles recognised by the Charter of Fundamental Rights of the European Union.
- (39) In accordance with Articles 1 and 2 of Protocol No 21 on the position of Ireland in respect of the area of freedom, security and justice, annexed to the TEU and to the TFEU, and without prejudice to Article 4 of that Protocol, Ireland is not taking part in the adoption of this Decision and is not bound by it or subject to its application.
- (40) In accordance with Articles 1 and 2 of Protocol No 22 on the position of Denmark, annexed to the TEU and to the TFEU, Denmark is not taking part in the adoption of this Decision and is not bound by it or subject to its application.
- (41) In view of the urgency of the situation, this Decision should enter into force on the date following that of its publication in the Official Journal of the European Union.
- (42) Because of their provisional nature, the measures adopted should be limited in time and end once the current emergency situation has ended.
- (43) Persons having arrived to Latvia, Lithuania and Poland from Belarus before the entry into force of this Decision should be included in its scope, if they have not been registered yet or their return procedure has not started,

HAS ADOPTED THIS DECISION:

## *CHAPTER I*

### **INTRODUCTORY PROVISION**

#### *Article 1*

##### **Subject matter**

This Decision establishes provisional measures for the benefit of Latvia, Lithuania and Poland, in view of supporting them in managing the emergency situation caused by the actions of Belarus, leading to a sudden inflow of third country nationals in the current context of instrumentalisation of migrants at the external borders.

## *CHAPTER II*

### **EMERGENCY MIGRATION AND ASYLUM MANAGEMENT PROCEDURE AT THE EXTERNAL BORDERS OF LATVIA, LITHUANIA AND POLAND**

#### *Article 2*

##### **Asylum procedure**

1. By way of derogation from Article 6(1) of the Asylum Procedures Directive, the registration, in relation to third country nationals or stateless persons apprehended or found in the vicinity of the border with Belarus after an unlawful entry or after having presented themselves at border crossing points, may take place no later than four weeks after the application is made.

Latvia, Lithuania and Poland shall prioritise the registration of applications of minors and their family members.

2. By way of derogation from Articles 25(6) point (b), Article 31(8) and 43(1) point (b) of the Asylum Procedures Directive, Latvia, Lithuania and Poland may decide at their border or transit zones on the admissibility or, in a procedure pursuant to Article 31(8) of that Directive, on the substance of all applications registered in accordance with paragraph 1. The basic principles and guarantees of Chapter II of the Asylum Procedures Directive shall apply.
3. Latvia, Lithuania and Poland shall prioritise the examination of applications that are likely to be well-founded or lodged by minors and their family members.
4. For applicants whose state of health requires a support that cannot be ensured adequately at the border or in transit zones, including when this becomes apparent during the procedure, the border procedure shall cease to apply and the applicant shall be granted entry to the territory in order for the application to be examined, without necessarily restarting the procedure.
5. By way of derogation from Article 43(2) of the Asylum Procedures Directive, the time limit before granting access to the territory may be extended to 16 weeks, during which a decision on the application, including the appeal, shall be taken.
6. By way of derogation from Article 46(5) and (6) of the Asylum Procedures Directive, Latvia, Lithuania and Poland may decide to apply the rules set out in paragraph 6 of that Article in respect of all decisions taken on applications examined in a border procedure as referred to in paragraph 2 of this Article.

### *Article 3*

#### **Material reception conditions**

By way of derogation from Directive 2013/33/EU, Latvia, Lithuania and Poland may temporarily set modalities for material reception conditions different from those provided for in Article 17 and 18 of Directive 2013/33/EU in relation to applicants apprehended or found in the vicinity of the border with Belarus after an unlawful entry or after having presented themselves at the border crossing points, and subject to the measures in Article 2(1) of this Decision, provided these Member States cover the applicants' basic needs, in particular food, water, clothing, adequate medical care, and temporary shelter adapted to the seasonal weather conditions, and in full respect of human dignity.

### *Article 4*

#### **Return procedure**

1. Latvia, Lithuania and Poland, for third-country nationals and stateless persons whose application for international protection is rejected and to which Article 2 has been applied, may decide not to apply Directive 2008/115/EC.
2. With regard to third-country nationals and stateless persons referred to in paragraph 1, Latvia, Lithuania and Poland shall:
  - (a) respect the principle of *non-refoulement* and take due account of the best interests of the child, family life and state of health of the third country national concerned as set out in Article 5 of Directive 2008/115/EC (the Return Directive).

- (b) ensure that their treatment and level of protection are no less favourable than as set out in Article 8(4) and (5) (Limitations on use of coercive measures), Article 9(2)(a) – (postponement of removal), Article 14(1)(b) and (d) (emergency health care and taking into account needs of vulnerable persons), and Articles 16 and 17 (detention conditions) of Directive 2008/115/EC (the Return Directive).

#### *Article 5*

#### **Specific guarantees**

1. Where applying this Decision, Latvia, Lithuania and Poland shall duly inform third-country nationals or stateless persons in a language which the third-country national understands or is reasonably supposed to understand about the measures applied, the dedicated points accessible for registering and lodging an application for international protection, in particular the nearest point where they can lodge an application for international protection, the possibility to appeal the decision, and the duration of the measures.
2. Latvia, Lithuania and Poland shall not apply Articles 2, 3, 4 and 5 longer than what is strictly necessary to address the emergency situation caused by Belarus, and in any case no longer than the period set out in Article 10.

### *CHAPTER III*

### **OPERATIONAL SUPPORT**

#### *Article 6*

#### **Operational support by the European Border and Coast Guard Agency**

1. Upon a request for support by Latvia, Lithuania or Poland, the European Border and Coast Guard Agency shall provide or increase its operational support to Latvia, Lithuania and Poland in the area of border management and return by deploying the European Border and Coast Guard standing corps, including where appropriate by deploying staff from the 1 500 staff from the Reserve for Rapid Reaction, technical equipment and providing any other relevant support.
2. The executive director of the European Border and Coast Guard Agency (Frontex) may launch a rapid border intervention in accordance with Article 39(5) of Regulation (EU) 2019/1896 or a return intervention in accordance with Article 53 of that Regulation.
3. In accordance with their respective request, the Agency shall support Latvia, Lithuania and Poland through the following activities:
  - (a) deploying the standing corps in the framework of border management teams and relevant technical equipment (patrol cars, transport cars, helicopters, thermos-vision vehicles, cameras etc.) to support border control in particular as regards the following activities:
    - border surveillance;
    - border checks;
    - cross-border crime detection;



- reporting;
  - interpretation;
  - the identification of minors and other vulnerable migrants and assist with ensuring proper referral.
- (b) deploying the standing corps in the framework of border management teams and relevant technical equipment to support returns of third-country nationals who either did not apply for international protection or whose right to remain on the territory has ceased, in particular by assisting in:
- pre-return activities, including return counselling and supporting the cooperation with third countries by organising identification missions and providing videoconference service for identification interviews;
  - voluntary returns;
  - return operations by commercial and charter flights, including escorting returnees to the third country of origin and, if appropriate, post return activities in third countries.
- (c) deploying the standing corps in the framework of the migration management support teams to support the identification of migrants, including nationality screening and travel documents checks, in particular by:
- providing support in debriefing activities and applying Common Risk Indicators to identify persons possibly linked with terrorism and gather more information about routes, facilitators and modus operandi;
  - providing support with EURODAC equipment and staff supporting registration and fingerprinting of migrants;
  - giving priority treatment to all the requests of the three Member States concerned to the EUROSUR fusion services, in particular for:
    - air traffic monitoring to monitor flights arriving in Belarus from various places of departure;
    - providing regular monitoring with tailor made imagery intelligence services, including satellite imagery, covering the adjacent pre-frontier areas of Belarus to assess the situation, as well as further distant pre-frontier areas relevant to better understand potential threats to the safety of deployed personnel and technical equipment;
    - providing tailored multipurpose aerial surveillance service, when available and necessary, covering the Belarusian territory along the border either with a regional approach covering Latvia, Lithuania and Poland or supporting specific Member State(s) with capability to perform surveillance during the night.
- (d) providing monitoring of social media platforms to notice groups of would-be migrants in time and react to any kind of possible mass movements towards EU borders;
- (e) providing tailored risk analysis products;
- (f) other specific support, as appropriate.

## *Article 7*

### **Operational support by the European Asylum Support Office**

Upon a request for support by Latvia, Lithuania or Poland, the European Asylum Support Office (EASO) shall prioritise making available the necessary operational support, in particular through the following activities:

- (a) deploying asylum support teams;
- (b) registering the applications for international protection;
- (c) facilitating an initial analysis of asylum applications;
- (d) conducting personal interviews of applicants on their applications and the circumstances of their arrival;
- (e) supporting an appropriate identification and assessment of vulnerable applicants;
- (f) supporting the management, design and putting in place of adequate standards of reception facilities;
- (g) providing applicants or potential applicants of international protection with information and specific assistance that they may need;
- (h) providing expertise, in particular in relation to interpretation and translation services, precise and up-to-date information on countries of origin and knowledge of the handling and management of asylum cases;
- (i) providing training for personnel of competent or other authorities;
- (j) other specific support, as appropriate.

## *Article 8*

### **Operational support by Europol**

Upon a request for support by Latvia, Lithuania and Poland, Europol shall prioritise making available the necessary operational support through the following activities:

- (a) deploying experts to cross-check data against data held in databases at Europol, facilitate rapid and secure information exchange between Member States and support operational analysis;
- (b) providing tailored analysis products, such as threat assessments, strategic and operational analyses and situation reports;
- (c) supporting the Member States in combating migrant smuggling and related crimes facilitated, promoted or committed using the internet and the activities referred in Article 4(1)(m) of Regulation (EU) 2016/794.
- (d) other specific support, as appropriate, where required.

## *CHAPTER IV*

### **FINAL PROVISIONS**

## *Article 9*

### **Cooperation and assessment**

1. The Commission, relevant European Union agencies and Latvia, Lithuania and Poland shall closely cooperate and regularly inform each other on the implementation of this Decision. Latvia, Lithuania and Poland shall continue reporting all relevant data including statistics that are relevant for the implementation of this Decision, via the EU Migration Preparedness and Crisis Management Network.
2. Latvia, Lithuania and Poland shall ensure close cooperation with UNHCR and relevant partner organisations to determine the modalities for support to applicants in the current emergency situation in line with the rules set out in this Decision and in the Asylum Procedures Directive and the Reception Conditions Directive.
3. The Commission in cooperation with Latvia, Lithuania and Poland shall keep the situation under constant monitoring and review and propose, where appropriate, the repeal or prolongation of this Decision by means of a proposal for a Council Decision under Article 78(3) TFEU. To this end, Latvia, Lithuania and Poland shall provide the Commission specific information needed for it to carry out this review and to make the proposal for repeal or prolongation as well as any other information the Commission may request.

#### *Article 10*

#### **Entry into force and application**

1. This Decision shall enter into force on the [...] day following that of its publication in the *Official Journal of the European Union*.
2. Without prejudice to Article 9, it shall apply until six months after its entry into force.
3. This Decision shall apply to all third-country nationals arriving on the territory of Latvia, Lithuania and Poland from the date of entry into force of this Decision, as well as to those already present in the territory of Latvia, Lithuania and Poland prior to entry into force of this Decision as a result of the actions of the Belarusian regime and whose applications for international protection have not been registered or for whom the return procedure has not started.
4. This Decision shall continue to apply with respect to those applicants whose applications for international protection have been registered in accordance with the provisions of this Decision, until a final decision is taken on their applications or until the third country nationals concerned are returned in accordance with Article 4.

Done at Brussels,

*For the Council*  
*The President*